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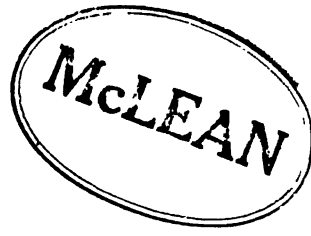


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72A

# PRACTICE

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47

## ACTIONS AT LAW IN PENNSYLVANIA

EMBRACING

TRIALS, MOTION IN ARREST OF JUDGMENT AND RULE  
FOR NEW TRIAL, APPEALS, CERTIORARI, JUDG-  
MENTS, EXECUTIONS, SHERIFFS' SALES, DIS-  
TRIBUTION, DELIVERY OF POSSESSION,  
AND ALL THE COMMON LAW  
ACTIONS FROM ACCOUNT  
RENDER TO WASTE

WITH

### FORMS

In Four Volumes

BY

WILLIAM F. JOHNSON  
OF THE PHILADELPHIA BAR

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### VOL. 2

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PHILADELPHIA  
REES WELSH & CO., LAW PUBLISHERS  
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## PREFACE

TO VOLUME 2, JOHNSON'S PRACTICE

11/17/46  
J. H. L. T. v. 2

The almost universal commendation received from Judges and Lawyers throughout Pennsylvania, for the first volume of Johnson's Pennsylvania Practice is an incentive to complete the series with a sincere view to excel even the first volume. The scope of the present volume is to finish the logical order of Practice in the Court of Common Pleas from Trials to Execution, Sheriffs' Sales and Delivery of Possession, and then to take up the particular forms of the Common Law actions in alphabetical order from Account Render to Waste, embracing all the forms necessary. The subjects which partake of equitable procedure that are not embraced in this volume will all be fully treated in the volume on Equity. Among these will be the high and extraordinary remedies of Injunctions, Eminent Domain, Habeas Corpus, Mandamus, Quo Warranto, and such other divisions of Practice as do not come within the purview of Actions at Law. Some of these subjects are Assignments for the Benefit of Creditors, Receivership and Bankruptcy, Ground Rents, Insolvency, Lunacy and Habitual Drunkenness, Divorce, Partition, Trusts, the Price Act, Feme Sole Traders, Partnership and Accounting.

It was the purpose of the Editor to embrace Assignment for the Benefit of Creditors and Divorce in this volume, but being reminded that a complete Divorce Code will likely be enacted by the present Legislature and the Assignment Law be radically changed, it is deemed better to postpone these subjects to Volume 4, although the matter was completed more than a year ago by the Editor.

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<i>Id certum est, quod certum reddi potest</i> — that is certain which can be made certain . . . . .	644-	35
<i>Injuria sine damno</i> — legal wrong without damage . . . .		
<i>In loco parentis</i> — in place of the parent . . . . .	980-	2
<i>In pais</i> — in the country . . . . .	425-	21
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<i>Judicium quasi juris dictum</i> — a judgment is as if the voice of the law . . . . .	214-	1
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<i>Jurat</i> — he has sworn . . . . .	715-	33
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<i>Nullius filius</i> — nobody's child . . . . .	937-	33
<i>Omnia præsumuntur rite esse acta</i> — everything is presumed to have been done rightly . . . . .	815-	25
<i>Onus probandi</i> — burden of proof . . . . .	455-	75
<i>Oportet quod res certa deducatur, in judicium</i> — a thing certain must be brought to judgment . . . . .		
<i>Ouster</i> — dispossession . . . . .	625-	5
<i>Pendente placito</i> — during determination . . . . .	666-	21
<i>Per my et per tout</i> — by half (or share) and by the whole	625-	5
<i>Per quod consortium vel servitium amisit</i> — by which he is deprived of companionship and service . . . . .	844-	2

## GLOSSARY.

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<i>Pluries</i> — oftentimes . . . . .	254-	66
<i>Procedendo</i> — to be proceeded in . . . . .	72-	7
<i>Proctor</i> — plaintiff's attorney in admiralty . . . . .	576-	8
<i>Pro interesse suo</i> — in respect of his interest . . . . .	394-	7
<i>Pro rata</i> — in proportion . . . . .	231-	31
<i>Pur autre vie</i> — for the life of another . . . . .	397-	14
<i>Purpresture</i> — invasion of eminent domain . . . . .	947-	11
<i>Quando acciderint</i> — when they may fall in . . . . .	690-	1
<i>Quare executionem non</i> — wherefore not [have] execution . . . . .	690-	1
<i>Qui facit per alium, facit per se</i> — he who acts by another acts by himself . . . . .	836-	15
<i>Quod computet</i> — that it be computed . . . . .	548-	1
<i>Quod recuperet</i> — that he shall recover . . . . .	214-	2
<i>Quod scire facias præfat</i> — that you cause to know as afore- said . . . . .	690	2
<i>Quod sit corum</i> — that he shall be before us . . . . .		
<i>Quosque debitum fuerit levatum</i> — until the debt be or might be levied . . . . .	391-	16
<i>Rerum gestarum</i> — of the things connected with it . . . . .	968-	14
<i>Res acta</i> — the thing done . . . . .	948-	14
<i>Res inter alios acta</i> — things done among others . . . . .	725-	50
<i>Res ipsa loquitur</i> — the thing speaks for itself . . . . .	834-	4
<i>Retorno habendo</i> — having a return made (of the goods) . . . . .	684-	21
<i>Scire facias ad computandum et rehabendum terram</i> — that you make known to compute and return the land . . . . .	385-	5
<i>Sci. fa. ad rehabendum terram</i> — you cause to know why he shall not have back the land . . . . .	690-	1
<i>Scire facias quare restitutionem non</i> — you cause to know why not [have] restitution . . . . .	690-	1
<i>Scire feci</i> — caused to know . . . . .	692-	4
<i>Sic utere tuo, ut alienum non laedas</i> — so to use thine as not to harm others . . . . .	942-	5
<i>Son assault demesne</i> — the assault was his . . . . .	836-	10
<i>Stare decisis</i> — to stand as decided . . . . .	972-	20
<i>Suggestio falsi</i> — suggestion of a lie . . . . .	874-	9
<i>Sui juris</i> — of his own right . . . . .	219-	14
<i>Suppressio veri</i> — concealing of the truth . . . . .	867-	4
<i>Tarde venit</i> — it came late . . . . .	245-	54
<i>Trespass quare clausum fregit</i> — wherefore you broke the close, etc. . . . .	843-	1
<i>Ubi jus, ubi remedy</i> — where there is a right there is a remedy . . . . .	834-	6

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<i>Ultra vires</i> —beyond the powers . . . . .	446-	58
<i>Usque ad flum medium aquæ</i> —even to the middle of the stream . . . . .	958-	29
<i>Usufruct</i> —right to use the fruit . . . . .	840-	28
<i>Vel causam nobis significas</i> —whether the cause shall be made known to us . . . . .	194-	1
<i>Venditioni exponas</i> —that you expose to sale . . . .	387-	9
<i>Verbum sap. suf.</i> —a word to the wise is enough . . .	166-	42
<i>Vis Major</i> —the Higher Power . . . . .	836-	12
<i>Volenti non fit injuria</i> —no harm is done (the sufferer) being willing . . . . .	970-	17



# PRACTICE

## ACTIONS AT LAW IN PENNSYLVANIA

### CHAPTER I.

#### TRIALS—(A) VOLUNTARY ARBITRATION

- |   |   |
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| 17. Submission with reservation of law.                                 | 36. Enforcement of awards.                      |
| 18. The award.  | 37. Action upon an award.                       |
| 19. Exceptions to the award.  |   |

#### 1. Methods of trial.

The cause being at issue and ready for trial it may be ruled out or submitted to arbitrators or referees, or be tried by a referee learned in the law or by the court with the consent and agreement of the parties or be tried by the court and a jury. These methods will be considered in their order; and first of arbitration and reference.

#### 2. Modes of arbitration.

Arbitration was once a very common and useful mode of settling disputes, but it is now almost in disuse, except where the courts are far behind with their issue and trial lists. It may still serve some very useful purposes, such as:

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(a) To ascertain whether the plaintiff has a good cause of action and can support it with legal evidence.

(b) To learn whether the defendant has a good defense and can prove it.

(c) To obtain a judgment and lien against the defendant's real estate.

Arbitration is either compulsory or voluntary.

### 3. Voluntary reference.

Section 3 of the act of January 12, 1705, provided as follows:

"In all cases where the plaintiff and defendant having accounts to produce one against another, shall by themselves, or attorneys, or agents, consent to a rule of court for referring the adjustment thereof to certain persons, mutually chosen by them in open court, the award or report of such referees being made according to the submission of the parties, and approved of by the court and entered upon the record or roll, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men; and the party to whom any sum or sums of money are thereby awarded to be paid, shall have judgment or a *scire facias* for the recovery thereof, as the case may require and as is hereinbefore directed concerning sums found and settled by jury."

Section 12 of the act of April 11, 1848, P. L. 537, provides:

"In all cases where, by the verdict of a jury, any debt or damages shall have been found or certified in favor of the defendant, he shall be entitled to judgment and execution, in like manner as if the verdict were in favor of the plaintiff; and the defendant need not resort to *scire facias*, as required by the act of 1705, for defalcation."

### 4. Practice under act of 1705.

While this act specified only "accounts," the courts interpreted it in a broad sense so as to cover dealings of various kinds concerning which suits were brought, and pending.<sup>1</sup> The act of June 16, 1836, P. L. 717, relating to the same subject, did not supplant it,<sup>2</sup> but virtually embodied it.<sup>3</sup> In order to avail themselves of this law there must be an action pending between the parties,<sup>4</sup> or an agreement for an amicable action filed at or before the time of the filing of an award.<sup>5</sup> The act says that the submission shall be made a rule of court; but if the action is referred to in the agreement, the referees being chosen in open court, a rule will be implied.<sup>6</sup> The award must follow the agreement to submit and must be signed by all the referees,<sup>7</sup> and must be approved by the court,

<sup>1</sup> Hooton v. Will, 1 Dallas, 450; Book v. Edgar, 3 Watts, 29.

<sup>2</sup> Coleman v. Lukens, 4 Wharton, 356; Pennington v. Bowman, 10 Watts, 283.

<sup>3</sup> Painter v. Kistler, 59 Pa. 333.

<sup>4</sup> White v. Shriver, 2 Watts, 473.

<sup>5</sup> Herman v. Freeman, 8 S. & R. 9.

<sup>6</sup> Ford v. Keen, 13 Pa. 179. (See P. & L. Digest of Dec., vol. 1, cols. 1169-70.)

<sup>7</sup> Okison v. Flickinger, 1 W. & S. 258.

before enrolled. An execution cannot issue until judgment is entered on the award.<sup>8</sup> The award will not carry costs where the verdict of a jury would not.<sup>9</sup>

Such a reference followed by an award was held to have a conclusive effect upon the right involved, the same as a verdict.<sup>10</sup>

##### 5. Reference of controversies not relating to the title of real estate.

Section 1 of the act June 16, 1836, P. L. 717, provides:

"It shall be lawful for all persons, desirous to end, by arbitration, any controversy, suit or quarrel, except such as respect the title of real estate, to agree, in writing, that their submission of the same to the award or umpirage of any person or persons, shall be made a rule of any court of record of this commonwealth, having jurisdiction, which the parties shall choose, and they shall insert such their agreement in their submission, or the condition of the bond or promise whereby they may oblige themselves, respectively, to submit to the award or umpirage of any person or persons."

The actions real excepted are ejectment<sup>11</sup> and partition.<sup>12</sup> All controversies other than those which "respect the title of real estate" may be submitted, and any order, though but provisional, may be enforced.<sup>13</sup> While at the common law any agreement to refer was binding, whether or not in writing.<sup>14</sup> This act says it shall be lawful to agree in writing,<sup>15</sup> and such should be the practice.

##### 6. Agreement to refer.

Unlike the practice under the act of 1705, *supra*, which requires the arbitrators to be chosen in open court, when or after the action is entered, this reference may be made out of court by the parties, who may bind themselves thereto, name their arbitrators and have their agreement made a rule of court, without which the award cannot be enforced.<sup>16</sup> But if a judgment is entered by agreement v. Benjamin, 5 W. & S. 562; *Marshall v. Bozorth*, 17 Pa. 409. for such amount as the arbitrators find due, it is valid, although it is not a submission under this act.<sup>17</sup>

An agreement to refer may be made by a trustee<sup>18</sup> or an executor

<sup>8</sup> *Book v. Edgar*, 3 Watts, 29.

<sup>9</sup> *Holdship v. Alexander*, 13 S. & R. 230; *Clark v. McKisson*, 6 S. & R. 87; *Guier v. McFaden*, 2 Binney, 587; *Stuart v. Harkins*, 3 Binney, 321.

<sup>10</sup> *Speer v. McChesney*, 2 W. & S. 234.

<sup>11</sup> *Duer v. Boyd*, 1 S. & R. 203.

<sup>12</sup> *Bellas v. Dewart*, 17 Pa. 85.

<sup>13</sup> *Wilson v. Brown*, 82 Pa. 437.

<sup>14</sup> *McManus v. McCulloch*, 6 Watts, 356; *Harris v. Hayes*, 6 Binney, 422; *Millar v. Criswell*, 3 Pa. 449; *Wentz v. Bealor*, 14 C. C. 337. (See P. & L. Dig., vol. 1, col. 1169.)

<sup>15</sup> *Gay v. Waltman*, 89 Pa. 453.

<sup>16</sup> *Fox v. Ealer*, 2 Miles, 169; *Otis v. Northrop*, 2 Miles, 351; *Benjamin*

<sup>17</sup> *Wall v. Fife*, 37 Pa. 394; *Henneigh v. Kramer*, 50 Pa. 532.

<sup>18</sup> *Brower v. Osterhout*, 7 W. & S. 344; *Hume v. Hume*, 3 Pa. 144. (But where the *cestui que trust* objects, see *Lynch v. North*, 14 W. N. O. 437.)

or administrator,<sup>19</sup> or a city solicitor for a city of the third class.<sup>20</sup>

#### 7. Making it a rule of court.

Section 2 of the act of 1836, *supra*, provides:

"When any agreement shall be made as aforesaid, and inserted in the submission, or promise, or condition of the respective bond, the same shall, upon producing an affidavit thereof, made by the witnesses thereto, or any one of them, in the court of which the same is agreed to be made a rule, and filing the said affidavit in court, be entered of record in such court, and a rule shall, thereupon, be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made pursuant to such submission."

The affidavit of the witness or witnesses to the agreement signed by the parties is essential to authorize the entry of the rule, where the controversy is out of court; but not where a suit is pending.<sup>21</sup> Where an award is irregularly entered without such affidavit, it cannot be reached by a plea of *nul tiel record*, but the proper course is to move to strike it off.<sup>22</sup>

#### 8. Form of agreement and affidavit.

Ira Lutz	}	In the court of common pleas of Blair County.
v.		
James Shields.	No. —	Term, 19—.

Now, September 29, 1909, the parties to the above suit, desirous to end the same by arbitration, agree and oblige themselves to submit the same and all matters in controversy therein, to the award of James Reed, John Hayes and John Guise [or, any two of them agreeing, if a majority only is desired]; and also agree that this submission shall be made a rule of said court agreeably to the provisions of the act of assembly of June 16, 1836, relating to arbitration and reference; so that the said award may be made and set down in writing, under their hands and seals [or the hands and seals of at least two of them], ready to be delivered to the parties in said suit on or before the — day of — next; and said arbitrators shall meet at —, on the — day of — A. D. —, at — o'clock — M. to hear the said parties.

In the presence of

Gertrude Shields, }  
William A. Magee, }

Ira Lutz  
James Shields.

Blair County ss.

Gertrude Shields being duly sworn according to law says that she saw Ira Lutz and James Shields sign the above agreement of submission on the day the same bears date.

[Signed]

Sworn to, etc.

Gertrude Shields.

<sup>19</sup> Peter's Ap., 38 Pa. 239; Christy v. Christy, 176 Pa. 421.

<sup>20</sup> Spring Brook Water Co. v. Pittston, 10 Kulp, 406.

<sup>21</sup> Shisler v. Keavy, 75 Pa. 79; Manhattan, Etc., Co. v. McLaughlin, 80 Pa. 58.

<sup>22</sup> Wall v. Fife, 37 Pa. 394; Wilson v. Brown, 82 Pa. 437.

### 9. Form and substance of agreement.

No particular form is required to refer a controversy,<sup>23</sup> but the fact that it was submitted must be proved;<sup>24</sup> and it need not be expressly made a rule of court if consent can be implied,<sup>25</sup> but no rule will be granted without an agreement to submit.<sup>26</sup> A substantial compliance with the act is all that is necessary.<sup>27</sup> But a reference to the counsel of both sides is too indefinite.<sup>28</sup> Under the act of 1705 no appeal lies.<sup>29</sup>

### 10. Prospective submission.

An agreement to submit any dispute which may arise *in futuro*, in order to oust the jurisdiction of the court, must name the arbitrator or arbitrators.<sup>30</sup> The bringing of a suit revokes the agreement in such case.<sup>31</sup> But a clear submission to an arbitrator named is binding,<sup>32</sup> and if he is absent or dies, a suit may be brought;<sup>33</sup> or where the parties by their acts waive the stipulation.<sup>34</sup> Where "all and every difference growing out of a contract" is submitted, this includes a dispute about the non-performance of it,<sup>35</sup> but if limited to questions arising from the execution, it does not cover rescission.<sup>36</sup> If by the agreement the award shall be final, it is conclusively binding on the parties,<sup>37</sup> but to oust the jurisdiction of the court it must clearly appear that the whole subject was duly submitted.<sup>38</sup> When the parties have chosen an engineer to pass upon the work, his decision was held conclusive, no matter how neglectful of duty he was.<sup>39</sup> However, to correct this manifest wrong the act of June 1, 1907, P. L. 381, declares that no contract providing that an award or appraisal of an engineer, architect or other person shall be final or conclusive or that the certificate of an

<sup>23</sup> *Wilson v. Getty*, 57 Pa. 266; *Gay v. Waltham*, 89 Pa. 453; *Somerset v. Ott*, 207 Pa. 539.

<sup>24</sup> *Stokely v. Robinson*, 34 Pa. 315.

<sup>25</sup> *Manhattan, Etc., Co. v. McLaughlin*, 80 Pa. 53, P. & L. Dig. of Dec., vol. 1, 1170; C. R. A., vol. 1, col. 371.

<sup>26</sup> *Fox v. Ealer*, 2 Miles, 169.

<sup>27</sup> *Wilson v. Brown*, 82 Pa. 437.

<sup>28</sup> *Weichardt v. Hook*, 83 Pa. 434.

<sup>29</sup> *Kimmel v. Shank*, 1 S. & R. 24.

<sup>30</sup> *McQuaide v. Penna. R. Co.*, 6 D. R. 391; C. R. A., vol. 1, col. 375; P. & L. Dig. of Dec., vol. 1, cols. 1176-7.

<sup>31</sup> *Knipe v. Livingston*, 19 Montg. 17.

<sup>32</sup> *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. 205; *Brown v. Decker*, 142 Pa. 640; P. & L. Dig. of Dec., vol. 1, cols. 1174-5.

<sup>33</sup> *Shreiner v. Cummins*, 63 Pa. 374; *Fayette Co. v. Laing*, 127 Pa. 119.

<sup>34</sup> *Wright v. Susquehanna, Etc., Co.*, 110 Pa. 29; *Whelan v. Boyd*, 114 Pa. 228.

<sup>35</sup> *Connor v. Simpson*, 104 Pa. 440.

<sup>36</sup> *Lauman v. Young*, 31 Pa. 306.

<sup>37</sup> *Gowen v. Pierson*, 166 Pa. 258; P. & L. Dig. of Dec., vol. 1, cols. 1179-80-81.

<sup>38</sup> *Koch v. Kuhns*, 6 Supr. C. 186; *Chandley v. Boro.*, 200 Pa. 230; *Citizen's, Etc., Co. v. Howell*, 19 Supr. C. 255; *Jacob v. Weissner*, 207 Pa. 484.

<sup>39</sup> *McManus v. Phila.*, 201 Pa. 632; and other cases for which see P. & L. Dig. Dec., vol. 1, col. 1182, and C. R. A., vol. 1, col. 375.



engineer, architect or other person shall be a condition precedent to maintaining an action on such contract, shall oust the jurisdiction of the courts. But a proviso was inserted that the act should not apply to municipal or other corporations invested with the privilege of taking private property for public use.<sup>39a</sup>

A submission of the meaning of the specifications or the value of extras does not include a question as to whether it was done in a workmanlike manner.<sup>40</sup> A question as to a mechanic's lien where the contract provides for delivering a building free from all incumbrances may be referred.<sup>41</sup> It was held that an award which exceeds the terms of submission is void only for such excess.<sup>42</sup> A finding by an architect that a sum should be retained to await decision on responsibility for defects is not an award,<sup>43</sup> and the party whose engineer is the referee is not bound by his misconduct because of his employment.<sup>44</sup> A municipality is generally bound by its contract to arbitrate.<sup>45</sup> A railway lease providing for submission of disputes is valid though the lessee owns a majority of the stock of the lessor.<sup>46</sup> A submission of a building contract to arbitrators instead of the architect has been sustained.<sup>47</sup> It is immaterial how the referees arrive at their valuation, if it is fairly done.<sup>48</sup> An agreement in a mining lease to arbitrate under the act of 1836, with a clause permitting revocation, is optional.<sup>49</sup>

Where a municipal contract refers disputes to an officer his award is binding, in the absence of proof of mistake, fraud or collusion.<sup>50</sup> The same rule applies to individuals,<sup>51</sup> though the contract is not thereby vitiated, when the referee fails in his duty.<sup>52</sup> The award will not be set aside for mistake of judgment alone.<sup>53</sup> Agreements to arbitrate disputes will not be enlarged by implication.<sup>54</sup>

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<sup>39a</sup> *Pittsburg, Etc., Co. v. Sharp*, 190 Pa. 256; *Harlow v. Homestead*, 194 Pa. 57; *Werneberg v. Pittsburg*, 210 Pa. 267, as to municipalities. As to certificates of architects, see these cases: *Payne v. Roberts*, 214 Pa. 568; *Sheehan v. Pittsburg*, 213 Pa. 133; *Fay v. Liester Piano Co.*, 32 Supr. C. 437; *Hunn v. Penna. Inst., Etc.*, 221 Pa. 403; *Warren-Ehret Co. v. Byrd*, 220 Pa. 246; *Wymard v. Deeds*, 21 Supr. C. 332; *P. & L. Digt.* 3 C. R. A., cols. 131-134.

<sup>40</sup> *Gallagher v. Sharpless*, 134 Pa. 134.

<sup>41</sup> *Barclay v. Deckerhoof*, 171 Pa. 378.

<sup>42</sup> *Drhew v. Altoona*, 121 Pa. 401.

<sup>43</sup> *Huckestein v. Kelly*, 162 Pa. 631.

<sup>44</sup> *Gonder v. Berlin R. Co.*, 171 Pa. 492.

<sup>45</sup> *Chester v. Union R. Co.*, 218 Pa. 24. (See N. 39a.)

<sup>46</sup> *Wolf v. Penna. R. Co.*, 195 Pa. 91.

<sup>47</sup> *Worden v. Connell*, 196 Pa. 281.

<sup>48</sup> *Ralston v. Ihmsen*, 204 Pa. 588.

<sup>49</sup> *Henry v. Lehigh V. C. Co.*, 13 Luz. L. R. 48, 215 Pa. 448.

<sup>50</sup> *Clark v. Pittsburg*, 217 Pa. 46; *Phila. v. Durham*, 16 D. R. 81.

<sup>51</sup> *Frederick v. Margwarth*, 200 Pa. 156.

<sup>52</sup> *Frederick v. Margwarth*, 221 Pa. 418.

<sup>53</sup> *McNally v. Montour R. Co.*, 33 Supr. C. 51.

<sup>54</sup> *Dobbling v. York Springs R. Co.*, 203 Pa. 628, 207 Pa. 123; *Somerset v. Ott*, 207 Pa. 539; *Citizen's, Etc., Co. v. Howell*, 19 Supr. C. 255; *Jacob v. Weissner*, 207 Pa. 484; *Chandley v. Cambridge Springs*, 200 Pa. 230.

### II. Effect of agreement.

It was long since held that general agreements to refer disputes arising under contracts to arbitrators do not oust the jurisdiction of the courts;<sup>45</sup> but that parties who stipulated to refer disputes to a person or persons were bound by their contract.<sup>46</sup> However, the matter referred must be distinctly set forth and nothing left to inference;<sup>47</sup> and it must be confined to the very matter designated for such reference<sup>48</sup> and not for the loss of the contract.<sup>49</sup> When the arbitrators have agreed upon their award it is too late to revoke their appointment;<sup>50</sup> nor can the agreement be varied by a parol understanding.<sup>51</sup> A partner can bind his co-partners by an agreement and it need not be under seal.<sup>52</sup> An arbitrator having declined and another having been substituted for him, it will be presumed to have been done by consent of both parties.<sup>53</sup> The number of arbitrators may be determined by the parties themselves.<sup>54</sup>

The agreement is binding as far as the parties may bind themselves, although several actions are embraced in one of which there is a party not bound by it,<sup>1</sup> and although it includes matters not legally at issue,<sup>2</sup> and where various suits are pending an agreement to discontinue and refer is binding.<sup>3</sup> The submission of "all business in dispute" was held to authorize the arbitrators to annul a contract in dispute.<sup>4</sup> Where all matters up to the death of a party are submitted it covers all claims accrued prior to the funeral of decedent.<sup>5</sup> A submission without an award does not bar a bill for an account.<sup>6</sup> The parties may waive their right to exceptions and appeal by agreeing to an immediate execution.<sup>7</sup> One who agrees to an award, in consideration of discontinuance of a suit by the other cannot revoke.<sup>8</sup> By submission a plea in abatement is

<sup>45</sup> *Gray v. Wilson*, 4 Watts, 39.

<sup>46</sup> *Leebrick v. Lyter*, 3 W. & S. 365; *McGeehan v. Duffield*, 5 Pa. 499; *McCahan v. Reamy*, 33 Pa. 535; *Herdie v. Bilger*, 47 Pa. 60; *Reynolds v. Caldwell*, 51 Pa. 298; *Irvin v. Schultz*, 46 Pa. 74; *Hartup v. Pittsburgh*, 97 Pa. 107; *McCune v. Lytle*, 197 Pa. 404. (See C. R. A., vol. 1, col. 379.)

<sup>47</sup> *Lauman v. Young*, 31 Pa. 306; *Memphis R. Co. v. Wilcox*, 48 Pa. 161; *O'Reilly v. Kerns*, 52 Pa. 214; *Reading, Etc., Co. v. Graeff*, 64 Pa. 395.

<sup>48</sup> *Citizen's, Etc., Co. v. Howell*, 19 Supr. C. 255.

<sup>49</sup> *Dobbling v. York, Etc., Co.*, 203 Pa. 628.

<sup>50</sup> *Johnson v. Andress*, 5 Phila. 8; *Shisler v. Keavy*, 75 Pa. 79; *Buckwalter v. Russell*, 119 Pa. 495.

<sup>51</sup> *Manhattan, Etc., Co. v. McLaughlin*, 80 Pa. 53.

<sup>52</sup> *Taylor v. Coryell*, 12 S. & R. 243; *Gay v. Waltman*, 89 Pa. 453.

<sup>53</sup> *Browning v. McManus*, 1 Wharton, 177.

<sup>54</sup> *Quay v. Westcott*, 60 Pa. 163.

<sup>1</sup> *Summerville v. Painter*, 44 Pa. 110.

<sup>2</sup> *Grier v. Bilger*, 13 Pa. 58; *Remington v. Morris*, 2 Grant, 457.

<sup>3</sup> *McCune v. Lytle*, 197 Pa. 404.

<sup>4</sup> *Noble v. Peebles*, 13 S. & R. 319.

<sup>5</sup> *Montgomery's Ap.*, 7 Atl. 231.

<sup>6</sup> *Carr v. Raleigh*, 2 Phila. 242.

<sup>7</sup> *Gallup v. Reynolds*, 8 Watts, 424; *Gans v. Drew*, 2 Walker, 418; *Huckestein v. Kaufman*, 173 Pa. 199.

<sup>8</sup> *McGheenen v. Duffield*, 5 Pa. 497.

waived;<sup>9</sup> and also to the jurisdiction, because a suit had been brought which, however, was ended by a voluntary nonsuit.<sup>10</sup> An administratrix who submits to an award cannot be required to give security for a book account.<sup>11</sup>

### 12. Revocation and annulment.

An agreement to refer is annulled by the death of a party;<sup>12</sup> and a new submission by the legal representative is required.<sup>13</sup> A voluntary submission may be revoked by either of the parties before acted upon,<sup>14</sup> unless it be made upon a consideration,<sup>15</sup> or upon a contract<sup>16</sup> whereby rights are gained or lost;<sup>17</sup> or where the agreement has been made a rule of court.<sup>18</sup> If the agreement provides for arbitration within a certain time fixed the arbitrators cannot act after such time except by consent of the parties.<sup>19</sup> Where one of the arbitrators withdraws, the proper course is to file a revocation.<sup>20</sup> When the agreement has been acted upon, it is too late to revoke,<sup>21</sup> unless the parties have reserved the right to appeal.<sup>22</sup> But they may abandon the proceedings;<sup>23</sup> or the agreement may be defeated by refusal of the arbitrators to act, or agree, when a rule to set aside and vacate will be made absolute.<sup>24</sup> If a vacancy occurs, for the filling of which there is no provision the rule to arbitrate may be discharged.<sup>25</sup> The submission being in writing, a revocation must also be in writing, and of equal solemnity.<sup>26</sup> The time of submission must be followed by the arbitrators.<sup>26a</sup>

### 13. Appointment of referees.

Referees can only be appointed in presence of the parties or their agents or attorneys<sup>27</sup> and when they agree upon one his inter-

<sup>9</sup> *Stimmel v. Miller*, 8 C. C. 128.

<sup>10</sup> *Barclay v. Deckerhoof*, 171 Pa. 378.

<sup>11</sup> *Hoare v. Muloy*, 2 Yeates, 161.

<sup>12</sup> *Marseilles v. Kenton*, 17 Pa. 238.

<sup>13</sup> *Power v. Power*, 7 Watts, 205; *Bailey v. Stewart*, 3 W. & S. 560. See *Ruston v. Dunwoody's Adm.*, 1 Binney, 42.

<sup>14</sup> *Coleman v. Grubb*, 23 Pa. 393; P. & L. Dig. of Dec., vol. 1, col. 1187; 1 C. R. A. 379. *Mentz v. Armenia, Etc., Co.*, 79 Pa. 478.

<sup>15</sup> *Paist v. Caldwell*, 75 Pa. 161; *Lewis' Ap.*, 91 Pa. 359; *Williams v. Tracey*, 95 Pa. 308; *Mitchell v. Newman*, 4 Penny. 443; *White's Ap.*, 108 Pa. 473.

<sup>16</sup> *McCune v. Lytle*, 197 Pa. 404; *Frederick v. Margwarth*, 221 Pa. 418.

<sup>17</sup> *Zehner v. Lehigh, Etc., Co.*, 187 Pa. 487.

<sup>18</sup> *Shisler v. Keavy*, 75 Pa. 79.

<sup>19</sup> *Johnson v. Crawford*, 212 Pa. 502.

<sup>20</sup> *Lance v. Lumber Co.*, 3 C. C. 142.

<sup>21</sup> *Oxley v. Oldden*, 1 Dallas, 430; *Grubb v. Grubb*, 2 Dallas, 191; *Pollack v. Hall*, 4 Dallas, 222; *Robinson v. Bickley*, 30 Pa. 384; *Buckwalter v. Russell*, 119 Pa. 495; *Thomas v. Heger*, 174 Pa. 345; *Greenawalt v. Hamilton*, 4 Penny. 495.

<sup>22</sup> *Erie v. Tracey*, 2 Grant, 20.

<sup>23</sup> *McKenna v. Lyle*, 155 Pa. 599.

<sup>24</sup> *Dougherty v. Shimer*, 1 Luz. L. R. 44.

<sup>25</sup> *Wolf v. Augustine*, 181 Pa. 576.

<sup>26</sup> *Dickinson v. Rorke*, 30 Pa. 390; *Horne v. Welsh*, 35 Supr. C. 569.

<sup>26a</sup> *Johnson v. Crawford*, 212 Pa. 502.

<sup>27</sup> *Shippen v. Bush*, 1 Dallas, 251.

est is immaterial.<sup>28</sup> A mistake in the name of a referee is amendable,<sup>29</sup> and if the person be not named but the officer designated the one who holds the office at the time will be held the person to act.<sup>30</sup> If a vacancy occurs, unless the manner of filling it is agreed upon, it can only be filled by agreement of the parties.<sup>31</sup> But where the vacancy was filled by the court, consent will be presumed.<sup>32</sup>

#### 14. Office of umpire.

Where an umpire is called in by disagreeing referees, he becomes the judge of the law and facts submitted,<sup>33</sup> by the referees,<sup>34</sup> or the parties on request by them.<sup>35</sup>

The referees may be sworn by the attorneys, if no one objects.<sup>36</sup>

#### 15. Powers of referees.

The powers of arbitrators are circumscribed by the agreement to submit;<sup>37</sup> they cannot set up another tribunal,<sup>38</sup> or substitute a stranger for one of their board;<sup>39</sup> or award a nonsuit;<sup>40</sup> or revise or correct an award;<sup>41</sup> or advise with counsel of one party;<sup>42</sup> or proceed in the absence of one arbitrator.<sup>43</sup> But they need not continue the hearing for the absence of one of the parties, when he had notice.<sup>44</sup>

#### 16. Meetings.

Unless the parties have due notice of the meetings of the arbitrators, the judgment on the award will be stricken off;<sup>45</sup> but this notice may be rendered unnecessary by agreement of the attorney,<sup>46</sup> though service on the attorney was formerly held to be insufficient.<sup>47</sup> Notice may be waived.<sup>48</sup> The law does not require arbitrators to keep a minute of their meetings and adjournments, though it would

<sup>28</sup> *Monongahela, Etc., Co. v. Fenton*, 4 W. & S. 205; *Meadow Co. v. Serrill*, 2 T. & H. Pr. 814; *Stoke v. McCullough*, 1 Central R. 55.

<sup>29</sup> *Elliot v. Elliot*, 1 Dallas, 379.

<sup>30</sup> *North, Etc., R. Co. v. McGrann*, 33 Pa. 530.

<sup>31</sup> *Potter v. Sterrett*, 24 Pa. 411.

<sup>32</sup> *Browning v. McManus*, 1 Wharton, 177.

<sup>33</sup> *Boyer v. Aurand*, 2 Watts, 74.

<sup>34</sup> *Graham v. Graham*, 9 Pa. 254; *Same v. Same*, 12 Pa. 128.

<sup>35</sup> *Falconer v. Montgomery*, 4 Dallas, 232; *Passmore v. Pettit*, 4 Dallas, 271.

<sup>36</sup> *Large v. Passmore*, 5 S. & R. 51.

<sup>37</sup> *Scott v. Barnes*, 7 Pa. 134; *Knickerbocker Ice Co. v. Smith*, 147 Pa. 248; *Weaver v. Powell*, 148 Pa. 372.

<sup>38</sup> *Levezey v. Gorgas*, 4 Dallas, 71.

<sup>39</sup> *Russell v. Gray*, 6 S. & R. 145.

<sup>40</sup> *Miller v. Miller*, 5 Binney, 62.

<sup>41</sup> *Robinson, Etc., Co. v. Mellon*, 139 Pa. 257; *Hartley v. Henderson*, 189 Pa. 277.

<sup>42</sup> *Shabach v. Hoover*, 21 Pitts. L. J. 104.

<sup>43</sup> *Albright v. Minersville, Etc., Co.*, 2 Leg. Rec. 267.

<sup>44</sup> *Forney v. Morrison*, 1 Leg. Rec. 85.

<sup>45</sup> *Roberts v. Smith*, 19 Phila. 310.

<sup>46</sup> *Shibe v. Rex*, 1 Browne, 174.

<sup>47</sup> *Rivers v. Walker*, 1 Dallas, 81.

<sup>48</sup> *Graham v. Graham*, 9 Pa. 254.

be better if it did.<sup>49</sup> If an arbitrator is called as a witness and refuses to be sworn but makes a statement, in which a party acquiesced, he cannot afterwards take exception. He should have asked the board to rule upon the request that he be sworn.<sup>50</sup> The presumption of regularity clothes the proceedings before arbitrators.<sup>51</sup> If a tender is made before them; it should be noted of record.<sup>52</sup> They have no power to hear the case and examine witnesses *ex parte*<sup>53</sup> or receive communications from one party which are not disclosed to the other.<sup>54</sup>

The meeting may be adjourned by oral consent;<sup>55</sup> and an order to adjourn is not the subject of exception.<sup>56</sup> If a party ask for adjournment to procure testimony and the arbitrators refuse, on exception, the award will be set aside,<sup>57</sup> if a reasonable ground is laid.<sup>58</sup> In case of adjournment to a time to be fixed afterwards, notice of the time must be given to the parties.<sup>59</sup>

#### 17. Submission with reservation of law.

Section 3 of the act of 1836, *supra*, provides:

"It shall be lawful, also for the parties to any suit to consent, as aforesaid, to a rule of court, for referring all matters of fact in controversy in such suit to referees, as aforesaid, reserving all matters of law arising thereupon for the decision of the court, and the report of such referees, setting forth the facts found by them, shall have the same effect as a special verdict, and the court shall and may proceed thereupon, in like manner as upon a special verdict, and either party may have a writ of error, to the judgment entered thereupon, as in the case of a judgment entered upon a special verdict."

Whilst "any suit" is mentioned above, it does not refer to suits in equity, but only to actions at law.<sup>60</sup> Making the submission a rule of court is only required as to controversies where no suit is pending.<sup>61</sup> Consent will not be implied, however, where the intent is not apparent.<sup>62</sup> If the agreement provides that a majority of the arbitrators shall decide, the report need not be signed by all.<sup>63</sup>

#### 18. The award.

The award is the formal finding of the arbitrators and it need not

<sup>49</sup> *Mundorf v. Grier*, 7 Pitts. L. J. 164.

<sup>50</sup> *Fairchild v. Hart*, 1 Phila. 227.

<sup>51</sup> *Buckman v. Davis*, 28 Pa. 211; *Robinson v. Bickley*, 30 Pa. 384; *Painter v. Histler*, 59 Pa. 331.

<sup>52</sup> *Vosburg v. Reynolds*, 8 Luz. L. R. 283.

<sup>53</sup> *Hagner v. Musgrove*, 1 Dallas, 83.

<sup>54</sup> *Maybin v. Coulon*, 4 Dallas, 298; *Miller v. R. Co.*, 2 C. P. R. 10.

<sup>55</sup> *Rogers v. Playford*, 12 Pa. 181.

<sup>56</sup> *Becker v. Wesner*, 1 Woodward, 202.

<sup>57</sup> *Passmore v. Pettit*, 4 Dallas, 271.

<sup>58</sup> *Latimer v. Ridge*, 1 Binney, 458.

<sup>59</sup> *Kelly v. Kelly*, 5 Law Times (N. S.), 95.

<sup>60</sup> *Cotton v. Babcock*, 64 Pa. 462; *Danville, Etc., R. Co.'s Ap.*, 81 \* Pa. 326.

<sup>61</sup> *Buckman v. Davis*, 28 Pa. 211; *Summy v. Hiestand*, 65 Pa. 300.

<sup>62</sup> *Brendlinger v. Yeagley*, 53 Pa. 464.

<sup>63</sup> *Walters v. Pettit*, 12 C. C. 431.

conform with the pleadings, technically;<sup>1</sup> so it may find a sum due and direct its payment in installments.<sup>2</sup> But an award for more than the jurisdictional amount in a suit before a justice of the peace is not sustainable.<sup>3</sup> But although a justice had no jurisdiction over an award amicably agreed to, an action in assumpsit may be maintained upon it.<sup>4</sup> An award in ejectment, for the plaintiff, with costs but no damages, under the voluntary law was sustained;<sup>5</sup> as also, without costs or damages,<sup>6</sup> but one in full of all costs and damages will carry only damages.<sup>7</sup> Where a matter is referred for appraisement the report is not an award.<sup>8</sup>

An award is not invalidated because the submission does not designate the court in which the rule is to be entered;<sup>9</sup> nor because of a collateral agreement for the surrender of certain premises.<sup>10</sup> Where the submission is by parol the award may also be by parol,<sup>11</sup> and will draw interest from its rendition.<sup>12</sup> An award will not be affected by the fact that one who was referee, afterwards became counsel for one of the parties.<sup>13</sup> It is assignable as security for counsel fees.<sup>14</sup> Since the act of March 28, 1808, P. L. 531, it need not be sealed.<sup>15</sup> A final award cannot be attacked collaterally, except for plain mistake of law or fact.<sup>16a</sup>

#### 19. Exceptions to the award.

Section 4 of the act of 1836, *supra*, is as follows:

"The party against whom an award shall be made, as aforesaid, may except thereto, within such time as the court by their rules, shall direct for either of the following causes, and for no other, viz.:

I. That the arbitrators or umpire misbehaved themselves in the case, or

II. That they committed a plain mistake in matter of fact or matter of law, or

III. That the award was procured by corruption or other undue means."

Such exceptions must be filed within the time fixed by the rules of court.<sup>16</sup> In Philadelphia, by section 1, rule 33, it is ten days; in Lycoming County by rule 2, it is 20 days. [Examine your rules.]

<sup>1</sup> Grier v. Bilger, 13 Pa. 58.

<sup>2</sup> Geary v. Cunningham, 10 S. & R. 230.

<sup>3</sup> M'Killip v. M'Killip, 2 S. & R. 489.

<sup>4</sup> Climensohn v. Climensohn, 163 Pa. 451.

<sup>5</sup> Austin v. Snow, 2 Dallas, 157.

<sup>6</sup> Harvey v. Snow, 1 Yeates, 156.

<sup>7</sup> Buckley v. Ellmaker, 13 S. & R. 71.

<sup>8</sup> Jarthans v. State, Etc., Co., 1 Pearson, 104; Coates, Etc., R. Co. v. Moore, 64 Pa. 79.

<sup>9</sup> Woelfel v. Hammer, 159 Pa. 448.

<sup>10</sup> Wynn v. Bellas, 34 Pa. 160.

<sup>11</sup> Gay v. Waltman, 89 Pa. 453.

<sup>12</sup> Jones v. Ringold, 1 Yeates, 480.

<sup>13</sup> Phillip's Est., 48 Leg. Int. 232.

<sup>14</sup> Fithian v. New York, Etc., R. Co., 31 Pa. 114.

<sup>15</sup> McAdams v. Stilwell, 13 Pa. 90; Young v. Shook, 4 Rawle, 299.

<sup>16a</sup> March v. Lukens, 214 Pa. 206; 3 C. R. A., col. 136.

<sup>16</sup> Shoemaker v. Smith, 2 Binney, 239; Shewell v. Wycoff, 1 Dallas, 312.

If on the face of the report there is apparent error for which an appellate court would set aside the award, exceptions may be filed later;<sup>17</sup> or where the arbitrators themselves certify that they have erred.<sup>18</sup>

Exceptions need not be in writing when the grounds appear on the face of the report;<sup>19</sup> otherwise they must be set forth and sworn to.<sup>20</sup> One who files exceptions to an award which is alternative waives his right to elect.<sup>21</sup>

## 20. Power of the Court.

Where the parties voluntarily submit their cause without reserving the right to appeal, the court will strike off an appeal, even if the adversary asked for a continuance and cross-examined witnesses before a commissioner.<sup>22</sup> But under the act of 1705 exceptions may be filed which, if well taken, will be sustained.<sup>23</sup> In order that the right of appeal may be taken away before a justice of the peace the agreement must be in writing.<sup>24</sup> An award may be against defendants jointly;<sup>24a</sup> or it may be in the alternative in equity.<sup>24b</sup>

The errors of fact or law for which exceptions may be filed must be clear.<sup>25</sup> The test of the cause is whether a court would set aside a verdict and grant a new trial on the same ground.<sup>26</sup> If there has been any collusion or misconduct by the arbitrators, the award will be set aside;<sup>27</sup> but it must be proved.<sup>28</sup> The question of fraud cannot be raised in the appellate court,<sup>29</sup> where the record only will be examined.<sup>30</sup> Exceptions may be taken for fraud or collusion, an agreement to the contrary notwithstanding.<sup>31</sup> Exceptions based on irregularities in the proceedings are for the court below and will not be considered in the appellate court, although depositions are sent up with the record.<sup>32</sup>

The court may set aside an award for error of law where the

<sup>17</sup> *Hamilton v. Gallagher*, 4 Yeates, 202; *Russell v. Gray*, 6 S. & R. 145.

<sup>18</sup> *Davis v. Schuylkill, Etc., Canal Co.*, 4 Binney, 296.

<sup>19</sup> *Buckley v. Durant*, 1 Dallas, 129.

<sup>20</sup> *Pearce v. Shaw*, 1 S. & R. 365.

<sup>21</sup> *Brown v. Young*, 1 Yeates, 76.

<sup>22</sup> *Spratt v. Raymond*, 149 Pa. 258.

<sup>23</sup> *Mussina v. Hertzog*, 5 Binney, 387; *Horton v. Stanley*, 1 Miles, 418.

<sup>24</sup> *Dawson v. Condry*, 7 S. & R. 366.

<sup>24a</sup> *Brock v. Lawton*, 210 Pa. 195.

<sup>24b</sup> *McCune v. Lytle*, 197 Pa. 404.

<sup>25</sup> *Romans v. Robertson*, 3 Yeates, 584; *Happer v. Thomas*, 5 D. R. 182; *Chambers v. McKee*, 44 Pitts. L. J. 367. (See P. & L. Dig. of Decisions, vol. 1, col. 1225, and 3 C. R. A., col. 136, for other cases.)

<sup>26</sup> *Williams v. Craig*, 1 Dallas, 315.

<sup>27</sup> *Speer v. Bidwell*, 44 Pa. 23; *Liverpool, Etc., Co. v. Goehring*, 99 Pa. 13; *Riding v. Burkert*, 8 C. C. 640; *Connor v. Simpson*, 44 Leg. Int. 241.

<sup>28</sup> *Armstrong v. Hall*, 15 Pa. 23; *Hostetter v. Pittsburg*, 107 Pa. 419; *Hartup v. Pittsburg*, 131 Pa. 535.

<sup>29</sup> *Laufer v. Sell*, 141 Pa. 159.

<sup>30</sup> *Rogers v. Playford*, 12 Pa. 181; *Shisler v. Keavy*, 75 Pa. 79.

<sup>31</sup> *Brandon v. Forest Co.*, 59 Pa. 187.

<sup>32</sup> *Buckman v. Davis*, 28 Pa. 211.

finding shows on what principles it was founded;<sup>33</sup> or for uncertainty.<sup>34</sup> But where exceptions are taken to the jurisdiction of a justice, it will not be set aside, when the record shows jurisdiction;<sup>35</sup> nor where the question was purely one of fact,<sup>36</sup> though for a plain mistake of fact an award will be set aside.<sup>37</sup> As a rule the parties take the risks of mistakes of judgment by the referee on the law or facts, when they agree to its finality.<sup>38</sup> They cannot except because he refused to issue subpoenas or swear witnesses, etc.<sup>39</sup> Having accepted and acted upon an award they cannot except for want of express authority.<sup>40</sup> The proper way to reach an award is by bill, and this lies only for misconduct, fraud or mistake.<sup>41</sup> But where it is made a rule of court, the remedy is by exceptions and not by bill.<sup>42</sup> Where judgment is entered without approval of the court, the same may be given *nunc pro tunc*.<sup>43</sup>

## 21. Resubmission.

Where exceptions are sustained the report should be set aside or resubmitted as provided in section 7 of the act, *supra*, as follows:<sup>44</sup>

"If, upon exceptions filed to any award, it shall appear to the court that the referees have made a mistake, in fact or law, it shall be lawful for such court to refer the cause back to the same referees, for such further or other proceedings therein as shall be expedient."

Under the above section, the court may refer the cause back to the arbitrators where it appears from special findings that they erred in the law;<sup>45</sup> or if they made a mistake in the award.<sup>46</sup> The court may do this without the consent of the parties.<sup>47</sup> But it will not refer it back to revise an alleged mistake of fact which is disputed.<sup>48</sup> Such mistake must be plain upon the face of the record.<sup>49</sup> The court cannot alter an award,<sup>50</sup> but if illegal or defective should set it aside.<sup>51</sup> If the award be excessive, the court may reduce it,

<sup>33</sup> Osborn v. First Natl. Bank, 175 Pa. 494.

<sup>34</sup> Stickle v. Miley, 1 York, 18; Brown v. Long, 4 Clark, 436.

<sup>35</sup> Kuhn v. Eggers, 17 C. C. 155.

<sup>36</sup> James v. Sterrett, 137 Pa. 234.

<sup>37</sup> Chambers v. McKee, 44 Pitts. L. J. 367.

<sup>38</sup> Astwood v. Wanamaker, 26 Supr. C. 591.

<sup>39</sup> Keystone Bank v. Ashton, 12 Phila. 188.

<sup>40</sup> Sunbury, Etc., Co. v. Avery, 32 Leg. Int. 449.

<sup>41</sup> March v. Lukens, 14 D. R. 733; 214 Pa. 206.

<sup>42</sup> Burt v. Greek Catholic Church, 51 Pitts. L. J. 343; North Braddock v. Corey, 205 Pa. 35.

<sup>43</sup> Seybert v. Walton, 5 Luz. L. R. 161.

<sup>44</sup> McGlue v. City, 105 Pa. 236.

<sup>45</sup> Osborn v. Bank, 175 Pa. 494.

<sup>46</sup> Christmas v. Thompson, 3 S. & R. 133.

<sup>47</sup> Shaw v. Pearce, 4 Binney, 485.

<sup>48</sup> Klingensmith v. Steel, Etc., Co., 17 Supr. C. 210; Chambers v. McKee, 185 Pa. 105.

<sup>49</sup> Kidd v. Emmett, 72 Pa. 150; Gunn v. Bowers, 126 Pa. 552; Reynolds v. Creveling & Co., 177 Pa. 267; Klipstein v. Whitesides (No. 1), 30 Supr. C. 35.

<sup>50</sup> Post v. Sweet, 8 S. & R. 391.

<sup>51</sup> Etter v. Edwards, 4 Watts, 63.



where it would have the same power over a verdict;<sup>52</sup> or may impose just terms when confirming it.<sup>53</sup> But if the parties have made the award final, the court will not interfere to rectify mistakes.<sup>54</sup> After a cause has been reversed the court cannot refer it back without the consent of the parties<sup>55</sup> though they may cure the error by voluntary appearance.<sup>56</sup>

## 22. Enforcement of award.

Section 5 of the act of 1836, *supra*, provides:

"If exceptions shall not be filed within the time limited as aforesaid, or, if upon exceptions filed the court shall confirm the award, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be liable to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court, on motion, may issue process accordingly, or the said court may, on motion, award an execution or executions, to carry the same into effect."

## 23. Award has effect of verdict.

Section 6 of the same act is as follows:

"In all cases where the parties to any suit shall by themselves, their attorneys or agents, consent to a rule of court, for referring the matters in controversy in such suit to certain persons mutually chosen by them, the award of such referees, if made according to the submission of the parties, being approved of by the court and entered upon the record, shall have the same effect and shall be deemed and taken to be as available in law as the verdict of a jury; and the party in whose favor such report shall be made, whether plaintiff or defendant, shall have judgment, and the like process for the recovery thereof, as on a verdict in an action commenced by such party."

This award must be of the same character as a verdict to render it enforceable by execution.<sup>57</sup>

## 24. Form and effect.

The award under this act must follow the form of submission, and it has no greater force than a verdict until approved in due form by the court and judgment entered upon it.<sup>1</sup> The court in approving or declining to approve is guided by the same rules of justice as in granting new trials.<sup>2</sup> It may not cut down the amount

<sup>52</sup> Rank v. Rank, 21 W. N. C. 399.

<sup>53</sup> Rogers v. Playford, 12 Pa. 181.

<sup>54</sup> McCahan v. Reamey, 33 Pa. 535.

<sup>55</sup> Coleman v. Lukens, 3 W. & S. 37.

<sup>56</sup> Brooke v. Bannon, 3 W. & S. 382. (See P. & L. Dig., vol. 1, cols. 1224-1232; vol. 1, C. R. A., cols. 387-8-9.)

<sup>57</sup> Wood v. Earl, 5 Rawle, 44; Pennington v. Bowman, 10 Watts, 283; Wilson v. Brown, 82 Pa. 437. (See P. & L. Dig., vol. 1, col. 1224; vol. 1, C. R. A. 387.)

<sup>1</sup> Steele v. Lineberger, 59 Pa. 308; McGlue v. City of Phila., 105 Pa. 236; Stephen's Executor's Ap., 38 Pa. 9. (See P. & L. Dig. of Dec., vol. 1, col. 1207.)

<sup>2</sup> Buckwalter v. Russell, 119 Pa. 495; Gunn v. Bowers, 126 Pa. 552.

of the award, unless clearly erroneous.<sup>3</sup> A judgment improperly entered may be set aside.<sup>4</sup> A common law award cannot be attacked collaterally.<sup>5</sup> When parties submit their differences, they can only be relieved from an award in plain cases of fraud or mistake, unless they provide for an appeal.<sup>6</sup> If they submit to an award that is final they are bound to it.<sup>7</sup>

No mere error or omission will justify interference.<sup>8</sup> The agreement may provide for the issuance of execution on the award.<sup>9</sup> The court may pass upon a question as to whether the award was within the submission;<sup>10</sup> or whether the parties are bound by it.<sup>11</sup> While the award is a lien on land the subsequent costs of an appeal are not.<sup>12</sup> The report of arbitrators imports verity,<sup>13</sup> but the subject matter before them in arriving at their decision may be proved.<sup>14</sup> Evidence of a parol award cannot be given, unless coupled with an offer to perform or a demand for performance.<sup>15</sup> A judgment on a suit based on an award which was opened by the court is not admissible in evidence.<sup>16</sup> If an award has not been approved by the court and no judgment entered, a plea of *nul tiel* record will be good as against a *scire facias* upon it.<sup>17</sup> The award of a referee will not be overturned, on a question of fact where the evidence is sufficient to carry the case to a jury.<sup>18</sup> Declarations of arbitrators after an award are inadmissible,<sup>19</sup> and it cannot be impeached collaterally.<sup>20</sup> The arbitrators may be called to prove what they decided,<sup>21</sup> but not what evidence of tender there was before them.<sup>22</sup> Where one of the parties refuses to perform the award the other may plead such refusal in bar.<sup>23</sup> It must comply with the law under which it was made or the award will be set aside.<sup>24</sup>

Where suits between the same parties are separately submitted the awards must be separate;<sup>25</sup> but if jointly submitted a single

<sup>3</sup> Reynolds v. Creveling & Co., 177 Pa. 267.

<sup>4</sup> Painter v. Kistler, 59 Pa. 331; Walters v. Pettit, 12 C. C. 431.

<sup>5</sup> March v. Lukens, 14 D. R. 733.

<sup>6</sup> Robinson v. Bickley, 30 Pa. 385; Taylor v. Brittain, 1 Foster, 188.

<sup>7</sup> Gratz v. Phillips, 14 S. & R. 144. (See Pepper & Lewis Digest, vol 1, col. 1207.)

<sup>8</sup> English v. Wilmerding School Dist., 165 Pa. 21.

<sup>9</sup> Gallup v. Reynolds, 8 Watts, 424.

<sup>10</sup> Wightman v. Pettis, 29 Pa. 283.

<sup>11</sup> Studebaker v. Moore, 3 Binney, 124.

<sup>12</sup> Christy v. Crawford, 8 W. & S. 99.

<sup>13</sup> Brink v. Bell, 4 Yeates, 491.

<sup>14</sup> Scott v. Baker, 37 Pa. 330.

<sup>15</sup> Hosie v. Gray, 71 Pa. 198.

<sup>16</sup> Collins v. Freas, 77 Pa. 493.

<sup>17</sup> Steele v. Lineberger, 59 Pa. 308.

<sup>18</sup> Ellison v. Hosie, 147 Pa. 336.

<sup>19</sup> Brower v. Osterhout, 7 W. & S. 344.

<sup>20</sup> Bower v. Tallman, 5 W. & S. 556.

<sup>21</sup> Zeigler v. Zeigler, 2 S. & R. 286; Converse v. Colton, 49 Pa. 346.

<sup>22</sup> Wade v. Gallagher, 1 Yeates, 77.

<sup>23</sup> Jones v. Penna. R. Co., 143 Pa. 374.

<sup>24</sup> Marshall v. Bozarth, 17 Pa. 409. (See Pepper & Lewis Digest, vol. 1, col. 1211.)

<sup>25</sup> Hart v. James, 1 Dallas, 355; Groff v. Musser, 3 S. & R. 262; Todd v. Rough, 10 S. & R. 18.

award will be sustained.<sup>26</sup> Where there is a joint action there can be but one award.<sup>27</sup> It must be within the scope of the agreement to submit.<sup>28</sup> An award against the complainant in equity has been sustained, although no crossbill was filed.<sup>29</sup> Unless the agreement provides for an award by a majority<sup>30</sup> the award must be signed by all.<sup>31</sup> If an award is certain to a common intent it will not be set aside, if it keeps within the scope of the agreement.<sup>32</sup> But if it is uncertain as to the person,<sup>33</sup> or the sum,<sup>34</sup> or the property<sup>35</sup> concerned, it will be set aside. It must be final—end the controversy,<sup>36</sup> and will be sustained if it in effect awards no cause of action;<sup>37</sup> and, in equity, it may be alternative.<sup>38</sup>

### 25. Costs.

Unless restricted by the agreement of submission, arbitrators have power to award full costs even in slander where the damages found are under forty shillings;<sup>39</sup> or in trespass when the award was for \$1 and costs.<sup>40</sup> They may award costs even where nothing is said about them in the agreement.<sup>41</sup> However, where a judgment would not carry costs under an act of assembly, they cannot award costs.<sup>42</sup> It is not necessary that there should be a suit pending; an award may carry costs upon a mere dispute referred.<sup>43</sup> But they cannot put the costs on the winner, without authority in the agreement.<sup>44</sup> Where the law provides for double costs an award will carry the same.<sup>45</sup> But costs may not be awarded contrary to law.<sup>46</sup> Where the court orders each party to pay half of the referee's fee, the one failing to pay cannot file exceptions.<sup>47</sup>

<sup>26</sup> Bemus v. Quiggle, 7 Watts, 362; Brock v. Lawton, 210 Pa. 195.

<sup>27</sup> Soxman v. Soxman, 3 P. & W. 44.

<sup>28</sup> Drhew v. Altoona, 121 Pa. 401. (See P. & L. Dig., vol. 1, col. 1213.)

<sup>29</sup> McCune v. Lytle, 197 Pa. 404.

<sup>30</sup> Weaver v. Powel, 148 Pa. 372. (See P. & L. Dig. of Dec., vol. 1, col. 1215.)

<sup>31</sup> Bartolet v. Dixon, 73 Pa. 129. (See P. & L. Dig. of Dec., vol. 1, col. 1216-7.)

<sup>32</sup> Noble v. Peebles, 13 S. & R. 319; Barnet v. Gilson, 3 S. & R. 340.

<sup>33</sup> Bowen v. Mattison, 1 Luz. L. R. 45.

<sup>34</sup> Stanley v. Southwood, 45 Pa. 189 (P. & L. Dig., vol. 1, col. 1218); Connor v. Simpson, 104 Pa. 440.

<sup>35</sup> Etnier v. Shope, 43 Pa. 110.

<sup>36</sup> Johnston v. Brackbill, 1 P. & W. 364; Sutton v. Horn, 7 S. & R. 228; Hamilton v. Hart, 125 Pa. 142.

<sup>37</sup> Traquier v. Redinger, 4 Yeates, 282; McDermott v. Ins. Co., 3 S. & R. 604.

<sup>38</sup> Brock v. Lawton, 210 Pa. 195.

<sup>39</sup> Gower v. Clayton, 6 S. & R. 85.

<sup>40</sup> Wilkinson v. Grey, 14 S. & R. 345.

<sup>41</sup> Young v. Shook, 4 Rawle, 299.

<sup>42</sup> Guier v. McFaden, 2 Binney, 587; Lewis v. England, 4 Binney, 5.

<sup>43</sup> Hewitt v. Furman, 16 S. & R. 135.

<sup>44</sup> Moffet v. Dorsey, 2 Browne, 24.

<sup>45</sup> Brink v. Bell, 4 Yeates, 491; Act May 20, 1767, 1 Sm. L. 274.

<sup>46</sup> Holdship v. Alexander, 13 S. & R. 230.

<sup>47</sup> Peeling v. Clinton Granite Co., 35 C. C. 166.

**26. Inspectors of penitentiaries authorized.**

Section 2 of the act of April 10, 1848, P. L. 428, provides:

"The inspectors of the eastern and western penitentiaries shall, in addition to the powers and duties already given to them, have power, and are hereby directed to agree to refer to arbitrators or referees, under and pursuant to the provisions of the voluntary arbitration laws now in force, all disputes which have arisen or may arise between the said prisons, their agents, or the inspectors thereof, or either of them, and any person or persons who may have sent or shall send raw materials to them, respectively, for the purpose of being manufactured by the convicts in the said prisons, or either of them; and to take such further proceedings in such references as shall enable a full and fair hearing and investigation of all the accounts, statements and proofs touching the same, and a just and speedy decision of such claims and disputes, by such referees to be mutually chosen by said parties; and the decision of such referees or arbitrators in the premises to be filed under a rule of court, shall be final and conclusive; and the sum awarded shall be collected and paid to the successful party, as like amounts are, in such cases of reference, by law, recoverable; and in case said parties cannot agree upon a third referee or arbitrator, he shall be selected and appointed by the other two referees so to be chosen by the said parties."

**27. Arbitration of labor disputes.**

The act of April 26, 1883, P. L. 15, provided a comprehensive, fair and equitable system of arbitration of labor disputes between employers and employees in the iron, steel, glass, textile fabrics and coal trades called trades tribunals; and the act of May 18, 1893, P. L. 103, provided for the appointment of arbitrators by the Courts of Common Pleas to settle such disputes. These modes of arbitration seem to be wholly ignored by the parties interested, preferring to resort to strikes and lock-outs.

**28. Form of bond to perform award.**

Where the parties give bond to each other to stand by and perform the award, it may be as follows, the plaintiff being obligor in one and the defendant in the other:

Job Tod	}	In the court of common pleas of Huntingdon County. No. —	Term, 19—.
Alois Bertelle.			

*In Assumpsit.*

Know all men by these presents, that I, Job Tod, plaintiff in the above entitled suit, am held and firmly bound to Alois Bertelle, defendant in the same suit, in the sum of — dollars, to be paid to said Alois Bertelle, his executors, administrators and assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated — — —.

Whereas the said Job Tod and Alois Bertelle, desirous to end by arbitration the above suit, have submitted the same to the award

of Karl Reed, Smith Weed and James Teed [or any two of them agreeing] and have obligated themselves to submit to the award of the said persons [or any two of them agreeing], as aforesaid, and have agreed that said submission shall be made a rule of the said court, agreeably to the act of assembly of June 16, 1836:

Now the condition of this obligation is such, that if the above bounden Job Tod shall in all things submit to stand by and perform the award of the said Karl Reed, Smith Weed and James Teed [or any two of them agreeing], of all matters in controversy in said suit, so that the said award be made and set down in writing under their hands and seals [or the hands and seals of any two of them], ready to be delivered to the parties to said suit on or before the — day of — next, then this obligation to be void, or else to be and remain in full force and virtue.

Sealed and delivered in presence of  
Wade Stout,  
Irene Knox.

Job Tod.

#### Affidavit

Huntingdon County ss. Wade Stout being duly sworn says that he saw Job Tod, whose name is signed to the foregoing bond, sign, seal and deliver the same as his act and deed on the day that said bond bears date.

Sworn to, etc.

Wade Stout.

#### 29. Form of rule.

Job Tod	} In the court of common pleas of Huntingdon	Term, 19—.	
v.			County.
Alois Bertelle.			No. —

And now September 29, 1909, upon producing the affidavit of Wade Stout of the due execution and delivery of the agreement and bond [or agreement, if no bond is given] in which is inserted the submission of the above stated suit to the award Karl Reed, Smith Weed and James Teed [or any two of them agreeing] and filing the said affidavit in court. In motion of Henry W. Petrikin, Esq., of counsel for the plaintiff, it is ordered that the said agreement and submission be entered of record, and a rule is hereby made by said court that the parties to the said suit shall submit to and finally be concluded by the arbitration which shall be made pursuant to said submission.

By the Court.

\_\_\_\_ Prothonotary.

#### 30. Form of award.

In pursuance of the submission within mentioned, we the arbitrators, having accepted the appointment and assumed the duties of arbitrators, and having met at the time and place specified in the agreement to submit [or, after due notice to the parties, at the time and place fixed in said notice] and having heard and duly considered the proofs and allegations of the parties submitted to us under oath, by them respectively, do award that the plaintiff has no cause of action [or, that there is due from the defendant to

the plaintiff the sum of — dollars]. Witness our hands and seals  
the — day of — A. D., 19—.

Karl Reed, [Seal]  
Smith Weed, [Seal]  
James Teed. [Seal]

**31. Approval by the court.**

The foregoing award having been duly presented to the court is confirmed and ordered filed and the prothonotary is directed to enter judgment thereon accordingly.

*Per Cur.*

— day of — 19—.

\_\_\_\_\_  
Judge.

**32. Award of facts.**

Where the parties agree to a submission of the facts only, reserving the law for the court, the forms are to be varied accordingly. In such case an award would be made as follows:

Pursuant to the within stated submission, we, the undersigned arbitrators therein named, after having given due notice to the parties, met at — in the borough of Huntingdon on the — day of — A. D. 190— and having heard the proofs and allegations of the parties, under oath, do report and find the following facts, viz.: [set out the facts as found]. If upon these facts the court shall decide that the plaintiff is legally entitled to recover, then we do award that there is due from the defendant to the plaintiff the sum of — dollars; but if the court shall decide that the plaintiff is not legally entitled to recover, then we do award that the plaintiff has no cause of action.

[Signed and sealed as before.]

**33. Agreement to submit under sec. 6, act 1836.**

Grasse Freed	} In the court of common pleas of Mifflin County.	
v.		
Treed Frax.		
	No. —	Term, 19—.

Now, September 27, 1909, it is agreed that a rule be entered in said court for referring the matters in controversy in said suit to Andrew Reed, James Fox and Charles Thomas, mutually chosen by the parties, to be found by them [or any two agreeing] agreeably to the provisions of the sixth section of the act of June 16, 1836, relating to reference and arbitration, the referees to meet on — days' notice, *ex parte* [or as agreed upon].

A. Reed Hayes,  
Attorney for Plaintiff.  
Rufus C. Elder,  
Attorney for Defendant.

A similar form of reference will answer under the act of March 21, 1806, 4 Sm. L. 326; but the affidavit of a subscribing witness is necessary to make it a rule of court.

**34. Agreement under act of 1705.**

Alus Mauck	} In the court of common pleas of Venango County.	Term, 19—.
v. Toma Gent.		
	No. —	

Now, October 1, 1909, the parties to this cause consent [or by their attorneys John H. Osmer and Q. D. Hastings, consent] to a rule of court for referring the adjustment of all matters in dispute between them to Clarence Bierly, William Hart and Fred Meddaugh [or any two of them agreeing] referees mutually chosen by them in open court, in accordance with the 3d section of the act of 1705 relating to defalcation. Referees to meet on — days' notice, *ex parte*.

**35. Appeals from awards.**

Where the parties have not provided in their agreement for an appeal, the award becomes final and no appeal lies,<sup>48</sup> except for fraud or collusion in the arbitrators<sup>49</sup> or manifest error upon the face of the record.<sup>50</sup> But, to be binding, such agreement must be in writing, a verbal waiver being insufficient.<sup>51</sup> On appeal, a refusal to recommit the case, on exceptions, will not be reversed, unless the facts would have justified the reversal of a verdict.<sup>52</sup> If there was no finding as to a material fact at issue, the case will be sent back with a direction to the court to re-submit the matter.<sup>53</sup>

**36. Enforcement of awards.**

Where the parties make their reference a rule of court, judgment must be entered upon the award before execution can be had,<sup>54</sup> and, in accordance with a rule of court, where four days are allowed in which to move in arrest of judgment, a judgment entered sooner will be stricken off.<sup>55</sup> Where the award is in favor of the defendant he must proceed by *sci. fa.*, or attachment.<sup>56</sup> An award with stay of execution has been held good.<sup>57</sup> Where a power of attorney is given to confess judgment on an award it is sufficient to sustain an execution.<sup>58</sup> An attachment will not lie for the costs of an arbitration.<sup>59</sup>

**37. Action upon an award.**

Where the parties have not made their reference a rule of court

<sup>48</sup> Hughes' Admr. v. Peaslee, 50 Pa. 257; Hostetter's Ap., 92 Pa. 132; Hindman v. Doughty, 37 W. N. C. 440. P. & L. Digest, vol. 1, cols. 1235-6, 7; C. R. A., vol. 1, col. 389.

<sup>49</sup> Laufer v. Sell, 141 Pa. 159.

<sup>50</sup> Betz v. Delbert, 16 W. N. C. 360; Chester v. McIntyre, 13 Supr. C. 545; De La Vergne, Etc., Co. v. Kolischer, 214 Pa. 400; Findlay v. Phila., 217 Pa. 330; Klipstein v. Whitesides (No. 1), 30 Supr. C. 35.

<sup>51</sup> Dawson v. Condy, 7 S. & R. 366.

<sup>52</sup> Klingensmith v. West Leechburg, Etc., Co., 17 Supr. C. 210.

<sup>53</sup> Dick v. Huidekoper, 218 Pa. 380.

<sup>54</sup> Book v. Edgar, 3 Watts, 29.

<sup>55</sup> Barre v. Affleck, 2 Yeates, 274.

<sup>56</sup> Blackburn v. Markle, 6 Binney, 174; 12 S. & R. 143.

<sup>57</sup> Barde v. Wilson, 3 Yeates, 149.

<sup>58</sup> Ker v. Loughridge, 3 C. C. 441.

<sup>59</sup> Arnold v. Burr, 5 Kulp, 407.

the award is only enforceable by an action at law,<sup>60</sup> in which the plea of *non assumpsit infra sex annos* does not avail.<sup>61</sup> In such action, an affidavit of defense is required,<sup>62</sup> but judgment will not be given for want of a sufficient affidavit of defense where the award is uncertain.<sup>63</sup> An affidavit of defense is insufficient which raises one of the questions submitted to the arbitrators.<sup>64</sup> Where the submission is at common law the prothonotary cannot enter judgment on an agreement that he may.<sup>65</sup>

A justice of the peace has jurisdiction of such action.<sup>66</sup> An action may be sustained upon an award as to such portion as was within the submission;<sup>67</sup> and although an irregular judgment was entered upon it.<sup>68</sup> One who sues upon his claim notwithstanding an award, is debarred from falling back on the award.<sup>69</sup> Specific performance of an award will not be decreed where it was made by two of three referees named.<sup>70</sup>

In an action on an award the recital contained in the award itself is not evidence of the submission;<sup>71</sup> but an arbitrator may testify as to matters brought up at the hearing,<sup>72</sup> and to the termination,<sup>73</sup> but not to prove his misconduct in his official relation,<sup>74</sup> which must be shown otherwise.<sup>75</sup>

Where an award is uncertain evidence may be admitted to explain it;<sup>76</sup> but not to show that the evidence was misapprehended;<sup>77</sup> or to prove facts which might have been proven at the hearing.<sup>78</sup> Evidence of mistake of the arbitrators can only be given under notice of special matter.<sup>79</sup>

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<sup>60</sup> *Richardson v. Cassily*, 3 Watts, 320; *McCune v. Lytle*, 197 Pa. 404; *Lockwood v. Deming*, 1 Pitts. 212.

<sup>61</sup> *Rank v. Hill*, 2 W. & S. 56; *Green, Etc., R. Co. v. Moore*, 64 Pa. 79.

<sup>62</sup> *Bayard v. Gillaspay*, 1 Miles, 256.

<sup>63</sup> *Conner v. Simpson*, 104 Pa. 440.

<sup>64</sup> *Brock v. Lawton*, 210 Pa. 195.

<sup>65</sup> *White v. Shriver*, 2 Watts, 471.

<sup>66</sup> *Scott v. Barnes*, 7 Pa. 134; *Slocum v. Taylor*, 8 S. & R. 399.

<sup>67</sup> *South v. South*, 70 Pa. 195.

<sup>68</sup> *Hume v. Hume*, 3 Pa. 144.

<sup>69</sup> *Hamilton v. Hart*, 125 Pa. 142.

<sup>70</sup> *Backus' Ap.*, 58 Pa. 186.

<sup>71</sup> *Collins v. Freas*, 77 Pa. 493.

<sup>72</sup> *Graham v. Graham*, 9 Pa. 254.

<sup>73</sup> *Perit v. Cohen*, 4 Wharton, 81.

<sup>74</sup> *Ellmaker v. Buckley*, 16 S. & R. 72.

<sup>75</sup> *Speer v. Bidwell*, 44 Pa. 23.

<sup>76</sup> *Lynn v. Risberg*, 2 Dallas, 180.

<sup>77</sup> *Howard v. Salter*, 1 Browne, 90.

<sup>78</sup> *English v. Wilmerding, etc.*, 165 Pa. 21.

<sup>79</sup> *Taylor v. Coryell*, 12 S. & R. 243.



## CHAPTER II

### TRIALS — (B) COMPULSORY ARBITRATION

1. Rule of reference.
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3. Form of entry of rule.
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5. Affidavit of service.
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7. Matters excluded.
8. Time when rule may be entered.
9. Fixing number and appointment of arbitrators.
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11. Duties of prothonotary, when a party.
12. Choosing arbitrators.
13. Forms of choice.
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15. Proof of service.
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18. Proceedings when arbitrator is absent.
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20. Form of subpoena.
21. Form of attachment.
22. Depositions of aged, etc., witnesses.
23. Trial and powers.
24. Punishment of disorder.
25. Proceeding before a justice.
26. Power to compel production of books, etc.
27. Costs of postponement.
28. Making and filing award.
29. Umpire, when to be called in.
30. Form of award.
31. Certificate of appointment.
32. Nature of award.
33. Record of award.
34. Effect of entry.
35. Lien of award.
36. Costs on award.
37. Setting aside award.
38. Nonsuit after appeal.
39. Appeal from award.
40. Appeal in *forma pauperis*.
41. Right of appeal.
42. Affidavit.
43. Payment of costs.
44. Affidavit, without payment of costs.
45. Notice of application.
46. Condition of recognizance.
47. Form of recognizance.
48. Condition — wages.
49. Appeal without security.
50. Corporations, etc.
51. Recognizance and perfecting bail.
52. Waiver of objections.
53. Waiver of right of appeal.
54. Costs to be taxed.
55. Withdrawal of appeal.
56. Execution on judgment.
57. Compensation of arbitrators.
58. Fees of constables, etc.
59. Practice on appeal.
60. Costs on the appeal.
61. Appeals from the common pleas.
62. Penalty — neglect to serve copy.
63. Penalty on arbitrators.
64. Penalty for corruption.
65. Penalty for bribery.
66. Recovery of fines, etc.
67. Penalty for withholding books, etc.
68. Lawyer's court of compulsory arbitration.
69. Rules in Allegheny county.

#### I. Rule of reference.

Section 8 of the act of June 16, 1836, P. L. 719, provides:

"It shall be lawful for either party in any civil suit or action, his agent or attorney, to enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain, to be mentioned therein, not

exceeding thirty days thereafter, for the trial of all matters in variance in the suit between the parties."

"Section 9. *Provided*, That it shall not be lawful for the plaintiff in any suit to enter such rule, until after a declaration or statement of the cause of action shall have been filed by him."

"Section 10. And *provided also*, That no suit or action which shall be set down for trial at any court, shall be referred (except by consent of parties) within thirty days before, nor during the sitting of such court, unless such suit or action shall have been previously continued to the next term."

## 2. Rule by defendant.

Section 1 of the act of May 14, 1874, P. L. 159, provides:

"It shall not be lawful, in any civil suit or action in any court of this commonwealth, wherein the affidavit of claim is or may be required, and in which the plaintiff, by himself or his agent or attorney, shall have filed an affidavit of claim setting forth the nature and amount thereof, and shall have also filed a declaration or statement, for the defendant to enter a rule of reference, declaring his intention to have arbitrators chosen, unless he shall have previously filed an affidavit of defense, specifically setting forth the nature and character of the same; and a rule of reference shall in no case prevent the plaintiff from moving for, or the court from entering judgment for want of a sufficient affidavit of defense."

Where the plaintiff is entitled to a judgment for want of a sufficient affidavit of defense, the right cannot be defeated by a reference.<sup>1</sup>

## 3. Form of entry of rule.

Willard James } In the court of common pleas of Cambria County.

v.  
John Nevin. } No. —

Term, 19—.

Now, September 24, 1909, the plaintiff in this case, by his attorney, F. P. Martin, Esq. [or in his own proper person, or by — his agent], enters in the prothonotary's office, a rule of reference and therein declares his determination to have arbitrators chosen on the — day of — next, for the trial of all matters in variance in the suit between the parties, agreeably to the provisions of the act of June 16, 1836, relating to compulsory arbitrations.

Willard James,  
By his attorney,  
F. P. Martin.

Thereupon, section 11 of the act of June 16, 1836, provides that "It shall be the duty of the prothonotary with whom any such rule shall be filed, to enter the same of record, and to deliver to the party filing the same, a copy thereof, duly certified."

## 4. Service of certified copy.

Section 12 of the same act provides:

"It shall be the duty of the party, his agent or attorney entering

<sup>1</sup> Taggart v. Fox, 1 Grant, 190.

the rule as aforesaid, to cause a copy of such certified rule to be served on the opposite party, his agent or attorney, at least fifteen days before the day fixed in such rule for the appointment of arbitrators; and the manner of such service shall be, by delivering such copy to the party personally, his agent or attorney, or if the said party cannot be found, and have no agent or attorney, by leaving such copy at his last place of abode; and in the case of a corporation, such copy shall be served on the president, or other principal officer, cashier, secretary or chief clerk of the corporation."

Service may be made by any one and it need not be an officer; but the manner of service required by the act must be followed;<sup>2</sup> actual notice without service is not sufficient.<sup>3</sup> If service be made by leaving a copy with the wife of a party it must appear that she was at his residence at the time.<sup>4</sup> An attorney may be authorized to accept service.<sup>5</sup> But service on the attorney of the opposite party is not sufficient by leaving a copy in his office with his clerk,<sup>6</sup> except where a rule of court, as in Allegheny County, makes such service valid; nor service at a party's boarding house.<sup>7</sup> Where there is more than one defendant service must be made on each of them.<sup>8</sup> Defects in service may be waived by the appearance or delay of the party served.<sup>9</sup> It cannot be served outside the state,<sup>10</sup> but may be served like a summons.<sup>11</sup> If a copy is served it must be a true copy,<sup>12</sup> and it must show that the seal of the court was affixed to the original.<sup>13</sup>

#### 5. Affidavit of service.

Lycoming County ss.

Louis Kleckner being duly sworn says, that he served a certified copy of the annexed rule on the defendant therein named on the — day of —, A. D., 19—, by delivering said copy to him, the defendant, personally [or to Frank P. Cummings, Esq., his attorney, personally].

Sworn to and subscribed, etc.

Louis Kleckner.

If the party could not be found and has no agent or attorney, the return must show service at his last place of abode.

#### 6. Effect and scope.

By act of May 1, 1861, P. L. 521, the act of 1836, *supra*, was re-

<sup>2</sup> *Rivers v. Walker*, 1 Dallas, 81.

<sup>3</sup> *Hottenstine v. Auten*, 43 Pa. 323.

<sup>4</sup> *Pedan v. Cox*, 3 S. & R. 245. (See P. & L. Dig. of Dec., vol. 1, col. 1254.)

<sup>5</sup> *Finch v. Lamberton*, 62 Pa. 370.

<sup>6</sup> *Jackson v. Wilson*, 7 W. & S. 249.

<sup>7</sup> *Simpson v. Brown*, 1 Pitts. 143.

<sup>8</sup> *Marshall v. Lowry*, 6 S. & R. 281; *Ranck v. Becker*, 12 S. & R. 412; *Beltzhoover v. Comth.*, 1 Watts, 126. (See P. & L. Dig. Dec., vol. 1, col. 1255.)

<sup>9</sup> *Fehr v. Reich*, 36 Pa. 472; *Bosler v. Poe*, 16 S. & R. 231; *Stout v. Comth.*, 2 Rawle, 341; *Lycoming, Etc., Co. v. Storrs*, 97 Pa. 354.

<sup>10</sup> *McKinney v. Strausser*, 3 Law Times (N. S.), 42.

<sup>11</sup> *Charles v. Keystone Assn.*, 3 Del. Co. 78.

<sup>12</sup> *Orner v. Kaniper*, 1 Lehigh V. L. R. 115.

<sup>13</sup> *Hegman v. Wills*, 3 D. R. 252.

pealed as to Philadelphia County, so far as it relates to compulsory arbitration.<sup>14</sup> The act is constitutional<sup>15</sup> since it provides for an appeal to a tribunal where trial by jury may be had. Whilst it embraces "any civil suit or action," this was held to mean only at law and not in equity.<sup>16</sup> Only such cases can be referred of which the court has jurisdiction.<sup>17</sup> It has been held that a rule to refer may be taken on a sheriff's bond;<sup>18</sup> insolvent's bond;<sup>19</sup> administrator's bond;<sup>20</sup> recognizance on appeal;<sup>21</sup> recognizance for stay of execution;<sup>22</sup> suit for wages notwithstanding the preference act of March 22, 1877, P. L. 13;<sup>23</sup> account render under act of March 30, 1821, 7 Sm. L. 429;<sup>24</sup> appeals from reports of county auditors under section 10, act of April 14, 1838, P. L. 460; *sci. fa.* on award in favor of defendant;<sup>25a</sup> *sci. fa.* to revive judgment notwithstanding the plea of *nul tiel record*;<sup>26</sup> a judgment on a special verdict reversed by the supreme court;<sup>27</sup> balance due from a guardian as certified from the orphans' court;<sup>28</sup> an action of ejectment.<sup>29a</sup> There are certain stages of proceedings when a rule to refer cannot be entered; as, when the court has directed an issue of fact to be tried by a jury;<sup>27</sup> when a case is pending in the supreme court on a point of law;<sup>28</sup> or where a judgment has been opened to let defendant into a defense;<sup>29</sup> or an issue of law raised by demurrer<sup>30</sup> or an issue framed on an attachment execution;<sup>31</sup> or, before a justice of the peace, where the demand is not over \$5.33,<sup>32</sup> or an action to recover a penalty for violation of the U. S. revenue laws,<sup>33</sup> though a suit for a penalty in the form of debt under state laws may be arbitrated.<sup>34</sup>

#### 7. Matters excluded.

Section 39 of the act, *supra*, provides:

"Nothing in this act contained, shall be taken to authorize the

<sup>14</sup> Wintz v. Fiscio, 33 W. N. C. 220.

<sup>15</sup> McDonald v. Schell, 6 S. & R. 240; Comth. v. Bennett, 16 S. & R. 244.

<sup>16</sup> Taggart v. Fox, 1 Grant, 190; Danville, Etc., R. Co.'s Ap., 81 \* Pa. 326.

<sup>17</sup> Morrison v. Weaver, 4 S. & R. 190.

<sup>18</sup> Gordon v. Comth., 10 Watts, 443.

<sup>19</sup> Bowman v. Sharp, 6 Watts, 324.

<sup>20</sup> Stout v. Comth., 2 Rawls, 341.

<sup>21</sup> Stevenson v. Docherty, 3 Watts, 176.

<sup>22</sup> Pettit v. Wingate, 25 Pa. 74.

<sup>23</sup> Raisley v. Morgan, 1 Lack. L. N. 395.

<sup>24a</sup> Hill v. Crawford, 8 S. & R. 477.

<sup>26</sup> Lange v. Stouffer, 16 Pa. 251.

<sup>28</sup> Steinbrook v. Steinbrook, 2 P. & W. 165.

<sup>29</sup> Royer v. Myers, 15 Pa. 89.

<sup>29a</sup> Wilson v. Manson, 17 D. R. 938.

<sup>27</sup> Hoffman v. Walborn, 1 Pearson, 18.

<sup>28</sup> Mann v. Alberti, 2 Binney, 195.

<sup>30</sup> Lowney v. Tracey, 6 W. & S. 493.

<sup>31</sup> Taggart v. Fox, 1 Grant, 190; Stambaugh v. Geise, 15 D. R. 792.

<sup>31</sup> Stranahan v. Stranahan, 146 Pa. 44.

<sup>37</sup> Frey v. Lilly, 6 Northam., 89.

<sup>33</sup> Buckwalter v. U. S., 11 S. & R. 193.

<sup>34</sup> Comth. v. Bennett, 16 S. & R. 243; Mevay v. Edmiston, 1 Rawls, 457.

entering of a rule of arbitration in either of the following cases, viz.:

- I. Appeal to registers' court.
- II. Issues directed to any court to ascertain a fact or facts.
- III. Actions on bail bonds and recognizances.
- IV. Actions upon penal statutes.
- V. Actions brought by the commonwealth, unless such rule be entered by the attorney general, or his deputy, with his consent, in writing."

#### 8. Time when rule may be entered.

If a declaration is filed, a rule to refer may be entered before the return day,<sup>35</sup> but the summons must be served before or at the time of serving the rule.<sup>36</sup> A declaration filed on the same day as the entry of the rule will sustain an award and the court will not inquire into its priority.<sup>37</sup> The filing of a declaration is necessary in all cases where judgment cannot be taken without it;<sup>38</sup> but in ejectment the *præcipe* has been held to stand for a declaration.<sup>39</sup> If, however, the parties appear to the rule and make no objection, the right will be held waived.<sup>40</sup> The time to choose arbitrators may be altered before notice.<sup>41</sup> A rule will hold where entered more than thirty days before the Saturday on which the trial list is made out for the next term.<sup>42</sup> The cause remains in court until the arbitrators are chosen,<sup>43</sup> and a rule not acted upon may be treated as abandoned and a nullity.<sup>44</sup> If a rule, however, has been acted upon, a second one cannot be entered without having the first rule discharged.<sup>45</sup>

When the plaintiff takes the rule he waives his right to have an affidavit of defense filed;<sup>46</sup> but when the defendant takes the rule the plaintiff may still move for judgment for want of an affidavit of defense.<sup>47</sup> Ordinarily the case is out of court when arbitrators are chosen, but if the parties see fit to plead and go to trial, they cannot deny the jurisdiction of the court.<sup>48</sup> The rule cannot be stricken off until the day of meeting of the arbitrators has passed.<sup>49</sup>

#### 9. Fixing number and appointment of arbitrators.

Section 13 of the act of 1836 provides:

"On the day fixed for the appointment of arbitrators, if both

<sup>35</sup> Hertzog v. Ellis, 3 Binney, 209; Henness v. Meyer, 4 Wharton, 358; Burke v. Matthews, 2 Phila. 282; Mullen v. Mullen, 17 D. R. 1097.

<sup>36</sup> Fehr v. Reich, 36 Pa. 472.

<sup>37</sup> Wright v. Guy, 10 S. & R. 227.

<sup>38</sup> Faries v. Weisel, 7 W. N. C. 213.

<sup>39</sup> Reed v. Long, 10 C. C. 253.

<sup>40</sup> Frey v. Vanlear, 1 S. & R. 435; Warren v. Hugo, 7 C. C. 547.

<sup>41</sup> Crawford v. Gable, 2 Pa. 444.

<sup>42</sup> McMahan v. Friend, 13 Lanc. Bar, 172.

<sup>43</sup> Hoffman v. Locke, 19 Pa. 57; Cheland v. Old Forge, 9 Lack. Jur. 175.

<sup>44</sup> Purcell v. Lambert, 8 Kulp. 323.

<sup>45</sup> Barnet v. Hope, 5 Binney, 518; Smith v. Bartoletti, 18 Leg. Int. 110.

<sup>46</sup> Duncan v. Bell, 28 Pa. 516.

<sup>47</sup> Taggart v. Fox, 1 Grant, 190. (P. & L. Dig., vol. 1, col. 1259; 1260-61-62.

<sup>48</sup> Creps v. Dunham, 69 Pa. 456.

<sup>49</sup> Trimbley v. Maloney, 21 Pitts. L. J. 152.

parties attend, either in person or by their agents or attorneys, the arbitrators shall be chosen in the following manner, viz.:

I. The number of the arbitrators, which shall be either three or five, shall be fixed by the parties, or if they cannot agree, by the prothonotary: *Provided*, That the parties may agree to refer the cause to any one person whom they shall concur in choosing.<sup>50</sup>

II. If the number fixed be three, the plaintiff shall then nominate one person; if five, he shall nominate two, and if all or either, be objected to by the defendant, he shall nominate other persons in place of those objected to, until he shall have nominated six persons for every person so allowed by him to be nominated.

III. The defendant shall then nominate in like manner, an equal number of persons subject in like manner to objection on the part of the plaintiff.

IV. If the parties agree in the choice of arbitrators, as aforesaid, the umpire shall be chosen as follows: The parties shall nominate alternately, beginning with the plaintiff, seven persons, the opposite party having the right to object to the nomination, and if all the persons thus nominated be objected to, the prothonotary shall nominate a suitable and disinterested person; if he be objected to, he shall nominate another, and so on, until he shall name seven persons, and if all be objected to, he shall make out a list of five persons, and the parties shall then strike out alternately, beginning with the plaintiff, until the name of only one person be left, who shall be the umpire.

V. If the parties cannot agree in the choice of arbitrators, as aforesaid, the prothonotary shall make out a list, containing the names of five suitable and disinterested persons for each of the number of arbitrators, so as aforesaid fixed upon, from which list, the parties shall strike out, alternately, beginning with the plaintiff, until the number be left which was so fixed, and the persons so selected shall be the arbitrators.

VI. If the parties agree as to one or more of the arbitrators and differ as to one or more, the like proceedings shall be had to supply the deficiency and complete the number of arbitrators so fixed upon."

#### 10. Selection, party absent.

Section 14. If only one of the parties attend on the day fixed for the appointment of the arbitrators, the proceedings shall be as follows:

I. If the party attending be the party by whom the rule of reference was entered, proof shall be made that the notice was duly served on the opposite party, in the manner hereinbefore provided, and the proof of the service shall be the oath or affirmation of the person by whom it was made.

II. It shall be the duty of the prothonotary to fix the number of the arbitrators, to nominate for the absent party, and to object

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<sup>50</sup> See act of May 12, 1871, P. L. 800, as to the counties of Adams and York. An appearance by one of several defendants for himself and co-defendants is good, when not objected to at the time. (*Whitehill v. Whitehill*, 17 S. & R. 295.)

to the nominations made by the party present, if he shall think it necessary.

III. If in such case all the persons nominated on either side shall be objected to, the like proceedings shall be had for the choice of arbitrators, as if both parties were present, except that the duties required to be performed by the prothonotary in such case shall be performed by the recorder of deeds, the sheriff, coroner or treasurer of the proper county."

If one of the parties fails to attend, proof of service must be made and placed on record or the proceedings will be void.<sup>51</sup> The number of arbitrators, in such case, must be fixed by the prothonotary alone.<sup>51a</sup> It will be presumed that he did so, in the absence of proof to the contrary.<sup>51b</sup> The same presumption clothes his acts for the absent party;<sup>51c</sup> but if it appears that he acted with the party present and irregularly, the rule will be set aside.<sup>51d</sup>

#### 11. Duties of prothonotary when a party.

Section 35 of the act of 1836 provides:

"In all suits or actions in which the prothonotary of the court shall be a party or in which he may be interested, the duties hereinbefore required to be performed by him, shall be performed by the recorder of deeds, the clerk of the Orphans' Court, the sheriff, coroner or treasurer of the same county."

#### 12. Choosing arbitrators.

In choosing arbitrators the plaintiff is entitled to choose first, but the order in which the choice is made is immaterial.<sup>52</sup> A female either married or single may be chosen.<sup>53</sup> A justice of the peace may serve.<sup>54</sup> The day fixed for choosing must be within thirty days after entering the rule,<sup>55</sup> but a legal holiday cannot be fixed without consent of both parties.<sup>56</sup> It may be changed before notice of the time and place has been given to the opposite party.<sup>57</sup>

#### 12a. Time and place of meeting.

Section 15 of the act, *supra*, provides:

"The day, hour and place of meeting of the arbitrators shall be fixed by the parties, if present, and able to agree thereupon, but otherwise, it shall be the duty of the prothonotary to determine the same: *Provided*, That in such case the day of meeting shall not be less than ten or more than twenty days after their appointment."<sup>58</sup>

<sup>51</sup> Smith v. Bertollett, 18 Leg. Int. 110; Frey v. Heffner, 1 York, 201.

<sup>51a</sup> Mitchell v. Wilhelm, 6 Watts, 259; Feehrer v. Rudy, 7 W. & S. 183.

<sup>51b</sup> Withers v. Haines, 2 Pa. 435.

<sup>51c</sup> Steele v. Herrington, 1 Grant, 442.

<sup>51d</sup> Cave v. Crumly, 1 Clark, 312.

<sup>52</sup> Seybert's Ap., 4 Walker, 45.

<sup>53</sup> Evans v. Ives, 1 Kulp, 461.

<sup>54</sup> Temple v. Myers, 16 C. C. 232.

<sup>55</sup> Grant v. Mutual Aid Soc., 2 Schuylkill L. R. 149.

<sup>56</sup> Doles v. Powell, 1 Lack. Jur. 429.

<sup>57</sup> Crawford v. Gable, 2 Pa. 444.

<sup>58</sup> Kirk v. Eaton, 10 S. & R. 103.

Failure to comply with this is error but will be waived by appearance.<sup>58</sup>

### 13. Forms of choice.

And now, Nov. 2, 1909, in pursuance of the rule of reference in this case, the parties attended at the prothonotary's office and agreed that the number of arbitrators should be three and also agreed in the choice of Michael Rueth, James Booth and Clarence Huth, to be said arbitrators and agreed that they should meet at — in — on the — day of —, 19 —, at — o'clock — M. Where the parties cannot agree, the record must show that the prothonotary performs his duties under section 13.

### Form when but one party is present.

And now, Nov. 2, 1909, in pursuance of the rule of reference in this case, the plaintiff only attended at the prothonotary's office, and proof being made that the rule and notice of the meeting to choose arbitrators was duly served upon the defendant, the prothonotary fixed three as the number of arbitrators and nominated for the defendant. Whereupon Michael Rueth, James Booth and Clarence Huth were selected as arbitrators, and the prothonotary fixed the time and place of meeting, etc.

### 14. Service of copy of record.

Section 16 of the act of 1836 provides:

"It shall be the duty of the party by whom the rule of reference shall have been entered, to procure from the prothonotary a certified copy of the record containing the names of the arbitrators, and the time and place of their meeting, and to serve a copy of the same on each of the arbitrators and also on the opposite party, if he resides within the city or county, and if not, upon his agent or attorney, giving at least ten days' notice previous to the day of meeting."

The act of March 23, 1877, P. L. 28, is as follows:

"In all cases where arbitrators shall be chosen in pursuance of the provisions of the act of June 16, A. D., 1836, a certified copy of the record, containing the names of the arbitrators and the time and place of meeting, shall be served upon the opposite party, his agent or attorney, but if said party have no agent or attorney, then it shall be lawful to serve said certified copy upon the opposite party, in the same manner as a writ of summons in a personal action is now served: *Provided*, That a certified copy of the record containing the names of the arbitrators and the time and place of meeting, shall be served at least ten days before the time of meeting."

### 15. Proof of service.

Marie Rogers	} In the court of common pleas of Warren County,
v.	
Henry Hansen.	No. — Term, 19—.

<sup>58</sup> Stout v. Comth., 2 Rawle, 341. (See P. & L. Dig., vol. 1, col. 1267.)



**Warren County ss.**

James Deane, being duly sworn, says that he served a copy of the within record on the — day of — A.D., 19—, upon Arthur Shay, William Ray and Guy Bordwell, said arbitrators, by giving to each of them a copy thereof and on the same day he served the defendant, Henry Hansen, by handing him a true and attested copy thereof personally [or by handing same to his agent or attorney, naming him].

Sworn to, etc.

James Deane.

As a matter of practice both the arbitrators and the defendant himself or his agent or attorney may accept service and notice of the time and place of meeting. Service on the attorney is valid.<sup>60</sup>

This service cannot be dispensed with,<sup>61</sup> except by an acceptance of service.<sup>62</sup> Under the act of 1836, where the defendant resided in the county, personal service was required.<sup>63</sup> But under the act of 1877, where he has an attorney, it may be made on the latter. An appearance by the defendant before the arbitrators to object to the service is not a waiver of any defect.<sup>64</sup>

**16. Meeting — oath.**

The arbitrators must meet at the time and place fixed in the rule.<sup>65</sup> But a delay of a half hour was held to be sufficient compliance.<sup>66</sup>

Section 19 of the act, *supra*, provides:

"When the whole number of the arbitrators shall be assembled they shall be sworn or affirmed justly and equitably to try all matters in variance, submitted to them, which oath or affirmation may be administered to them by any person having authority to administer oaths, or in the absence of such person, by one of their number."

Objection to an irregularity in this respect must be made before award.<sup>1</sup> The report need not show on its face that they were sworn.<sup>2</sup>

**17. Proceedings in absence of party.**

Section 17 of the act of 1836 provides:

"If only one of the parties shall attend on the day appointed for the meeting of the arbitrators, and the arbitrators, or one or more of them, shall attend, the proceedings shall be as follows:

I. If the party attending be the party by whom the rule of reference was entered, proof shall be made that due notice of the time and place of meeting was given to the opposite party, as hereinbefore provided.

II. If the party absent shall have been prevented from attending

<sup>60</sup> Wilcox v. Payne, 88 Pa. 154. (See P. & L. Dig., vol. 1, col. 1270.)

<sup>61</sup> Henry v. Norwood, 4 Watts, 347.

<sup>62</sup> Kirk v. Eaton, 10 S. & R. 103.

<sup>63</sup> Finch v. Lamberton, 62 Pa. 370.

<sup>64</sup> Carter v. Slocum, 2 Phila. 401.

<sup>65</sup> Wier v. Johnston, 2 S. & R. 459; Frey v. Vanlear, 1 S. & R. 435.

<sup>66</sup> Super v. Manger, 1 Schuylkill, L. R. 125; P. & L. Dig., vol. 1, cols. 1269-70.

<sup>1</sup> Vanwegen v. Davis, 4 Leg. Gaz. 222.

<sup>2</sup> Negley v. Stewart, 10 S. & R. 207; Bunting v. Bunting, 8 Hazard's Pa. Reg. 196.

by sickness, or other unavoidable cause, and notice thereof shall be given to the arbitrators or arbitrator present, of the sufficiency of which cause such arbitrators or arbitrator shall judge, an adjournment shall take place to such subsequent time as the said arbitrators or arbitrator shall fix."

#### 18. Proceedings when arbitrator is absent.

Section 18 of the same act provides:

"If the whole number of arbitrators do not attend on the day appointed for the meeting, the proceedings shall be as follows:

I. Proof shall be made that due notice of the time and place of meeting was given to the arbitrator or arbitrators absent, as hereinbefore provided.

II. If both parties be present, either in person or by their agents or attorneys, the place of the arbitrator or arbitrators absent may be supplied by the parties aforesaid, if they can agree upon suitable persons.

III. If the parties shall be unable to agree, the arbitrator or arbitrators present shall appoint a suitable person or persons to fill the vacancy.

IV. If any one of the parties be absent and no sufficient reason be assigned as aforesaid, for such absence, it shall be lawful for the arbitrator or arbitrators present to appoint a suitable person or persons to fill the vacancy."

If the arbitrators are satisfied, in the last case, that the absent party had notice, they need not require proof of it, before appointing to fill the vacancy.<sup>3</sup>

But the record must show that due notice of the time and place of meeting was given to the arbitrator.<sup>4</sup> If an arbitrator, though present, refuses to act, there is a vacancy to be filled.<sup>5</sup> If but one arbitrator attends he should make a minute of it and adjourn the meeting,<sup>6</sup> giving notice to the absent parties and arbitrators, when the board may be filled;<sup>7</sup> one arbitrator may not appoint the two others.<sup>8</sup> It has been held that a party who attended at the appointment is not required to be notified of the adjournment.<sup>9</sup> It is not necessary to an adjournment that the arbitrator be sworn.<sup>10</sup> But having once met and taken the oath, there is no provision to substitute for an absentee.<sup>11</sup> In such case the remaining arbitrators shall proceed to the trial of the cause and if they cannot agree they may choose an umpire.<sup>12</sup>

<sup>3</sup> Reesman v. Kittanning Ins. Co., 3 C. C. 1.

<sup>4</sup> Smith v. Bartolett, 18 Leg. Int. 110.

<sup>5</sup> Stiles v. Carlisle, etc., Turnpike, 10 S. & R. 286.

<sup>6</sup> Steeley v. Irvine, 6 S. & R. 128.

<sup>7</sup> Stiles v. Carlisle, etc., Turnpike, 10 S. & R. 286.

<sup>8</sup> Wilson v. Cross, 7 Watts, 495.

<sup>9</sup> Eckert v. Sheets, 6 S. & R. 275; Brown v. Brashier, 2 P. & W. 114.

<sup>10</sup> Boone v. Reynolds, 1 S. & R. 231.

<sup>11</sup> Wilson v. Cross, 7 Watts, 495; Mitchell v. Wilhelm, 6 Watts, 259.

<sup>12</sup> Sickles v. Keach, 4 Luz. L. Obs. 39.

**19. Power to subpoena witnesses.**

Section 46 of the same act provides:

"The prothonotary of the court in which the suit shall be pending, or any alderman or justice of the peace, shall have power to issue subpoenas for witnesses to appear before the arbitrators."

And it is provided by section 40 of the same act that

"Each of the arbitrators shall have power to issue subpoenas to witnesses, to appear before them, and if any person who shall have been duly subpoenaed to attend as aforesaid, shall neglect or refuse to attend, a majority of the arbitrators shall have power to issue an attachment against such person, according to the practice of the courts."

**20. Form of subpoena.**

Section 41 of the act provides that the form of this subpoena shall be as follows, to-wit:

"— County ss. The Commonwealth of Pennsylvania. To —  
— etc., greeting:

We command you, that laying all business and excuses aside, you be and appear in your proper person, before A. B., C. D., &c., arbitrators [or referees], appointed to hear and determine all the matters in variance in a certain action wherein E. F. is plaintiff and G. H. is defendant, at the house of —, in —, on the — day of — next, then and there to testify all and singular those things which you shall know, on behalf of the plaintiff [or defendant]: Hereof fail not, under the penalty of three hundred dollars. Witness my hand, this — day of —, A.D. —. R. L. one of the arbitrators [or as the case may be]."

**21. Form of attachment.**

Section 42 prescribes the form of the attachment to compel attendance, as follows:

"— County, ss.

The Commonwealth of Pennsylvania. To the constable of —: We command you, that you take — —, late of your county, aforesaid, and have him forthwith before A. B., C. D., &c., arbitrators [or referees] appointed to hear and determine all matters in variance in a certain action, wherein E. F. is plaintiff and G. H. defendant, at the house of —, in —, then and there to answer to such matters and things as shall be objected against him, and not to depart without leave.

Witness my hand this — day of —, A. D. —.

—.  
E. F. } Arbitrators.  
R. F. }

[Or as the case may be.] "

It is an indictable offence to dissuade a witness from testifying before arbitrators, when he has been subpoenaed.<sup>18</sup>

<sup>18</sup> Comth. v. Watrous, 1 Com. Pl. Rep. 21.

**22. Depositions of aged, etc., witnesses.**

Section 47, same act, provides:

"It shall be the duty of the prothonotary of the proper court, on application by either party, his agent or attorney, to enter a rule, to take the depositions of aged, infirm, going or absent witnesses, or witnesses out of the commonwealth, to be read in evidence, either before referees or arbitrators, or to the jury, in case of an appeal from the award of arbitrators, in the same manner, and subject to the same rules and regulations, as are now observed in the courts of this commonwealth."

**23. Trial and powers.**

The trial of the case before arbitrators is conducted in the same order and manner as a case in court. The same rules apply as to the opening and closing addresses of counsel, the production, swearing, examination and cross-examination of witnesses and the reading of depositions or production of books and papers.

Section 40 of the act of 1836 provides:

"Referees and arbitrators in every case, as aforesaid, or a majority of them, shall have power:

I. To require from either party the production of all such books, papers and documents as they shall deem material to the cause.

II. To judge of the competency and credibility of witnesses and the propriety of admitting any written evidence that may be offered.

III. To administer oaths or affirmations to witnesses.

IV. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they shall think proper.

V. To decide both the law and fact that may be involved in the cause submitted to them."

**24. Punishment of disorder.**

Section 43 of the same act provides:

"Referees or arbitrators as aforesaid, or a majority of them, shall also have power to punish, by fine, not exceeding twenty dollars, all persons, whether parties, witnesses or others, who shall be guilty of disorderly conduct in their presence, or who shall insult, disturb or interrupt the said referees or arbitrators, when in business, which fine shall be recovered as follows:

Section 44. The said referees or arbitrators, or a majority of them, shall make out a certificate, in the following form, viz.:

We, the undersigned referees [or arbitrators, as the case may be] do certify that A. B. did this day at —, in the county of —, before us conduct himself in a disorderly manner [or as the case may be], tending to insult, disturb and interrupt us in the trial of a certain cause, wherein C. D. is plaintiff and E. F. is defendant, for which offence we have fined him, the said A. B., the sum of — dollars, which sum you are hereby required to collect according to law.

Witness our hands, this — day of —, A. D. —.

[Signed.]

G. A.	}	Arbitrators or Referees.
J. K.		
L. M.		

**25. Proceeding before a Justice.**

Section 45 of said act provides:

"The certificate aforesaid shall be transmitted to an alderman or justice of the peace of the proper city or county, who is hereby required to make a record thereof and issue execution to collect the same, in the manner that judgments under one dollar<sup>12a</sup> are by law collected, and the sum, when collected, shall be paid by such alderman or justice to the county treasurer, for the use of the county in which the offence may have been committed."

**26. Power to compel production of books, etc.**

Section 1 of the act of Feb'y 24, 1847, P. L. 153, provides:

"Arbitrators shall have power in any action depending before them, between any contractors, laborers or workmen and any company incorporated by the laws of this commonwealth, and empowered to construct, make and manage any railroad, canal or other public internal improvement, to require either party to produce any books or writing, in their possession or power, which contain evidence pertinent to the issue; and if such party shall fail to produce such books or writings, or to satisfy said arbitrators why the same is not in their power so to do, it shall be lawful for the said arbitrators to find an award against such party, if plaintiff, of no cause of action; if defendant, for such sum as the plaintiff, his agent or attorney, shall make oath or affirmation, is justly due, according to the best of his knowledge and belief: *Provided*, That before such requirement shall be made by such arbitrators, it shall be proved to their satisfaction, on oath or affirmation, that clear and distinct notice in writing shall have been given to produce such books or writings, at least ten days previous thereto."

**27. Costs of postponement.**

Section 48 of the act of 1836, *supra*, provides:

"In every case in which application shall be made by either party to referees or arbitrators, for the postponement of a meeting or a hearing, it shall be lawful for the said referees or arbitrators, or a majority of them, if satisfied of its justice, to require from the party making such application, the payment of the costs of meeting, including the payment of the arbitrators, and the attendance of the witnesses, previous to granting such applications, according to the practice of the courts in like cases."

**28. Making and filing award.**

Section 20 of the act of 1836 provides:

"As soon as the arbitrators shall have heard the evidence and allegations of the parties, they shall proceed to determine the matters in controversy, submitted to them, and they shall make out their award which shall be signed by all or a majority of them, and shall transmit the same to the prothonotary, within seven days after they shall have agreed upon the same."

"Section 21. Arbitrators, appointed as aforesaid, shall not be entitled to receive any daily pay or other compensation, unless they

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<sup>12a</sup> Sums under \$5.33 are without stay or appeal.

make their report and transmit the same to the prothonotary within seven days after they shall have agreed upon the same."

Failure to comply with the law in this regard will not vitiate the award;<sup>14</sup> and the court may compel them by rule to file it.<sup>15</sup> It has been custom for them to hold their award until their fees are paid, which are usually paid by the successful litigant and taxed to his use as costs.

### 29. Umpire, when to be called in.

It is provided by section 22 of the same act:

"That if one of the arbitrators aforesaid shall die, or become incapable, or shall refuse to attend to the duties of his appointment, or shall remove or depart from the county, it shall be lawful for the remaining arbitrators to proceed with the cause and make an award if they can agree upon the same; but if they cannot agree, thereupon it shall be lawful for them to appoint an umpire, and the umpire so appointed, together with the said arbitrators, shall proceed with the cause and make an award."

There is no provision for calling in an umpire except when the arbitrators cannot agree upon an award, as where two or four sit and divide evenly.<sup>16</sup>

### 30. Form of award.

Mark McClure	}	In the court of common pleas of Washington	
v.		County.	
Jules Bebout.	}	No. —	Term, 19—.

And now October 2, 1909, we the above named arbitrators having met the parties in the above stated case at the — in — County of Washington, on the — day of — 1909, at — o'clock A. M. pursuant to the above certificate of appointment, and after being duly sworn [or affirmed] according to law, and hearing the said parties and their proofs and allegations do award in favor of the plaintiff and against the defendant in the sum of — dollars, with costs of suit.

Witness our hands the day and year aforesaid.

Signed

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } Arbitrators.

In case they find for the defendant without naming a sum, their award is that "the plaintiff has no cause of action."

### 31. Certificate of appointment.

Mark McClure	}	In the court of common pleas of Washington	
v.		County.	
Jules Bebout.	}	No. —	Term, 19—.

I hereby certify that in pursuance of the provisions of the act of assembly of the Commonwealth of Pennsylvania, entitled "An act relating to reference and arbitration," James Wint, Charles Rowe

<sup>14</sup> Boone v. Reynolds, 1 S. & R. 231.

<sup>15</sup> Monohan v. Strenger, 1 Phila. 376.

<sup>16</sup> Sickel v. Keach, 4 Luz. L. Obs. 39.

and Henry Dill were appointed arbitrators for the trial of all matters in variance in the above suit between the said parties, who, or a majority of whom, are to make report thereon, and transmit the same to the prothonotary of the said court within seven days after they shall have agreed upon the same, agreeably to the provisions of the said act of assembly in such case made and provided. The said arbitrators are to meet at the — of — in the — of — county aforesaid, on the — day of —, 1909, at — o'clock in the forenoon.

Certified from the record this — day of — A. D., 1909.

[Seal.]

— — —,  
Prothonotary.

### 32. Nature of award.

Unless the arbitrators are appointed to find only the facts in the nature of a special verdict, they are to find both the law and the facts,<sup>17</sup> and it should be as certain as a verdict must be.<sup>18</sup> They may award whatever a jury could find under the pleadings in the case,<sup>19</sup> but not a nonsuit.<sup>20</sup> The award may not exceed the amount demanded in the plaintiff's statement.<sup>21</sup> The certainty required is that to a common intent, and if this intent can be ascertained from the whole report, the award, though informal, will not be stricken off.<sup>22</sup> Where the statement is against one an award against two is fatal.<sup>23</sup> An award against a party who has died is invalid, without substitution of the legal representative.<sup>24</sup> But where the executor appears and the opposite party makes no objection, an award is good.<sup>25</sup> Where a plaintiff does not appear to defendant's rule, the award is "no cause of action."<sup>25a</sup>

An award in replevin finding the property in one of the parties will not be set aside because it does not also find the value of it.<sup>26</sup> If the defendant makes a tender the arbitrators should note it and mention it in the report.<sup>27</sup> Where the defendant pleaded tender and paid the money into court, an award for any amount to the plaintiff imports finding against the tender.<sup>28</sup>

### 33. Record of award.

Section 23 of the act of 1836, *supra*, provides:

"It shall be the duty of the prothonotary receiving such award.

<sup>17</sup> Hoffman v. Walborn, 1 Pearson, 18.

<sup>18</sup> White v. Jones, 8 S. & R. 349; Kitchen v. Funston, 14 S. & R. 337; Biggs v. Funk, 5 Watts, 478.

<sup>19</sup> Le Barron v. Harriott, 2 P. & W. 157; Gram's Ap., 4 Watts, 44.

<sup>20</sup> Miller v. Miller, 5 Binney, 62.

<sup>21</sup> Babb v. Stromberg, 14 Pa. 307.

<sup>22</sup> Bubb v. Sandusky, 2 D. R. 279; Sicard v. Peterson, 3 S. & R. 468. (See Pepper & Lewis Digest of Dec., vol. 1, col. 1278.)

<sup>23</sup> Stewart v. Abrams, 7 Watts, 448.

<sup>24</sup> Meehan v. Karolin, 1 Lack. Jur. 305.

<sup>25</sup> Kessler v. Haupt, 26 Pitts. L. J. 160.

<sup>25a</sup> Brandt v. Chester, Etc., R. Co., 8 D. R. 583.

<sup>26</sup> Harker v. Addis, 4 Pa. 515.

<sup>27</sup> Vosburg v. Reynolds, 5 Kulp, 228.

<sup>28</sup> Berkheimer v. Geise, 82 Pa. 64.

forthwith to enter the same of record, in the proper dockets." It has been held that leaving the award with the prothonotary, not during office hours, is not a sufficient entry.<sup>29</sup>

If it appear to the court that there is a clerical error in the award, it may be re-submitted for correction.<sup>30</sup>

#### 34. Effect of entry.

Section 24 of the act of 1836 provides:

"Every award so entered shall have the effect of a judgment with respect to the party against whom it is made, from the time of the entry thereof and shall be a lien upon his real estate, until reversed upon appeal, or satisfied according to law."

When the award is filed and a minute made of it, it becomes a judgment by such entry,<sup>31</sup> and a lien from that date,<sup>32</sup> although an appeal be taken;<sup>33</sup> which lien continues for five years (*infra*) and as against judgments subsequently entered has priority;<sup>34</sup> but not to include costs which accrue after entry.<sup>35</sup> Execution may issue on such award without having first issued a *sci. fa.*<sup>36</sup> But on a confessed award, judgment must first be entered, or an execution cannot be issued.<sup>37</sup>

#### 35. Lien of award.

Section 1 of the act of April 21, 1840, P. L. 449, provides:

"No award of arbitrators now entered, or hereafter to be entered, shall continue a lien upon the real estate of the party against whom the same shall have been made for a longer period than five years from the day on which such award shall be or shall have been entered, notwithstanding any appeal which may have been entered therefrom, unless revived within that period, according to the provisions of the act to which this is a supplement, and the supplement to the same, passed March 26, Anno Domini, 1827." (Section 3, P. L. 129.)

Where a plaintiff has appealed from an award in his favor and obtains a judgment for a larger sum, his appeal operates as a release of his lien and intervening judgments take priority.<sup>38</sup>

#### 36. Costs on award.

Arbitrators are bound by the law governing the case, in awarding costs.<sup>39</sup> If the cause be an appeal from a justice of the peace, the

<sup>29</sup> *Sims v. Hampton*, 1 S. & R. 412.

<sup>30</sup> *Heslop v. Bush*, 80 Pa. 70.

<sup>31</sup> *Richter v. Chamberlin*, 6 Binney, 35; *Post v. Sweet*, 8 S. & R. 391; *McFaden's Est.*, 7 Supr. C. 368.

<sup>32</sup> *Ebersoll v. Krug*, 3 Binney, 528; *Evans v. Duncan*, 4 Watts, 24; *Dietrich's Ap.*, 4 Watts, 208; *Turner v. Whiston*, 15 C. C. 484.

<sup>33</sup> *Ramsey's Ap.*, 4 Watts, 71.

<sup>34</sup> *First Natl. Bank's Ap.*, 100 Pa. 418.

<sup>35</sup> *Christy v. Crawford*, 8 W. & S. 99.

<sup>36</sup> *O'Donnell v. Lynch*, 1 W. & S. 283.

<sup>37</sup> *Corder v. Mays*, 3 Grant, 135; P. & L. Dig. C. R. A., vol. 1, col. 392.

<sup>38</sup> *Lentz v. Lamplugh*, 12 Pa. 346; *Eton's Ap.*, 83 Pa. 152.

<sup>39</sup> *Downs v. Lewis*, 13 S. & R. 108; *Hoffman v. Slossan*, 2 W. & S. 36; *Lindenburger v. Unruh*, 1 Browne, 194.



rule as to costs in such cases will be followed;<sup>40</sup> also if it should have been brought before a justice and was not.<sup>41</sup> Where it is reduced below the jurisdictional amount by set-off, costs may be awarded.<sup>42</sup> But if an award with costs is not objected to or appealed from, it seems the court will not disturb it.<sup>43</sup> Upon a second rule the party must pay the costs of his first rule which he abandoned.<sup>44</sup> Costs may be given by the court.<sup>45</sup>

A defendant who declines to appear may still have his costs on an award in his favor. In an action for slander, where the damages are under forty shillings (\$5.33 1-3), no more costs than damages follow suit, by the act of March 27, 1713, 1 Sm. L. 76. This rule has been followed in the case of arbitration<sup>47</sup> except in one case,<sup>48</sup> where it is held that a jury or arbitrators may award full costs, but the court cannot.

### 37. Setting aside award.

Section 26 of the act of 1836, *supra*, provides:

"It shall be lawful for the court to set aside an award of arbitrators on due proof:

I. That the arbitrators misbehaved themselves in the course of the hearing before them.

II. That the award was procured by corruption or other undue means."

This is done on petition setting forth the facts warranting it. A bill in equity will not lie, for want of notice and an opportunity to defend.<sup>49</sup> The remedy for mistakes in fact or law is by appeal;<sup>50</sup> so also as to matters not on the face of the record which occurred after the arbitrators had jurisdiction, except for the causes above stated.<sup>51</sup> If a party dies after reference, the rule is thereby revoked and an award will be set aside.<sup>52</sup> An award will not be set aside because the arbitrators ruled out evidence offered, this being ground for appeal.<sup>53</sup> The misbehavior for which an award will be vitiated must be substantial and go to the fairness and justice of the hearing.<sup>54</sup> Trivial matters will not be considered.<sup>55</sup>

<sup>40</sup> *Fortune v. Tyler*, 1 Ashmead, 11; *Addison v. Hampson*, 6 Pa. 463; *Fitzsimmons v. Lecky*, 3 P. & W. 111.

<sup>41</sup> *Sharpless v. Hibberd*, 2 Del. Co. 254.

<sup>42</sup> *Spear v. Jamieson*, 2 S. & R. 530.

<sup>43</sup> *Bradley v. Wenger*, 10 Lanc. Bar, 144.

<sup>44</sup> *Fleetwood v. Vanatta*, 1 Ashmead, 10.

<sup>45</sup> *Bellas v. Levy*, 2 Rawle, 21.

<sup>47</sup> *Stuart v. Harkins*, 3 Binney, 321; *Brown v. Ettla*, 1 Pearson, 180.

<sup>48</sup> *Moon v. Long*, 12 Pa. 207.

<sup>49</sup> *North Braddock Boro v. Corey*, 205 Pa. 35.

<sup>50</sup> *Wilson v. Wachua*, 11 D. R. 450; *Walls v. Wilson*, 28 Pa. 514; *Wynn v. Bellas*, 34 Pa. 160.

<sup>51</sup> *Thompson v. White*, 4 S. & R. 135; *Wilson v. Hamilton*, 4 S. & R. 135.

<sup>52</sup> *Knipe v. Livingston*, 19 Montg. Co. 17.

<sup>53</sup> *Comth. v. La Fitte*, 2 S. & R. 106.

<sup>54</sup> *Rheem v. Allison*, 2 S. & R. 113; *Liberty Twp. v. Chalker*, 2 Leg. Op. 90; *Bean v. Hunsberger*, 7 Mont'g Co. 17. (See P. & L. Dig. of Dec., vol. 1, col. 1291-2.)

<sup>55</sup> *Lehigh, Etc., Co. v. Zehner*, 25 C. C. 124.

But conduct affecting good faith and impartiality will be.<sup>56</sup> In order to appeal on these grounds an application must be made to set aside and be refused;<sup>57</sup> however, it has been held that as to misbehavior, a refusal to set aside is similar to the refusal of a new trial.<sup>58</sup> Where the agreement to arbitrate is also that the award be final, an order striking it off is a final judgment from which an appeal can be taken.<sup>59</sup> Where a rule has been irregularly taken the court can set it aside at any stage.<sup>60</sup> But an award cannot be attacked collaterally.<sup>61</sup> If the award erroneously contains the words "by consent of parties," the right of appeal is not thereby precluded.<sup>62</sup>

A party may be estopped from alleging misbehavior of the arbitrators;<sup>63</sup> but on the ground of fraud and collusion the judgment may be opened,<sup>64</sup> or where the referees themselves point out a plain mistake in their findings,<sup>65</sup> though the court may not alter their award after it is filed.<sup>66</sup> It may be recommitted for correction of a clerical error,<sup>67</sup> but not a matter of substance.<sup>68</sup>

### 38. Nonsuit after appeal.

Section 25 of the act of 1836 is as follows:

"*Provided*, That the court may, after appeal, allow the plaintiffs to suffer a nonsuit, with like effect as if the cause had not been referred as aforesaid, if the special circumstances of the case shall appear to require it."

That the arbitrators erred in law, or that the applicant wishes to bring another suit, is not sufficient to warrant nonsuit without consent of the opposite party.<sup>69</sup> The effect of a nonsuit is to nullify the award.<sup>70</sup>

### 39. Appeal from award.

Section 27 of the act of 1836 is as follows:

"Either party may appeal from an award of arbitrators to the court in which the cause was pending at the time the rule of reference was entered, under the following rules, regulations and restrictions, viz.:

I. The party appellant, his agent or attorney, shall make oath

<sup>56</sup> Burns v. Smith, 180 Pa. 606; Rogers v. Playford, 12 Pa. 184. (See P. & L. Dig. of Dec., vol. 1, col. 1293.)

<sup>57</sup> Sheets v. Rudebaugh, 2 Rawle, 149; Waage v. Weiser, 5 Wharton, 307.

<sup>58</sup> Bemus v. Clark, 29 Pa. 251.

<sup>59</sup> Wynn v. Bellas, 34 Pa. 160.

<sup>60</sup> Taggart v. Fox, 1 Grant, 190.

<sup>61</sup> Ziegler v. Ziegler, 2 S. & R. 286.

<sup>62</sup> McClain v. Boyer, 84 Pa. 417.

<sup>63</sup> Bean v. Hunsberger, 7 Montg. Co. 17.

<sup>64</sup> Cochran v. Eldridge, 49 Pa. 365.

<sup>65</sup> Sturgis v. Rue, 3 Clark, 499; P. & L. Dig., vol. 1, col. 1293.

<sup>66</sup> Tilghman v. Fisher, 9 Watts, 441; Wheeler v. Woodward, 66 Pa. 158; P. & L. Dig., vol. 1, col. 1294.

<sup>67</sup> Heslop v. Bush, 80 Pa. 70.

<sup>68</sup> Straight v. Comth., 7 Pitts. L. J. 140; P. & L. Dig., vol. 1, col. 1295.

<sup>69</sup> Girard Bank v. Schuylkill Bank, 8 W. & S. 242.

<sup>70</sup> McKennan v. Henderson, 5 W. & S. 370; Dubois v. Bigler, 95 Pa. 203; Weist v. Jacoby, 62 Pa. 110; P. & L. Dig., vol. 1, cols. 1342-3.

or affirmation "that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done."

II. Such party, his agent or attorney, shall pay all the costs that have accrued in such suit or action. [Except in *forma pauperis*, *infra*.]

III. The party, his agent or attorney, shall enter into the recognizance hereinafter mentioned.

IV. Such appeal shall be entered, and the costs paid, and recognizance filed, within twenty days after the day of the entry of the award of the arbitrators on the docket."

#### 40. Appeal in forma pauperis.

Section 28, same act, is as follows:

"*Provided*, That if the party against whom any award shall be made as aforesaid, not being the party by whom the rule of reference was taken out, shall apply by petition to a judge of a court in which such action is depending, and shall therein set forth, that by reason of poverty, he is unable to pay the costs of the suit, as aforesaid, and shall make affidavit of such facts, it shall be lawful for such judge, after due notice to the opposite party, if he shall be satisfied of the truth of the statements in such petition, to make an order, that the appeal of such party in the case shall be good, although the costs shall not be paid by him, as aforesaid."

#### 41. Right of appeal — interest required.

The right to appeal from an award is not confined to the parties named in the record. Any party who has and shows a direct interest in the matter in controversy, may take it; as a judgment creditor of an insolvent who is dead;<sup>1</sup> or a sequestrator of a corporation,<sup>2</sup> or a defendant named as co-partner in a partnership which he denies;<sup>3</sup> one of joint parties for all,<sup>4</sup> subject to disavowal by the others.<sup>5</sup> The interest must be such that the party would be concluded or estopped by the award.<sup>6</sup> A citizen of a municipality may appeal from an award against it, on the interest he has as a taxpayer.<sup>7</sup> The right to appeal may be waived.<sup>8</sup> The question as to the right is properly raised by a motion to strike off the appeal.<sup>9</sup>

#### 42. Affidavit for appeal.

Filing an affidavit and recognizance and paying the accrued costs constitute a good appeal.<sup>10</sup> Following is the usual form:

<sup>1</sup> *Watson v. Willard*, 9 Pa. 89.

<sup>2</sup> *Huntingdon, Etc., Co. v. McAnulty*, 4 W. & S. 293.

<sup>3</sup> *Davison v. Clifford*, 3 C. C. 452.

<sup>4</sup> *Bonner v. Campbell*, 48 Pa. 286.

<sup>5</sup> *Monohan v. Loyd*, 2 Kulp, 140; *Franklin v. Leib*, 10 Lanc. Bar, 73. (See P. & L. Dig. of Dec., vol. 1, col. 1298.)

<sup>6</sup> *Morris v. Garrison*, 27 Pa. 226; *Weiler v. Long*, 13 C. C. 632.

<sup>7</sup> *Gaslight Co. v. Scranton*, 2 Law Times (N. S.), 43.

<sup>8</sup> *Bingham's Trustees v. Guthrie*, 19 Pa. 418.

<sup>9</sup> *Horbach v. Huey*, 7 Watts, 532.

<sup>10</sup> *Jones v. Badger*, 5 Binney, 461.

William B. Magee } In the court of common pleas of Center County.  
 v.  
 Edwin Short. } No. — Term, 19—.

And now, October 4, 1909, Edwin Short, the defendant, appeals from the award of arbitrators in this case.  
 Center County ss.

Edwin Short, the above named defendant, being duly sworn, says that it is not for the purpose of delay the above appeal is entered, but because he firmly believes injustice has been done.  
 Sworn to, etc. Edwin Short.

This affidavit need not be in writing if taken in due form by the prothonotary and a record made by him.<sup>11</sup> Without the word "firmly" it is defective<sup>12</sup> and cannot be amended after the time for appeal has gone by.<sup>13</sup> If the prothonotary fails to attest the jurat, the appeal will stand, for this omission may be supplied.<sup>14</sup> But otherwise where the record fails to show that the prescribed affidavit was taken.<sup>15</sup> Without the affidavit no appeal can be taken.<sup>16</sup> It will not be allowed *nunc pro tunc*.<sup>16a</sup> It may be sworn to before a justice of the peace,<sup>17</sup> or an alderman of another county;<sup>18</sup> in short, before anyone empowered to administer the oath. It may be made by the agent of a party;<sup>19</sup> or his attorney;<sup>20</sup> a sequestrator of a corporation;<sup>21</sup> by the use plaintiff;<sup>22</sup> by a taxpayer for a municipal corporation;<sup>23</sup> by an administrator for his estate;<sup>24</sup> or by one of joint parties.<sup>25</sup>

#### 43. Payment of costs.

As a condition of the appeal, except *in forma pauperis*, and by exempt parties, the accrued costs must be paid, this provision being constitutional,<sup>26</sup> and confirmed by later statute.<sup>27</sup> The accrued costs are those legally taxable at the time and do not embrace an attor-

<sup>11</sup> Ross v. Dysart, 24 Pa. 395; Treichler v. Bower, 1 Woodward, 219; Wilson v. Kelly, 81 Pa. 411.

<sup>12</sup> Bradley v. Eccles, 1 Browne, 258; Thompson v. White, 4 S. & R. 135; Yerger v. Griffith, 1 Chester Co., 260; Manuel v. Jackson, 9 Del. Co. 394.

<sup>13</sup> Proper v. Luce, 3 P. & W. 65.

<sup>14</sup> Pottsville Boro. v. Curry, 32 Pa. 443; P. & L. Dig., vol. 1, col. 1306.

<sup>15</sup> Shortle v. Stockton, 7 Watts, 526.

<sup>16</sup> McConnel v. Morton, 11 Pa. 398; Monaghan v. Phila., 28 Pa. 207; Dale v. Elder, 22 W. N. C. 59.

<sup>16a</sup> Kaier v. Stevens, 9 Kulp, 520; Seybert's Ap., 4 Walker, 45.

<sup>17</sup> Gakel v. Gletz, 6 Luz. L. R. 173.

<sup>18</sup> Duffie v. Black, 1 Pa. 388.

<sup>19</sup> Lauman v. Farmer's Bank, 1 Woodward, 283; Wickizer v. Blair, 7 Luz. L. R. 153.

<sup>20</sup> Anderson v. Fitler, 3 S. & R. 1; Whitehill v. Whitehill, 17 S. & R. 295.

<sup>21</sup> Huntingdon, Etc., Co. v. McAnulty, 4 W. & S. 293.

<sup>22</sup> Conway v. Fire Ins. Co., Brightly, 64.

<sup>23</sup> Monaghan v. Phila., 28 Pa. 207.

<sup>24</sup> McConnel v. Morton, 11 Pa. 398.

<sup>25</sup> Jones v. Backus, 114 Pa. 120; Bensell v. Boyd, 2 Miles, 296.

<sup>26</sup> McDonald v. Schell, 6 S. & R. 240.

<sup>27</sup> Merritt v. Smith, 2 Pa. 161; Act April 13, 1846, P. L. 303.

ney's fee,<sup>28</sup> but by agreement of the parties, stenographers' fees may be included.<sup>29</sup> It is sufficient if all costs are paid which the prothonotary has taxed as accrued costs, although more costs were really then due.<sup>30</sup> If the record shows that all costs are paid when the appeal is taken, a later change in this respect will not affect the appeal,<sup>31</sup> and appellant's costs will be presumed to have been paid.<sup>32</sup> Payment must be made in money and not by check or draft, unless cashed within the twenty days.<sup>33</sup> However, if the prothonotary accepts a check as money, he assumes the risk,<sup>34</sup> even if it is not paid within the time.<sup>35</sup> But he cannot take a note for the costs<sup>36</sup> or charge them to the attorney.<sup>37</sup> An appeal will not be stricken off for non-payment of costs, where they have not been taxed at the time, but are subsequently paid by appellant.<sup>38</sup> Where double costs are given the payment of single costs will suffice.<sup>39</sup> The appellant may not file a release of part of the costs<sup>40</sup> nor the receipts of witnesses,<sup>41</sup> but the costs of the constable for service of rule and subpoena may be paid direct to him.<sup>42</sup> An appeal should be stricken off when not all the taxed and accrued costs are paid.<sup>43</sup>

Although the appellee receipts in full for the costs, the officers will not be barred from issuing an execution for their fees.<sup>44</sup> Payment of the omitted costs may be enforced by attachment.<sup>45</sup>

Those exempt from payment of costs on appeal are executors, administrators and guardians,<sup>46</sup> but not as individuals;<sup>47</sup> an as-

<sup>28</sup> Schooley v. Turner, 3 Kulp, 150; Morris v. Sickler, 3 Kulp, 167; McCulla v. Opple, 1 Pearson, 150; Drake v. Parker, 1 C. C. 675; Shirk v. Schadt, 5 Law Times, N. S. 167; Zook v. Dierolf, 19 Lanc. L. R. 187.

<sup>29</sup> Schneider v. New York, Etc., Co., 98 Pa. 470; Flannery v. Susquehanna Ins. Co., 3 D. R. 777.

<sup>30</sup> McKeown v. Boudinot, 1 Browne, 150; Fraley v. Nelson, 5 S. & R. 234; Williams v. Hazlop, 14 Pa. 158; Crider v. Sheetz, 2 Lanc. Bar, No. 19; Stewart v. Jewell, 11 S. & R. 359; Baizely v. McGinty, 28 C. C. 1; Wise v. Penna., Etc., Co., 3 D. R. 564; Flannery v. Susquehanna, Etc., Co., 15 C. C. 185; Rought v. Rought, 13 D. R. 566.

<sup>31</sup> Fisher v. Penna. R. Co., 126 Pa. 293.

<sup>32</sup> Glessner v. Patterson, 6 York, 17.

<sup>33</sup> Richter v. Cummings, 1 Foster, 42; Walker v. Graham, 74 Pa. 35; Rice v. Constein, 89 Pa. 477; Flannery v. Susquehanna, Etc., Co., 15 C. C. 185; Hopkins v. Frothingham, 2 Lack. L. N. 133.

<sup>34</sup> Wilson v. Getty, 27 Pitts. L. J. 128.

<sup>35</sup> Burns v. Smith, 180 Pa. 606.

<sup>36</sup> Ellison v. Buckley, 42 Pa. 281.

<sup>37</sup> Carr v. McGovern, 66 Pa. 457; Lagen v. Caldwell, 1 Walker, 175.

<sup>38</sup> Riegel v. Beatty, 15 D. R. 654.

<sup>39</sup> Hartley v. Bean, 1 Miles, 168.

<sup>40</sup> Dall v. Norris, 2 C. C. 666.

<sup>41</sup> Myers v. Brown, 38 Leg. Int. 72.

<sup>42</sup> Schrenkeisen v. Kishbaugh, 162 Pa. 45.

<sup>43</sup> Walter v. Bechtol, 5 Rawle, 228.

<sup>44</sup> Ellsler v. Ellsler, 14 Leg. Int. 197.

<sup>45</sup> Carr v. McGovern, 66 Pa. 457; Columbia Natl. Bank v. Bletz, 5 Luz. L. R. 219.

<sup>46</sup> Act April 13, 1846, P. L. 303; Murray's Exs. v. Sharp, 72 Pa. 360; Miller v. Tyson, 1 Woodward, 216.

<sup>47</sup> Royer v. Myers, 15 Pa. 87.

signee, who did not take out the rule;<sup>48</sup> the United States,<sup>49</sup> and municipalities.<sup>50</sup>

A direction to the prothonotary not to pay over the costs is a nullity.<sup>51</sup> Where no costs are taxable, as where the suit in the Common Pleas is for less than \$100, no costs need be paid.<sup>52</sup> No affidavit of claim need be filed.<sup>53</sup>

If the record shows payment it cannot be contradicted,<sup>54</sup> and if the appellee accepts and takes the costs, he thereby ratifies the appeal and waives objection to irregularities in it.<sup>55</sup> Plaintiff's bill must be paid, although the award be for less than \$100;<sup>56</sup> but if the suit in the Common Pleas is for less than \$100, an appeal may be taken without payment of costs.<sup>57</sup>

#### 44. Affidavit, for appeal without payment of costs.

Willis Joy } In the court of Common Pleas of Northumberland  
v. }  
Aldus Gaylor. } County. No. —. Term, 190—.

To the Hon. Voris Auten, Judge of the said court. The petition of Aldus Gaylor, the above named defendant, respectfully represents:

1. That a rule of reference was taken in the above case by the plaintiff on the — day of — A. D., —, and so proceeded in that on the — day of —, A. D., —, the arbitrators chosen therein, awarded in favor of the plaintiff the sum of three hundred dollars.

2. That your petitioner desires to appeal from said award, having a just defense to the whole of the said plaintiff's claim, but by reason of poverty he is unable to pay the costs of this suit.

3. That he does not enter the appeal for the purpose of delay, but because he firmly believes injustice has been done. Wherefore your petitioner prays your Honorable Court to make an order allowing said appeal without the payment of costs.

And he will ever pray, etc.

Northumberland County ss.

Aldus Gaylor.

Aldus Gaylor, the named petitioner, being duly sworn, declares that the facts set forth in the above petition are true.

Sworn to, etc.

Aldus Gaylor.

<sup>48</sup> Act June 16, 1836 P. L. 715; *Morss v. Gritmann*, 10 Phila. 573.

<sup>49</sup> *United States v. Barber*, 17 S. & R. 348.

<sup>50</sup> *Robinson v. Jefferson County*, 6 W. & S. 16; *Pottsville v. Curry*, 32 Pa. 443; *Mercer v. Dyberry School Dist.*, 4 C. C. 530; *Wagenhurst v. Delaware Twp.*, 4 C. C. 533.

<sup>51</sup> *Duffie v. Black*, 1 Pa. 388.

<sup>52</sup> *Kerbaugh v. Curry*, 2 Phila. 206.

<sup>53</sup> *Lutz v. Weidner*, 1 Woodward, 385.

<sup>54</sup> *Rice v. Constein*, 89 Pa. 477; *Delong v. Allentown R. Co.*, 1 Woodward, 191.

<sup>55</sup> *Proper v. Luce*, 3 P. & W. 65; *Maloney v. Savage*, 1 Luz. L. Obs. 14.

<sup>56</sup> *Lutz v. Weidner*, 1 Woodward, 385.

<sup>57</sup> *Kerbaugh v. Curry*, 2 Phila. 206.

**45. Notice of application.**

Willis Joy } In the court of Common Pleas of Northumberland  
 v. }  
 Aldus Gaylor. } County. No. — Term, 19—  
 To Willis Joy, Plaintiff.

Sir: Take notice that application has been made to Hon. Voris Auten, judge of said court, to allow an appeal in the above entitled case to be entered, without payment of costs. The said judge has fixed — — —, at — — —, for hearing said petition.

Aldus Gaylor.

With the notice should be served a copy of the petition, and upon the day fixed if the opposite party does not appear, an affidavit of due service should be made, before asking for the formal order which will be as follows:

Now, to-wit, — — —, petition heard and upon due consideration, appeal allowed in this case, without payment of costs.

Per Cur.

Notice of the application cannot be dispensed with.<sup>58</sup>

Under this act the court must be satisfied of the poverty of the applicant;<sup>59</sup> one of several defendants cannot avail himself of it, unless all are alike too poor.<sup>60</sup> Independently of this act, the statute of 2 Henry VII, ch. 12, is in force in Pennsylvania.<sup>61</sup> The court may impose conditions in the allowance, such as time and immediate entry of plea to save delay;<sup>62</sup> or filing of an affidavit of defense.<sup>63</sup> The application may be made to any of the judges of the court wherein the suit is pending, but the appeal must be perfected, nathless, within 20 days;<sup>64</sup> however, after discharging an application, the court may extend the time.<sup>65</sup> The allowance of an appeal *in forma pauperis* does not dispense with the necessity of giving the required recognizance.<sup>66</sup>

**46. Condition of recognizance.**

Under sections 29 and 30 of the act of 1836, as amended by the act of March 20, 1845, P. L. 188, the condition of the recognizance is "bail absolute, in double the probable amount of costs accrued and likely to accrue in such cases, with one or more sufficient sureties, conditioned for the payment of all costs accrued or that may be legally recovered in such cases against the appellants." If the plaintiff appeals he shall by himself, his agent or attorney, bind

<sup>58</sup> McAndrew v. Curran, 5 Kulp, 412; C. R. A. vol. 1, col. 396; Dorman v. McGovern, 2 Leg. Rec. 223.

<sup>59</sup> Ashcraft v. Mathewson, 5 C. C. 80; Boyer v. Winters, 3 Kulp, 29; Greenwood v. R. Co., 5 Lanc. L. R. 214.

<sup>60</sup> Grant v. Barton, 2 Law Times (N. S.), 197.

<sup>61</sup> Cowan v. Chester, 2 Del. Co. 234; Sinnott v. Delaware, Etc., R. Co., 9 D. R. 705.

<sup>62</sup> Wendell v. Simpson, 7 W. N. C. 31.

<sup>63</sup> Hausman v. Frey, 2 Montg. Co. 13.

<sup>64</sup> Finkle v. Rosback, 10 C. C. 186.

<sup>65</sup> Schrenkeisen v. Kishbaugh, 162 Pa. 45.

<sup>66</sup> Gorman v. Falkler, 2 Pearson, 316; Noyes v. Brooks, 174 Pa. 632; P. & L. Dig., vol. 1, col. 1319; vol. 1 C. R. A. 396; Winnie v. Hawke Stone Co., 4 Jus. L. R. 161.

himself as above, to the defendant; and if the defendant appeals, he shall, in like manner bind himself to the plaintiff. This act was amended further by section 12, of the act of April 25, 1850, so as to apply to appeals by persons natural and artificial, and is construed to require security for costs only.<sup>67</sup> Under section 5 of the act of April 9, 1872, P. L. 47, on appeal from the award of arbitrators for the wages and moneys due for manual labor, the bail required "shall be bail absolute in double the amount of said judgments and awards, and the probable amount of costs accrued and likely to accrue in such cases, with one or more sufficient sureties, conditioned for the payment of the amount of the debt, interest and costs that shall be legally recovered in such case against the appellant."

#### 47. Form of recognizance.

Fane Stuver	}	In the court of Common Pleas of York County.
v.		
Reed Nichols.	}	No. ——— Term, 19—.

Know all men by these presents that we, Reed Nichols, defendant, and Roy Stahl and Ray Race are held and firmly bound unto Fane Stuver, plaintiff, in the sum of — dollars, lawful money of the United States, to be paid to the said Fane Stuver, his executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Scaled with our seals this — day of — A. D., 19 —.

Whereas the said Fane Stuver and Reed Nichols heretofore referred the suit herein to arbitrators, who on the — day of — A. D., 19 —, found an award for the sum of — dollars in favor of said Fane Stuver and against said Reed Nichols, whereby the said Reed Nichols complains that injustice was done and from which said award he has appealed to the said court of Common Pleas; now, the condition of this obligation is such that if the above bounden Reed Nichols, Roy Stahl and Ray Race shall pay all costs accrued or that may be legally recovered in such case against said appellant Reed Nichols, then this obligation to be void; otherwise to be and remain in full force and virtue.

Signed and delivered in presence of

Florence Somers, }  
Cadmus Gordon. }

Reed Nichols, [Seal]  
Roy Stahl, [Seal]  
Ray Race, [Seal].

#### 48. Condition — Wages.

Now, the condition of this obligation is such that if the above bounden, etc., shall pay the amount of the debt, interest and costs that shall be legally recovered in such case against the appellant, then this obligation to be void, etc.

<sup>67</sup> Delong v. Allentown R. Co., 1 Woodward, 191; Rush v. Home, Etc., Assn., 4 C. C. 523. (See P. & L. Dig., vol. 1, cols. 1323 and 1324; also Touhill v. Dayton, Etc., Co., 12 D. R. 560; Confair v. Stoddard Coal Co., 31 C. C. 369; O'Hara v. Republic, Etc., Co., 7 Lack. L. N. 42.)



**49. Appeal without security.**

Section 31 of the act of 1836 provided:

"That in all cases in which executors, administrators or other persons suing or sued in a representative character, or minors, shall be the party appellant from an award, the appeal shall be good, without the payment of costs, or entering in recognizance as aforesaid."

The act of May 3, 1852, P. L. 541, further mentioned "executors, administrators or other natural persons suing or sued in a representative character." See also act April 13, 1846, P. L. 303. This exemption can only be claimed when they litigate in a representative capacity,<sup>68</sup> and administrators need not make the affidavit;<sup>69</sup> nor a guardian.<sup>70</sup>

The United States may appeal without affidavit, security or payment of costs;<sup>71</sup> also a municipality, without payment of costs or giving security, but the affidavit as to delay must be made.<sup>72</sup>

Trustees of an insolvent and sequestrators of a corporation are embraced in the exempt class;<sup>73</sup> also assignees in bankruptcy,<sup>74</sup> and assignees for the benefit of creditors;<sup>75</sup> and receivers for a foreign corporation.<sup>76</sup>

**50. Corporations, etc.**

A private corporation must give security and comply with the law.<sup>77</sup> A recognizance which is defective because of insufficient bail, may be perfected on application to court for leave to perfect bail.<sup>78</sup> But a recognizance to pay a *per diem* allowance to the appellee is void.<sup>79</sup> The appellant, however, cannot escape the payment of costs.<sup>80</sup>

**51. Recognizance and perfecting bail.**

It was early held that the appellant need not join in the recognizance,<sup>1</sup> but his doing so did not invalidate it;<sup>2</sup> however, a cor-

<sup>68</sup> *Murray's Exs. v. Sharp*, 72 Pa. 360. (See P. & L. Dig. of Dec., vol. 1, col. 1321.)

<sup>69</sup> *Koontz' Admrs. v. Howsare*, 100 Pa. 506.

<sup>70</sup> Sec. 1, Act Mar. 27, 1833, P. L. 99.

<sup>71</sup> *U. S. v. Barber*, 17 S. & R. 348.

<sup>72</sup> *Monaghan v. Phila.*, 28 Pa. 207; *Watson v. Chester*, 2 Del. Co. 382; *Pottsville v. Curry*, 32 Pa. 443; *Wagonhurst v. Delaware Twp.*, 4 C. C. 533; *Mercer v. Dyberry School Dist.*, 4 C. C. 530.

<sup>73</sup> *Turnpike Co. v. McNulty*, 4 W. & S. 293.

<sup>74</sup> *Morss v. Gritmann*, 10 Phila. 573.

<sup>75</sup> Sec. 10, Act June 13, 1840, P. L. 691.

<sup>76</sup> *O'Horo v. Building & Loan Assn.*, 7 Lack. L. N. 42.

<sup>77</sup> *Good v. Royal Ins. Co.*, 4 Lanc. Bar, No. 36; *Catasauqua Mfg. Co. v. Lehigh, Etc., Co.*, 14 Phila. 644; *McConnell v. R. Co.*, 17 C. C. 175; *Pinks v. Gas Co.*, 18 C. C. 339; *Erhard v. Coal Co.*, 5 D. R. 611; *Bitner v. Ins. Co.*, 7 Del. Co. 29; *Touhill v. Dayton, Etc., Co.*, 12 D. R. 560.

<sup>78</sup> *Rought v. Rought*, 13 D. R. 566.

<sup>79</sup> *Shuff v. Morgan*, 7 Pa. 125.

<sup>80</sup> *Merritt v. Smith*, 2 Pa. 161.

<sup>1</sup> *Boyce v. Wilkins*, 5 S. & R. 329.

<sup>2</sup> *Jones v. Badger*, 5 Binney, 461.

poration must itself join with its sureties.<sup>3</sup> Since the act of 1845, an entry of the acknowledgment on the record by the prothonotary that the surety is held in a sum certain for all costs as provided by the act of assembly is sufficient.<sup>4</sup> Where the recognizance is defective, the appellant may be ruled to perfect his appeal within a time named or have his appeal quashed.<sup>5</sup> Where called upon to justify bail, it must be done on notice and presence of the opposite party.<sup>6</sup> The court has power to release a surety for cause, and substitute another.<sup>7</sup> Where the principal is discharged under the insolvent laws, the surety may be exonerated on the *sci. fa. sur. recognizance*.<sup>8</sup> A *per diem* allowance in the recognizance is unauthorized.<sup>9</sup> The liability of the surety cannot be changed by adding other plaintiffs on the *sci. fa.*<sup>10</sup> The plea of *nul tiel* record cannot be sustained by showing failure to pay the accrued costs.<sup>11</sup>

## 52. Waiver of objections.

The right to object on the ground of defects in the recognizance or irregularities in the appeal may be lost by delay or acquiescence;<sup>12</sup> as by drawing out the costs paid, though insufficient.<sup>13</sup>

## 53. Waiver of right of appeal.

A waiver of the right of appeal will be enforced, when in writing and brought into the record.<sup>14</sup> The action of the court in striking off an award may be reviewed, notwithstanding a waiver of the right of appeal from the award.<sup>15</sup> When the appellant holds the award beyond the twenty days allowed for entering the appeal he cannot enter it.<sup>16</sup> An appeal once entered cannot be withdrawn unless the opposite party consents.<sup>17</sup>

## 54. Costs to be taxed.

Section 32 of the act 1836, *supra*, provides:

"The costs to be paid by the appellant, as hereinbefore required, may nevertheless be taxed in the appellant's bill, and recovered of the adverse party, if, in the event of the suit the appellant is entitled to recover costs, agreeable to the provisions of this act."

<sup>3</sup> *Touhill v. Dayton, Etc., Co.*, 11 Kulp, 117.

<sup>4</sup> *Ross v. Dysart*, 24 Pa. 395.

<sup>5</sup> *Kerr v. Martin*, 122 Pa. 436; P. & L. Dig., vol. 1, col. 1326.

<sup>6</sup> *Havelin v. McFall*, 1 Browne, 230.

<sup>7</sup> *Salmon v. Rance*, 3 S. & R. 311.

<sup>8</sup> *Thomas v. Brown*, 9 Watts, 288.

<sup>9</sup> *Shuff v. Morgan*, 7 Pa. 125.

<sup>10</sup> *Fullerton v. Campbell*, 25 Pa. 345.

<sup>11</sup> *Palmer v. Wilkinson*, 73 Pa. 339.

<sup>12</sup> *Maus v. Sitesinger*, 2 S. & R. 421; *Ziegler v. Fowler*, 3 S. & R. 238; *Weidner v. Matthews*, 11 Pa. 336; *Wilson v. Kelly*, 81 Pa. 411; *Wetter v. Riley*, 95 Pa. 461; P. & L. Dig., vol. 1, cols. 1330, 1331.

<sup>13</sup> *Stowers v. O'Malia*, 2 Luz. L. R. 45.

<sup>14</sup> *Williams v. Danziger*, 91 Pa. 232; *Waldeman v. Witmore*, 3 Lack. Jur. 42; P. & L. Dig., vol. 1, cols. 1332-3.

<sup>15</sup> *Wynn v. Bellas*, 34 Pa. 160.

<sup>16</sup> *Mortimore v. O'Reagan*, 6 Leg. Gaz. 334.

<sup>17</sup> *Hugg v. Brown*, 6 Wharton, 468.

**55. Withdrawal of appeal.**

Section 33 of the act of 1836 provides:

"No appeal as aforesaid shall be withdrawn without the consent, in writing, of the opposite party first had and obtained, and it shall be the duty of the prothonotary to whom such written consent may be delivered, to file the same among the records of the cause."<sup>18</sup>

**56. Execution on judgment.**

Section 34 of the act of 1836 provides:

"If the appeal as aforesaid shall not be entered within the time hereinbefore limited, it shall be the duty of the prothonotary, at the request of the party in whose favor the award shall have been made, to issue execution, or such other process as may be necessary and proper, to carry into effect the judgment entered upon such award, subject, nevertheless, to the provisions of the law concerning the stay of execution upon judgments."

Whilst the award becomes a lien from the date of its entry, judgment cannot be entered until the twenty days have expired, when the prothonotary may enter judgment on *præcipe* filed, or on request. No execution can issue, meantime;<sup>19</sup> but a transcript may be taken for lien, in another county.<sup>20</sup>

The prohibition of the act extends to an attachment execution.<sup>20a</sup> The defendant alone can object to the writ and he may acquiesce in its premature issuance.<sup>20b</sup> Under the act of 1810, a defendant in whose favor an award is made may have execution without a previous *sci. fa.*<sup>20c</sup> Where an award is against several defendants, an execution cannot issue pending an appeal by some.<sup>20d</sup>

**57. Compensation of arbitrators.**

Section 49 of the act of 1836 provided a compensation of one dollar per day for all arbitrators and referees, but the act of March 22, 1877, P. L. 14, relating to arbitrators under the compulsory arbitration law, made it "two dollars for each day necessarily employed in the duties of their appointment, and five cents for each mile necessarily traveled in going to and returning from the place of meeting, which shall be entered and taxed in the bill of costs in the case and collected as the other costs of the case are collected: *Provided*, That in all cases where no defense is made before said arbitrators and in all cases in which said arbitrators shall be engaged less than five hours in hearing, their fees shall remain as heretofore."

The hearing must be five hours consecutively.<sup>21</sup> No pay attaches until they meet, organize and proceed with the cause. If they merely organize and adjourn they are not entitled to pay, unless the

<sup>18</sup> *Hugg v. Brown*, 6 Wharton, 468.

<sup>19</sup> *Woods v. Connor*, 6 Pa. 430.

<sup>20</sup> Act May 5, 1876, P. L. 110.

<sup>20a</sup> *Wray v. Tammany*, 13 Pa. 394.

<sup>20b</sup> *Wilkinson's Ap.*, 65 Pa. 189.

<sup>20c</sup> *O'Donnell v. Lynch*, 1 W. & S. 283.

<sup>20d</sup> *Hine v. Reading, Etc., Co.*, 2 Woodward, 151.

<sup>21</sup> *Corcoran v. Hetzel*, 9 C. C. 82.

adjournment is moved by one of the parties.<sup>22</sup> Where several causes between the same parties are submitted to them at the same time and no more time is consumed for the hearing than if there were but one, they are not entitled to compensation in each cause.<sup>23</sup> They are entitled to pay for every day required in the hearing and decision.<sup>24</sup>

#### 58. Fees of constables, etc.

Section 52 of the act of 1836 provides:

"The fees to be allowed to constables and other persons for services performed in pursuance of the provisions of this act shall be the same as the fees allowed by law for similar services, and the like penalty shall be inflicted for neglect of duty as in other cases."

#### 59. Practice on appeal.

When the appeal is perfected the practice upon it is the same as in other cases. A *sci. fa.* may be issued upon the award to preserve the lien,<sup>25</sup> and the record may be amended, if the cause of action is not sought to be changed.<sup>26</sup> The lien is unimpaired, except where the plaintiff appeals from an award in his favor, he is held to suspend his lien by the appeal.<sup>27</sup> If one of several joint parties appeals, execution as to those not appealing, is suspended,<sup>28</sup> and a reversal as to one is a reversal as to the others.<sup>29</sup> After appeal judgment may be entered in default of a plea;<sup>30</sup> but the plaintiff cannot take judgment for want of an affidavit of defense.<sup>31</sup> As already stated, amendments are allowed the plaintiff which do not change the cause of action;<sup>32</sup> but the defendant is restricted to such matters as he might have raised before the arbitrators, it seems,<sup>33</sup> but voluntarily withheld, as books, papers or documents.<sup>34</sup> If admissible under his declaration the plaintiff may prove a larger sum due than he claimed before the arbitrators,<sup>35</sup> and the defendant may prove a set-off, where the plaintiff fails to make out his case

<sup>22</sup> Baker v. Hunter, 1 Miles, 357.

<sup>23</sup> Girard v. Hutchinson, 4 S. & R. 81; Butcher v. Scott, 1 Clark, 311; Moore v. Hollenbach, 2 Woodward, 60.

<sup>24</sup> Hassinger v. Diver, 2 Miles, 411. If there are different parties they are entitled to fees in each case. (Miller v. Diffenbach, 10 Lanc. Bar, 144; see P. & L. Dig., vol. 1, col. 1200.)

<sup>25</sup> First Natl. Bank, Etc., v. Kauffman, 2 Leg. Rec. 33.

<sup>26</sup> Bethel Twp. v. Ritter, 1 Woodward, 282.

<sup>27</sup> Eaton's Ap., 83 Pa. 152.

<sup>28</sup> Guhr v. Chambers, 8 S. & R. 157. P. & L. Dig., vol. 1, col. 1334.

<sup>29</sup> Hayes v. Gudyhunst, 11 Pa. 221.

<sup>30</sup> Green v. Hallowell, 9 Pa. 53.

<sup>31</sup> Trenton Lock Co. v. Dolphin, 5 L. T. (N. S.), 76; Tuak v. Garrett, 6 W. & S. 89; Gregg v. Meeker, 4 Binney, 428.

<sup>32</sup> Getty v. Shearer, 20 Pa. 12; Reeside v. Hadden, 12 Pa. 243; P. & L. Dig., vol. 1, cols. 1336-7.

<sup>33</sup> Union Type Foundry v. Kittanning Ins. Co., 138 Pa. 137; Keeler v. Vantuyte, 6 Pa. 250.

<sup>34</sup> Sec. 11, Act Mar. 2, 1810, P. L. 145, Brisbane v. Mitchell, 8 S. & R. 423; P. & L. Dig., vol. 1, col. 1339.

<sup>35</sup> McConnell v. Micheltree, 4 Pa. 197.

and declines a nonsuit.<sup>36</sup> Where a witness has died since the arbitration his testimony at the arbitration may be proved on the trial.<sup>37</sup> This also applies to one rendered incompetent by the death of his adversary.<sup>38</sup> But evidence will not be received impeaching the conduct of the arbitrators in their absence.<sup>39</sup> The award cannot be read in evidence, nor anything connected with it.<sup>40</sup>

#### 60. Costs on the appeal.

If on the trial, after appeal, by the plaintiff, he recovers the same or a greater sum he is entitled to full costs.<sup>41</sup> If the defendant appeals and the plaintiff recovers less than the award, the costs on the appeal may not be put on the defendant.<sup>42</sup> The defendant is entitled to costs where the plaintiff suffers a nonsuit or the verdict is in favor of the defendant.<sup>43</sup> Where judgment on a verdict for less than the award was entered and that each party pay his own costs, the judgment was sustained.<sup>44</sup> The plaintiff, appealing, who recovers less than the award is not entitled to the costs of the appeal.<sup>45</sup> The costs which accrue on the appeal are a lien only from the date of final judgment.<sup>46</sup>

#### 61. Appeals from the Common Pleas.

An appeal from an award only lies to the Common Pleas,<sup>47</sup> and from this court only on a final judgment.<sup>48</sup> A refusal to set aside an award is not such a final judgment<sup>49</sup> but setting aside an award is,<sup>50</sup> and the appellate court can determine the question only from the face of the record.<sup>51</sup> The appellate court can only correct irregularities apparent on the record.<sup>51a</sup>

#### 62. Penalty — neglect to serve copy.

Section 36 of the act of 1836 provides:

"If the party by whom a rule of reference shall be entered, his

<sup>36</sup> *Lewis v. Culbertson*, 11 S. & R. 59.

<sup>37</sup> *Cox v. Norton*, 1 P. & W. 412.

<sup>38</sup> *Walbridge v. Knipper*, 96 Pa. 48; P. & L. Dig., vol. 1, col. 1340, col. 1342.

<sup>39</sup> *Bell v. Hamilton*, 1 Browne, 254.

<sup>40</sup> *Shaeffer v. Kreitzer*, 6 Binney, 430; *Stryker v. Ross*, 20 W. N. C. 271; P. & L. Dig., vol. 1, col. 1341.

<sup>41</sup> *Hilty v. Guthrie*, 31 Pitts. L. J. 322; *Haines v. Moorhead*, 2 Pa. 65.

<sup>42</sup> *Rankin v. Murry*, 2 P. & W. 74; P. & L. Dig., vol. 1, cols. 1345-6; *contra*, *Remely v. Kuntz*, 10 Pa. 180.

<sup>43</sup> *Gonsalus v. Liggitt*, 1 Rawle, 426; *Gallatin v. Cornman*, 1 P. & W. 115; *Flick v. Boucher*, 16 S. & R. 373.

<sup>44</sup> *Pratt v. Naglee*, 6 S. & R. 299.

<sup>45</sup> *Rees v. Fisler*, 3 Clark, 252. (Under act of 1810, see P. & L. Dig., vol. 1, cols. 1347-8.)

<sup>46</sup> *Christy v. Crawford*, 8 W. & S. 99.

<sup>47</sup> *Sheets v. Rudebaugh*, 2 Rawle, 149; P. & L. Dig., vol. 1, col. 1350.

<sup>48</sup> *Staud v. Smith*, 2 S. & R. 382; *Kendrick v. Overstreet*, 3 S. & R. 357; P. & L. Dig., vol. 1, col. 1351.

<sup>49</sup> *Bemus v. Clark*, 29 Pa. 251; *Schultz v. Bear Creek, Etc., Co.*, 174 Pa. 287; *Drum v. Uplinger*, 9 Supr. C. 404.

<sup>50</sup> *Orlady v. McNamara*, 9 Watts, 192.

<sup>51</sup> *Wilcox v. Payne*, 88 Pa. 154; vol. 1, P. & L. Dig., col. 1352.

<sup>51a</sup> *Chester v. McIntyre*, 13 Supr. C. 545.

agent or attorney, shall fail to cause a copy of the certified rule, or of the record containing the names of the arbitrators, and of the time and place of meeting, to be served, as hereinbefore required, he shall, for every such default, forfeit and pay the sum of twenty-five dollars, one-half to the use of the county and the other half to the use of the person who will sue for the same: *Provided*, That nothing herein contained shall be deemed to deprive the court of the right of setting aside any award obtained without due notice, as aforesaid, or shall interfere with the right of the party to recover such damages as he may have sustained."

This penalty is collected, even though the party had notice by other means;<sup>52</sup> and the opposite party may bring the suit,<sup>53</sup> which is of a civil nature and may also be arbitrated.<sup>54</sup> But if the rule is void no penalty attaches.<sup>55</sup>

### 63. Penalty on arbitrators.

Section 37 of the act of 1836 provides:

"If any person appointed an arbitrator and residing within the county, having received due notice of his appointment, shall fail to attend and take upon himself the duties of the appointment, unless prevented by sickness, or other unavoidable cause, he shall, for every such default, forfeit and pay the sum of two dollars, to be recovered by either party, who shall first sue for the same: *Provided*, That no arbitrator shall be compelled to serve on more than ten appointments in any one year."

### 64. Penalty for corruption.

Section 50 of the act of 1836 provides:

"If either party, his agent or attorney, or any other person in his behalf, shall, after the appointment of any referee or arbitrator, attempt to corrupt or influence such referee or arbitrator, by privately endeavoring, either in conversation, by correspondence or otherwise, to bias his mind or judgment in favor of such party, he shall forfeit and pay a sum not less than fifty dollars and not more than one hundred dollars, to be recovered by indictment in the court of quarter sessions of the proper county; one-half of which fine shall be for the use of the prosecutor, and the other half for the use of the proper county, saving to the other party his right to recover such damages as he may have sustained."

### 65. Penalty for bribery.

Section 51 of the act of 1836 provides:

"If any referee or arbitrator shall, directly or indirectly, take or receive any gift or gratuity whatever, from either party in the cause, or from any person in his behalf, to find an award in his favor, or in consideration of having found such award, such referee or arbitrator shall forfeit and pay ten times the value of the thing so taken, one-half to the commonwealth and the other

<sup>52</sup> *Hottenstine v. Auten*, 43 Pa. 323.

<sup>53</sup> *Dunlap v. McKee*, 25 Pa. 84.

<sup>54</sup> *Comth. v. Bennett*, 16 S. & R. 243; *Mevay v. Edmiston*, 1 Rawle, 456.

<sup>55</sup> *Cummin v. Wilson*, 2 Watts, 13.

half to the person that will sue for the same, and shall also be liable to prosecution by indictment, as for a misdemeanor: *Provided*, That nothing herein contained shall debar the party aggrieved of his action to recover the damages he shall sustain, in all cases where the penalty aforesaid shall be recovered at the suit of another person."

#### 66. Recovery of fines, etc.

Section 38 of the act of 1836 provides:

"All fines and forfeitures incurred under any of the provisions of this act, shall, unless it be otherwise provided for, be sued for before an alderman or justice of the peace, in the same manner that debts of equal amount are recoverable."

#### 67. Penalty for withholding books, etc.

Section 38 of the act of 1836, provides:

"On the trial of any cause, after an appeal from an award of arbitrators, it shall not be lawful for the appellant to produce as evidence in court, any books, papers or documents which he had in his power to produce at the time of the arbitration, and withheld from the arbitrators, after being required by the arbitrators to produce the same."

Such evidence must have been within the exclusive power of the appellant at the time; and the prohibition does not follow where he produced it, but afterwards withdrew it.<sup>56</sup> It must have been voluntarily withheld.<sup>57</sup>

#### 68. Lawyer's court of compulsory arbitration.

By reason of "the law's delays," which are not always to be laid on the shoulders of the lawyers, many courts are behind with their trials of causes at issue and the law which gives every litigant a right to be heard within a year is a dead letter. In Allegheny County the lawyers have given much thought to the subject of compulsory arbitration under the act of 1836, and a special committee appointed by the bar association reported a plan which has been made effective.<sup>1</sup> They term it the Lawyers' Court of Compulsory Arbitration. Its advantages are in the facts that the three arbitrators are men learned in the law and that appeals to court from their award will be less frequent, thus furnishing a speedy, inexpensive and in most cases conclusive adjudication of the cause and reducing very much the incumbrance of the issue list with causes of less importance. The President of the Bar Association appoints lawyers to be arbitrators or alternates, from month to month, who are to hear, try and determine the causes ruled out during the month for which they are appointed. Of course, it remains optional whether litigants will accept this court as their tribunal; but the plan pre-

<sup>56</sup> *Pearce v. Seminary*, 2 Watts, 340.

<sup>57</sup> *Barclay v. Hughes*, 1 Miles, 19; *Brisbane v. Mitchell*, 8 S. & R. 423. See *supra*.

<sup>1</sup> This committee is composed of H. M. Scott, chairman; C. F. Patterson, E. J. McKenna, R. C. Davis, Don Rose, H. G. Tinker, F. C. McGirr and F. C. Osborn, *ex officio*.

sents so many excellent features in the interest of speedy justice, that it promises to be accepted generally as a solution of the problem which burdens the courts of Allegheny County, and it might be adopted to advantage in other counties of the state where trial lists are from two to five years in arrear.

Among the remedies which the committee sets forth in its report are these:

2. Establish rules requiring the trial to be conducted the same as the trial of causes before a judge and jury.

3. Require the arbitrators to decide at once questions of substantive law, pleading and evidence; to enter nonsuits or the equivalent thereof.

5. Establish such rules as may be found desirable.

6. Persuade the judges of the Common Pleas to aid by making any necessary rules of court.

7. Persuade the prothonotary to require his clerks to designate one of the official arbitrators in all cases.

#### **69. Rules in Allegheny County.**

##### *Rule to Arbitrate. Striking off.*

By rule 14, Allegheny County, it is provided:

"If arbitrators are not chosen at the time specified in the rule, the prothonotary shall strike off the rule at the cost of the party taking it out unless the parties otherwise agree."

##### *Exceptions to Award.*

Rule 15, Allegheny County, is as follows:

"No exceptions to an award of arbitrators will be considered, unless filed within twenty days after the award is filed and verified by affidavit as to facts not appearing on the record."

Irregularities cannot be set up as a defense in an action upon an award.<sup>1</sup>

In case of a voluntary agreement in a lease to arbitrate, the arbitrators failing to agree, a court of equity will not compel arbitration but it may fix the amount of rent due for the extended term.<sup>2</sup>

##### *Bail on Appeal From an Award.*

Rule 16 of Allegheny County is as follows:

"In appeals from awards, if, within the time allowed by the act, bail is entered which the appellee deems insufficient, he may, within ten days after the time allowed for appeal, give the appellant or his attorney written notice that he excepts to the bail; whereupon the appellant shall, within ten days after such notice, justify the bail before the prothonotary, giving the appellee or his attorney twenty-four hours' notice; in default whereof, the bail shall be deemed insufficient, and, on motion, the appeal shall be dismissed."

<sup>1</sup> North Braddock v. Corey, 205 Pa. 35.

<sup>2</sup> Kaufman v. Liggett, 209 Pa. 87.



### CHAPTER III.

#### TRIALS (C)—BY REFERENCE UNDER SPECIAL ACTS

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|---|--|
| 1. Special acts as to Bradford and other counties.  | 20. Trial and duties, judgment, etc.           |
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| 17. Election in writing.                            | 35. Duties.                                    |
| 18. Choosing the arbitrator.                        | 36. Report.                                    |

##### 1. Special acts as to Bradford and other counties.

The act of April 6, 1869, P. L. 725, established a method of reference of civil actions to a referee.

Section 1 is as follows:

“That any civil action now pending or hereafter commenced in the court of Common Pleas for the county of Bradford, in said commonwealth, after issue joined, may be referred upon the written consent of the parties or their attorneys, or by oral consent in open court entered in the minutes.”

This act was extended to Susquehanna and Wyoming Counties, as well as the added provisions, by act of Jan’y 20, 1870, P. L. 85; also to Wayne and Luzerne Counties by act of March 23, 1870, P. L. 540. These acts were not repealed by the act of May 14, 1874.<sup>1</sup> They are constitutional.<sup>2</sup>

##### 2. The agreement to refer.

Under these acts a cause cannot be referred until after issue joined.<sup>3</sup>

<sup>1</sup> *Adleman v. Steel*, 6 Luz. L. R. 69; *Wilson v. Morrison*, 1 Kulp, 67.

<sup>2</sup> *Cutler v. Richley*, 151 Pa. 195.

<sup>3</sup> *Weil v. Frauenthal*, 2 Luz. L. R. 96; *Singer, Etc., Co. v. Koons*, 6 Luz. L. R. 83; P. & L. Dig., vol. 1, col. 1363.

The agreement being in general terms the proceedings must conform to the act of 1869.<sup>4</sup> If the referee dies before filing his report the reference will be stricken off.<sup>5</sup> The solicitor of a city has power to agree to a reference under these acts.<sup>6</sup> If the parties by their agreement refer matters generally the report will not be set aside on the ground that the referee exceeded his powers.<sup>7</sup>

### 3. Choice of referee.

Section 6 of the act of 1869, *supra*, provides:

"In all cases of reference under this act, the parties or their attorneys may agree upon a suitable person, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint a referee who shall be free from exception: *Provided*, That this act shall not be construed to repeal or in any manner affect any of the laws now in force in this commonwealth relating to arbitrations.

### 4. Manner of trial.

It is provided by section 2 of the act of 1869:

"The trial by the referee shall be conducted in the same manner as a trial by the court with a jury, and on notice of the time and place to be fixed by the referee."

### 5. Powers of referee.

Section 3, act of 1869. "The referee shall have the same power to grant adjournments, and to allow amendments to any pleadings, as the court, upon such trial, upon the same terms, and with like effect, and shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before him by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn, or to testify, as is prescribed by the court."

Under these powers the referee may allow amendments to the pleadings<sup>8</sup> and hear evidence at any stage of the proceedings, and may re-open the case on the argument for after-discovered evidence;<sup>9</sup> but when he has filed his report his power is ended.<sup>10</sup>

### 6. Duties as to report.

Section 4, act of 1869. "The said referee shall state the facts found and the conclusions of law separately, and his decision shall be given and may be excepted to and reviewed in like manner as though tried by the court with a jury, but not otherwise; and the said referee may, in like manner as the court, settle a case or exceptions on appeal or writ of error to the supreme court."

In his report he must separate the findings of fact from his con-

<sup>4</sup> Wilson v. Morrison, 1 Kulp, 67.

<sup>5</sup> Huggins v. Neill, 2 Supr. C. 103.

<sup>6</sup> Spring Brook, Etc., Co. v. Pittston, 10 Kulp, 406.

<sup>7</sup> Meek v. Sancowicz, 4 Kulp, 85.

<sup>8</sup> Wilmore v. Scranton, 4 Law Times (N. S.), 93.

<sup>9</sup> Anthony v. Barnes, 9 Luz. L. R. 30; Guernsey v. Angus, 6 Kulp, 30.

<sup>10</sup> Allentown, Etc., v. Delaware, Etc., Co., 8 Luz. L. R. 231.

clusions of law,<sup>11</sup> and state the facts specifically which are material to the issue.<sup>12</sup> The rule as to the findings of fact is that they are as binding as the verdict of a jury would be in the same cause,<sup>13</sup> even though there be conflict of testimony and the credibility of the witnesses is at issue.<sup>14</sup>

#### 7. Effect of report.

By section 5 of the act of Jan'y 20, 1870, P. L. 85, it is provided: "Section 5. The report of the said referee upon the whole issue shall stand as the decision of the court, and judgment shall be entered in the same manner as if the action had been tried by the court before a jury; and in case of reversal on appeal or writ of error, the supreme court shall enter the proper judgment or direct a new trial, as the justice of the case may require; and if a new trial shall be ordered, it shall be proceeded with before the same referee; but if the same referee is unable or refuses to act, then before some other referee, to be selected in the manner provided in section sixth."

#### 8. Entry of judgment.

Section 2 of the act of 1870, *supra*, provides:

"That the prothonotary shall enter judgment upon the report of the referee, upon the filing of the same, without the payment of a jury fee of four dollars, and either party may file his exceptions to said report within ten days thereafter, but not after that time; and that every party may have an opportunity to take out a writ of error, or to enter an appeal to the supreme court; no execution shall issue upon any such judgment within three weeks from the day in which such judgment shall be entered.

#### 9. Notice of filing report.

The act of June 22, 1871, P. L. 1363, known as the Luzerne County act, extends the Bradford County acts to Wayne and Luzerne Counties, but by section 4 limits "the provisions of this supplement" to Luzerne County and the mayor's court of Scranton.

Section one of said act provides as follows:

"That the report of the referee upon all questions of law and fact shall be filed, together with the whole testimony taken, and bills of exception sealed, in the office of the prothonotary, and in order to give all parties in interest an opportunity of entering exceptions to findings of fact or law, and to the admission or rejection of

<sup>11</sup> *Blackman v. Smith*, 3 Kulp, 140; *Scranton School Dist. v. McNamara*, 2 Lack. Jur. 68; *Reese v. Powell*, 4 C. P. R. 70; *Campbell, Etc., Co. v. Barrett*, 2 Lack. Jur. 76.

<sup>12</sup> *Stevens v. McAlpin*, 4 Luz. L. R. 97; *West v. Sherer*, 1 Lack. Jur. 117; *Vansyckel v. Stewart*, 77 Pa. 124; *Shiffer v. Broadhead*, 126 Pa. 260; *Butterfield v. Lathrop*, 71 Pa. 225.

<sup>13</sup> *Reynolds v. Williams*, 9 Kulp, 380; *Oakley v. Luzerne Boro.* 25 Supr. C. 425; *Fall Creek, Etc., Co. v. Smith*, 71 Pa. 230; *Thornton v. Enterprise Ins. Co.*, 71 Pa. 234; *Bulkley v. Wood*, 4 Supr. C. 391; *P. & L. Dig.*, vol. 1, cols. 1366-7.

<sup>14</sup> *Garrahan v. Randall*, 4 Kulp, 360; *Bohan v. Pittston Twp.*, 4 Kulp, 234.

testimony, for which bills have been sealed, no referee shall file his report until ten days after he has notified the parties of his intention so to do, on a day designated, and give them an opportunity of having access to such report; and it shall be the duty of the court of Common Pleas to hear and decide upon all exceptions so filed to the report of the referee, reserving to the court, however, the power of committing the report again to the referee, should justice require it; on the return of the referee's final report, or at such time as may be established by the rules of the particular court, either party may set down the cause for hearing on the next argument list: *Provided*, That at least four days shall intervene, and upon such hearing the court shall enter such judgment as to them shall seem proper; and to the judgment of the court so entered, either party may take exceptions, and upon request, the court shall reduce their opinion to writing, and file the same, and upon the judgment of the court, a writ of error may be taken to the Supreme court by either party, which shall be heard by the Supreme court as writs of error in other cases, and they shall enter proper judgment thereon, or direct a new trial; in case a new trial is ordered, it shall be proceeded with, before the same referee, but if the same referee is unable or refuses to act, then before some other referee, to be selected in the same manner as the original referee."

Under this act the court may re-commit the report to take additional testimony on a point deemed essential.<sup>15</sup> This power is discretionary with the court and akin to the common-law power of granting new trials.<sup>16</sup>

The notice of filing the report required by this act must be given or no judgment can be entered;<sup>17</sup> but notice may be accepted by defendant's attorney;<sup>18</sup> not, however, after defendant's death.<sup>19</sup> If no notice has been given exceptions may be filed at bar.<sup>20</sup> Notice will be presumed to have been given if the referee so reports.<sup>21</sup>

#### 10. Exceptions.

Exceptions filed to a report must conform to the rule of court, or they will be dismissed.<sup>22</sup> If to rulings on evidence, they must be taken at the time<sup>23</sup> and must be specific.<sup>24</sup>

A mere request is not an exception.<sup>25</sup> A large number of exceptions will be considered frivolous and dismissed.<sup>26</sup> Unless exceptions are taken they will be held to be waived, on appeal.<sup>27</sup> The court may set aside a report on the facts for reasons which would

<sup>15</sup> *Shiffer v. Brodhead*, 126 Pa. 260.

<sup>16</sup> *Moore v. Habel*, 3 Kulp, 310.

<sup>17</sup> *Wall v. Knapp*, 134 Pa. 53; *Paine v. P. R. Co.*, 6 Kulp, 442.

<sup>18</sup> *Comth. v. Schooley*, 5 Kulp, 53.

<sup>19</sup> *Scranton B. Assn. v. Ranck*, 5 C. C. 449.

<sup>20</sup> *West v. Sherer*, 1 Lack. Jur. 117.

<sup>21</sup> *Wilson v. Morrison*, 1 Kulp, 67.

<sup>22</sup> *McCarthy v. Masters*, 142 Pa. 82.

<sup>23</sup> *Dean v. Church*, 3 Lack. L. N. 234.

<sup>24</sup> *Heffron v. Kittaning, Etc., Co.*, 1 Lack. Jur. 235.

<sup>25</sup> *Warner v. Sox*, 4 Luz. L. R. 7.

<sup>26</sup> *Bubble v. Susquehanna Coal Co.*, 6 Luz. L. R. 198.

<sup>27</sup> *Torrey v. Scranton*, 133 Pa. 173.

be sufficient to grant a new trial.<sup>28</sup> Where the defect is formal the report may be re-submitted,<sup>29</sup> but not for a new hearing.<sup>30</sup> If his findings of fact are not sustained by the evidence the cause may be re-submitted.<sup>31</sup>

#### 11. Appeals.

On appeal, after a fair and full trial before a referee, and argument in the court below upon the exceptions, the appellate court will not consider an objection that the stenographer's notes were not certified by the referee and were not before the court.<sup>32</sup>

#### 12. Waiver of jury trial.

Section 2 of the act of 1871 provides:

"An agreement to a reference, under the act to which this is a supplement, shall be a waiver of the right of trial by jury; and the provisions of the act to which this is a supplement, inconsistent herewith, shall be and the same are hereby repealed."

#### 13. Subpœnas.

Section 1 of the act of Jan'y 20, 1870, P. L. 85, provides that "Subpœnas may be issued by the prothonotary or by the referee, at the option of the parties."

#### 14. Costs.

Section 3 of the act of 1870 provides:

"That the judgment to be entered upon the report of the referee shall be entered with costs in all cases in which a judgment of like amount entered upon a verdict of a jury would carry costs."

Where an appeal lies the costs must be paid before appeal.<sup>33</sup>

#### 15. Compensation of referee.

Section 7 of the act of 1869 is as follows:

"The compensation of the referee under this act shall be ten dollars per day for every day necessarily spent in hearing the case and preparing his report," the provisions in regard to payment by the county being repealed by act of 1871.

### LEGAL ARBITRATIONS IN ERIE, ELK, CRAWFORD AND LAWRENCE COUNTIES.

#### 16. Distinction between lay and legal arbitrations.

Section 1 of the act of April 6, 1870, P. L. 948, which was held to be constitutional,<sup>1</sup> provides as follows:

"That arbitrations under the compulsory arbitration law and

<sup>28</sup> Gray v. Rupp, 3 York, 25.

<sup>29</sup> Lackawanna, Etc., Co. v. Fales, 1 Luz. L. R. 751.

<sup>30</sup> West v. Sherer, 1 Lack. Jur. 117.

<sup>31</sup> Hibbs v. Woodward, 7 Luz. L. R. 77; Edgerton v. Williams, 6 Kulp, 149.

<sup>32</sup> Lenz v. Spencer, 28 Supr. C. 31.

<sup>33</sup> Walbridge v. Barbite, 7 C. C. 353.

<sup>1</sup> Cutler v. Richley, 151 Pa. 195.

its supplements shall be called lay arbitrations and arbitrations under this act legal arbitrations."

**17. Election in writing.**

"Section 2. That whenever a party shall, by himself or attorney, enter a rule to arbitrate the same, he shall be taken and deemed to have waived his right to appeal and trial by jury in said suit; it shall be optional with the other party to the suit or his attorney, whether the arbitration shall be a legal or lay arbitration; and unless the opposite party or his attorney shall, on or before the day fixed for choosing the arbitrators, elect, by writing filed, to have a legal arbitration, it shall be a lay arbitration as heretofore, with the right to each or either party to appeal."

**18. Choosing the arbitrator.**

"Section 3. That if the party not entering the rule shall, as aforesaid, elect to have a legal arbitration, there shall be but one arbitrator, who shall have been duly admitted to practice law in the courts of record in the county in which the suit is pending; and the method of choosing, service of notices, length of rules, and fixing times of hearing, shall be the same as under the lay or compulsory arbitration law."

Under this act, when a legal arbitrator is chosen, there is no right of appeal.<sup>2</sup>

**19. Powers of arbitrator.**

Section 4. That the arbitrator shall have the same power and authority to permit the amendment of the declaration and pleadings, grant nonsuits, award subpoenas and attachments against witnesses for non-attendance; to make interlocutory orders necessary for the trial of the case; to allow the names of the parties to be amended, substituted or changed, and to compel the production of books and papers to be used on the trial of said case, as judges of courts of record now have or may have, and with the same force and effect; and to punish witnesses in contempt, for non-attendance after having been duly and legally subpoenaed, by imposing upon them all the costs of the attachment awarded for their arrest; and the same may be levied of their goods and chattels, lands and tenements, without any right of exemption or stay of execution; for the collection of which said arbitrator may award execution in the name of the party aggrieved, in the suit against the said witness so in contempt."

**20. Trial and duties, judgment, etc.**

Section 5. That the hearing or trial before the arbitrator shall be proceeded in, in the same manner, and governed by the same rules as trials before courts and juries, so far as the same may be appointed, and exceptions to the admission or rejection of testimony shall be taken and noted at the time of the admission or rejection thereof; and either party at any time before the closing argument

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<sup>2</sup> Spratt v. Raymond, 149 Pa. 258; Cutler v. Richley, 151 Pa. 195.

in the case, may submit written points of the law arising therein and request the opinion of the arbitrator in writing thereon, so far as the said questions of law are raised by the facts in the case; it shall be the duty of the arbitrator to conduct the trial, and at the conclusion thereof to find and report the facts of the case in the form of a special verdict, together with the exceptions taken during the trial to the admission or rejection of evidence; and the points of law made by the parties and his decisions or ruling thereon, and his award or finding in the case. The award and accompanying papers before mentioned shall be by him filed in the prothonotary's office within seven days after the finding thereof; upon which award, so filed, judgment shall be entered *nisi*, to become absolute if no exceptions to the ruling or decisions of law thereon, or motion to set it aside, as hereinafter provided, be made or filed within twenty days after the filing of said award; if exceptions be filed to the decision or ruling of the law in the case, by the arbitrator, the same shall be in the nature of a writ of error to the Common Pleas or court in which the case is pending; to the decision of which, upon such exceptions, either party shall be entitled to take a writ of error to the Supreme court, upon the usual conditions and restrictions."

**21. Lien.**

"Section 6. That the judgment *nisi* on the award shall be and continue a lien until final judgment."

**22. Memorandum of hearing.**

"Section 7. That the arbitrator shall keep a memorandum of his acts and proceedings, under and by virtue of the fourth section of this act, and file the same, with his award, at the request of either party or of his own volition."

**23. Compensation.**

"Section 8. That as compensation for his services the arbitrator shall be entitled to receive ten dollars for the first day, and six dollars for each subsequent day's service necessarily employed in the hearing and determining the case; he shall be entitled to receive two dollars for each adjournment, upon application of either or both of the parties, at any time when no other proceedings are had; but he shall not charge or receive adjournment fees for any day when he shall charge or receive *per diem* compensation; which compensation shall be taxed and collected as costs in the case."

**24. Oath.**

"Section 9. That before entering upon his duties the arbitrator shall be sworn or affirmed to perform the duties of his appointment with fidelity; which oath or affirmation may be administered by any attorney of any court of record of this commonwealth, or by any officer having general authority to administer oaths."

**25. Setting aside award.**

"Section 10. That the award may be set aside and the case

referred to the same arbitrator, to be re-tried in the usual manner, not less than four nor more than ten days after said reference, for the following causes, to-wit: For such misbehavior, on the part of the arbitrator, as in the opinion of the court, shall invalidate the award, in which case the arbitrator shall forfeit his compensation; for testimony discovered after the trial, such as will justify the court in granting a new trial."

**26. Rule to show cause.**

"Section 11. That no rule to show cause why an award shall not be set aside for misbehavior, on the part of the arbitrator, shall be granted, unless the party making the motion, shall state the misbehavior in writing, specifically; which statement shall be verified by the oath or affirmation of the mover or some person acquainted with the fact."

**27. Application on after-discovered testimony.**

"Section 12. That no application or motion to set aside an award for after-discovered testimony shall be entertained, or rule granted to show cause, unless the mover shall have reduced the facts which he expects to prove, to writing; which statement shall be accompanied by the oath or affirmation of the mover, or some one for him, that the same are true and were not known to the party asking for the new trial at the time of the former trial, and that he expects to prove the said facts by a witness whose name and place of residence shall be given on the hearing of the rule to show cause; the said witness may be examined, and to his knowledge of the facts alleged, or on depositions, at the option of the court."

**28. Motion to set aside.**

"Section 13. That no motion to set aside an award shall be entertained by the court unless made within twenty days from the filing thereof in open court, if a court be in session at anytime during said twenty days, if not, to a judge at chambers."

**29. Subpœnas, executions, etc.**

"Section 14. That all subpœnas, executions, attachments, rules and orders, made or awarded by the arbitrator shall be issued by the prothonotary; and he may issue subpœnas returnable before the arbitrator, without a special order, or subpœnas may be issued by the arbitrator in his own name."

**30. Reference by agreement.**

"Section 15. That the parties, or their attorneys to a suit pending, or hereafter to be brought, may, by agreement in writing, amicably refer the trial and determination of the same to a legal arbitrator and fix their own time and place of hearing, with the same force and effect and with the same incidents and rights to the parties as if the said suit had been referred by rule entered and arbitrator chosen as hereinbefore provided: *Provided*, That the provisions of this act shall only apply to the counties of Erie, Elk, Crawford and Lawrence."



**31. Reference in Tioga and Potter counties.**

Section one of the act of February 23, 1870, P. L. 219, provided:

"That any civil action now pending or hereafter commenced in the court of Common Pleas for the counties of Tioga and Potter, in said commonwealth, after issued joined, may be referred upon the written consent of the parties or their attorneys, or by oral consent in open court entered in the minutes."

**32. Agreement to refer.**

"Section 6. In all cases of reference under this act, the parties or their attorneys may agree upon a suitable person, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint a referee who shall be free from exception: *Provided*, That this act shall not be construed to repeal or in any manner affect any of the laws now in force in this commonwealth relating to arbitrations."

**33. Compensation of referee.**

"Section 7. The compensation of the referee under this act shall be ten dollars per day for every day necessarily spent in hearing the case and preparing his report, to be paid by the county on approval by the court."

**34. Powers.**

"Section 2. The trial by the referee shall be conducted in the same manner as a trial by the court with a jury, and on notice of the time and place fixed by the referee."

"Section 3. The referee shall have the same power to grant adjournments, and to allow amendments to any pleadings, as the court upon such trial, upon the same terms and with like effect, and shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before him by attachment, or refusal to be sworn, or to be sworn or to testify, as is possessed by the court."

**35. Duties.**

"Section 4. The said referee shall state the facts found and the conclusions of law separately, and his decision shall be given and may be excepted to and reviewed in like manner as though tried by the court with a jury, but not otherwise; and the said referee may in like manner, as the court, settle a case or exceptions on appeal or writ of error to the Supreme court."

**36. Report.**

"Section 5. The report of the said referee upon the whole issue shall stand as the decision of the court and judgment shall be entered in the same manner as if the action had been tried by the court before a jury; and in case of reversal on appeal or writ of error, the supreme court shall enter the proper judgment or direct a new trial shall be ordered, it shall be proceeded with before the same referee, but if the said referee is unable or refuses to act,

then before some other referee, to be selected in the manner provided in section sixth."

Notice of filing his report is necessary under this act.<sup>3</sup>

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<sup>3</sup> *Baxter v. Hurlbert*, 7 Supr. C. 187.

## CHAPTER IV.

### TRIALS (D) — BY THE COURT

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|--------------------------------------|--|
| 1. Provision of the constitution.    | 6. Time of filing — notice — exceptions. |
| 2. Agreement — waiver of jury trial. | 7. Final judgment.                       |
| 3. Agreement and hearing.            | 8. Manner of review.                     |
| 4. Decision and practice.            | 9. Appeal from final judgment.           |
| 5. Findings of law and fact.         | 10. Costs.                               |
|                                      | 11. Trial by court and jury.             |

#### TRIAL BY THE COURT WITHOUT A JURY.

##### 1. Provision of the Constitution.

Section 27 of article 5 of the constitution provides:

"The parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases."

It was held that the constitutional provision was not self-executory,<sup>1</sup> but the act of April 22, 1874, P. L. 109, provided for such trials. There was a provision in this act excluding "those acting in a fiduciary capacity" which was held to be unconstitutional.<sup>2</sup> Prior to this municipal officers were held to come within the exception.<sup>3</sup>

##### 2. Agreement — waiver of jury trial.

The act of April 22, 1874, P. L. 109, following, section 27, article 5, of the constitution (P. L. 1874, p. 16) provides:

"Section 1. That in any civil case now pending in any of the courts of this commonwealth, or hereafter to be commenced, after issue joined, the parties thereto, excepting those acting in a fiduciary capacity, may, by agreement filed in the proper office, where such suit is pending, dispense with trial by jury, and submit the decision of such cases to the court having jurisdiction thereof; and such court shall hear and determine the same and the judgment shall be subject to writ of error or appeal as in other cases at law or in equity, at the option of either party."

Section 4 provides that "An agreement to submit under this act is a waiver of the right of trial by jury."

<sup>1</sup> Comth. v. Mitchell, 80 Pa. 57.

<sup>2</sup> Lummis v. Big Sandy, Etc., Co., 188 Pa. 27. (See Paul v. Grimm, 183 Pa. 326.)

<sup>3</sup> Campbell v. Fayette Co., 127 Pa. 86.

A cause may be thus submitted after an appeal from an award of arbitrators.<sup>3a</sup>

### 3. Agreement and hearing.

Section one providing for filing the agreement to submit is complied with when the parties agree in open court, all assenting, and the judge dictates to the stenographer an order embodying the agreement; which is filed and the matter entered on the court docket.<sup>4</sup>

By agreeing to a trial of the cause by the court no right is waived, except that of a jury trial. The right to amend is in no wise abridged.<sup>5</sup>

The trial proceeds in the same manner and under the same rules of evidence, etc., as if it were a jury trial. But if the court, on its own motion, strikes out relevant testimony admitted on the trial without objection, after both sides had rested, it will be reversed.<sup>6</sup>

### 4. Decision and practice.

"Section 2. The decision of the court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper court where the case is pending, as early as practicable, not exceeding sixty days, after such decision shall have been made from the termination of the trial, and notice thereof shall be forthwith given by the prothonotary or clerk, to the parties or their attorneys, and if no exceptions thereto are filed in the proper office within thirty days after service of such notice, judgment shall be entered thereon by the prothonotary or clerk; if exceptions to the findings of facts or conclusions of law be filed within said thirty days, the court or the judge thereof who tried the case in vacation, may, upon argument, order judgment to be entered according to the decision previously filed, or make such modifications thereof as in justice and right shall seem proper, subject always, nevertheless, to review by writ of error or appeal in the Supreme court; such writ of error or appeal to be taken in time and manner and with the effect prescribed by law."

### 5. Findings of law and fact.

Where a jury is dispensed with it is highly important that the facts found by the court "which are material to a just decision of the cause, should be separately and distinctly found, with at least as much precision and particularity as are required in a special verdict."<sup>7</sup> The finding must be of the facts and not the evidence thereof;<sup>8</sup> nor a reference to the facts of another case decided the

<sup>3a</sup> *Hopkins v. Wells*, 1 Chester Co. 543.

<sup>4</sup> *Wyoming, Etc., Assn. v. Lederer*, 1 Kulp, 517.

<sup>5</sup> *Spencer v. Clinefelter*, 101 Pa. 219.

<sup>6</sup> *Lewars v. Weaver*, 121 Pa. 208.

<sup>7</sup> *Ellis v. Lane*, 85 Pa. 265; *Foreman v. Hosler*, 94 Pa. 418; *Harris v. Hay*, 111 Pa. 562; *Sweigard v. Wilson*, 106 Pa. 207.

<sup>8</sup> *Central Bank v. Earley*, 113 Pa. 477; *Comth. v. McDowell*, 86 Pa. 377; *Ferguson v. Wright*, 61 Pa. 258.

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same day.<sup>9</sup> The court must make separate and distinct findings of fact and of law, and cannot combine the two in what it terms a "verdict."<sup>10</sup> It need not preface the findings of fact with a review of the evidence; nor will the appellate court review the facts where it finds that the judge below "clearly grasped the whole case in all its vexatious details; eliminated therefrom in his findings all irrelevant matter, and has presented to us a concise statement of the facts and law which prompted his decree. It is not improbable that after hearing the witnesses, wading through the papers presented, and hearing arguments of counsel, tinctured with so much acrimony as is present on these paper books, he was physically and mentally weary; if so, the opinion he filed shows a speedy recovery."<sup>11</sup> In order that the appellate court may review the cause properly, a mere submission on the pleadings filed is insufficient and the facts must be found separately from the law.<sup>12</sup> A finding of facts has been held sufficient where the judge reviews the facts and finds therefrom as a fact that there was no warranty of the goods.<sup>13</sup> A case heard before a jury, but withdrawn, and turned into a "case stated" for the court upon the whole record is neither a "case stated" nor a valid submission under the act of 1874.<sup>14</sup>

#### 6. Time of filing — notice — exceptions.

Within sixty days "after such decision shall have been made from the termination of the trial" has been held to apply to cases heard during the regular term of court.<sup>15</sup>

The provision as to notice is held to apply where a final judgment has been entered and a party deprived of his right to file exceptions, not where he files exceptions. Want of notice in the first instance is fatal.<sup>16</sup> Exceptions cannot be filed after thirty days from service of notice of the filing of the decision of the court, not even with leave of court.<sup>17</sup>

#### 7. Final judgment.

The filing of the decision is not a final judgment, and an appeal taken on exceptions and before the thirty days have expired is premature.<sup>18</sup> Without exceptions or an order of final judgment an appeal will be quashed.<sup>19</sup>

#### 8. Manner of review.

"Section 3. Every such case taken to the Supreme court upon writ of error shall be heard and determined therein as writs of error are therein heard and determined; and every such case taken

<sup>9</sup> *Comth. v. Equitable, Etc., Assn.*, 137 Pa. 412.

<sup>10</sup> *Carpenter v. Yeadon Boro*, 208 Pa. 396.

<sup>11</sup> *Dean, J., on Pershing, J., in Eichman v. Hersker*, 170 Pa. 402.

<sup>12</sup> *State, Etc., Ins. Co. v. Keefer*, 9 Supr. C. 186.

<sup>13</sup> *Krauskopf v. Pennypack Etc., Co.*, 26 Supr. C. 506.

<sup>14</sup> *Union Savings Bank v. Fife*, 101 Pa. 388.

<sup>15</sup> *Wyoming, Etc., Assn. v. Lederer*, 1 Kulp, 517.

<sup>16</sup> *Krauskopf v. Pennypack Etc., Co.*, 26 Supr. C. 506; *Miller v. Cambria County*, 25 Supr. C. 591.

<sup>17</sup> *Paul v. Grimm*, 183 Pa. 326; *Harris v. Mercur* (No. 1), 202 Pa. 313.

<sup>18</sup> *Comth. v. Mitchell*, 80 Pa. 57.

<sup>19</sup> *Miller v. Cambria Co.*, 25 Supr. C. 591.

to the Supreme court by appeal shall be heard and determined therein as cases of appeal in equity proceedings; and in case a new trial is ordered, it shall be proceeded with before the same court in the same manner as hereinbefore provided."

#### 9. Appeal from final judgment.

The appellate court can hear and determine only questions of law arising upon bills of exception relating to the law or evidence and such questions of fact as might be heard after a trial by jury.<sup>20</sup> Where the assignments are to the rejection of testimony the offers made must be treated by the appellate court, as true.<sup>21</sup> An appeal will be quashed if taken before the judge has filed his findings.<sup>22</sup> Every presumption will be held in favor of the correctness of the finding of facts.<sup>23</sup> If error be assigned upon the facts, all the evidence must be printed in the paper book of appellant.<sup>24</sup>

After affirmance of a case, the court below may grant an order requiring the plaintiff to file on record papers used as evidence upon the trial.<sup>25</sup>

#### 10. Costs.

Section 5. Cases submitted under the provisions of this act shall be subject to existing law as to costs, except no jury fee shall be required on entering judgment."

[For forms, see Referee learned in the law, *infra*.]

#### 11. Trial by court and jury.

It is not the intention of the compiler to devote much space to trial by jury in this volume, because this subject has been recently fully treated in an exhaustive work on "Juries and Jury Trials, State and Federal, Common Law and Statutory," which is commended to the practitioner.<sup>1</sup>

The work here referred to presents the origin and development of the jury system in England and the present practice in state and federal courts, in selecting, drawing, summoning, returning and choosing jurors, in all cases. Moreover, the practice in challenging, common law and statutory, is fully set forth, and the trial of a criminal case as well as a civil case, from the calling of the same to the verdict and judgment is so completely detailed in it, that to be without that work, argues a lack of interest in the subject.

<sup>20</sup> Jamison v. Collins, 83 Pa. 359; Griffith v. Sitgreaves, 90 Pa. 161; Rohheimer v. Hofman, 103 Pa. 409; Brown v. Susquehanna Boom Co., 109 Pa. 57; Comth. v. Hulings, 129 Pa. 317; Comth. v. Westinghouse Etc., Co., 151 Pa. 265; Fleer v. Reagan, 24 Supr. C. 170; Gonser v. Smith, 115 Pa. 452.

<sup>21</sup> Comth. v. Phila., 157 Pa. 531.

<sup>22</sup> Comth. v. Mitchell, 80 Pa. 57.

<sup>23</sup> Comth. v. Beech Creek R. Co., 188 Pa. 203; Comth. v. Ontario, Etc., R. Co., 188 Pa. 205; P. & L. Dig., vol. 21, col. 37, 756.

<sup>24</sup> Hyndman v. Hogsett, 111 Pa. 643.

<sup>25</sup> Von Storch v. Heermans, 8 Luz. L. R. 71.

<sup>1</sup> Juries and Jury Trials, State and Federal Common Law and Statutory, by Willis Reed Bierly. Rees Welsh & Co., 901 Sansom St., Phila., 1908 — \$4.00.

## CHAPTER V.

### TRIALS (E) — BY REFEREE LEARNED IN THE LAW

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|---|----------------------------------|
| 1. Agreement to submit.                         | 10. Judgment on decision.        |
| 2. Submission, acceptance, etc.                 | 11. Compensation of referee.     |
| 3. Duties and powers of referee.                | 12. Form — agreement to refer.   |
| 4. Practice before the referee.                 | 13. Acceptance by referee.       |
| 5. The referee's report.                        | 14. Oath of referee.             |
| 6. Notice of filing report.                     | 15. Form of notice by referee.   |
| 7. Power of the court over the award.           | 16. Exceptions to report.        |
| 8. Appeals.                                     | 17. Reversal of report.          |
| 9. Waiver of jury — setting aside of agreement. | 18. Exceptions by defendant.     |
|   | 19. Order overruling exceptions. |

#### 1. Agreement to submit.

Section one of the act of May 14, 1874, P. L. 166, provides:

"That in all civil suits or cases which the parties may legally, by agreement in writing, submit to the decision of the court, in any county or city of this commonwealth, the parties may, in like manner, by written agreement, submit the case to the decision of any person learned in the law, who is authorized to act as an attorney in the Supreme court of this state."

It was held that a county was not a party competent to submit to arbitration under this act,<sup>1</sup> but in a later case the objection raised in the Supreme court was not considered.<sup>2</sup>

In the case of a city it was decided that the solicitor might bind the municipality to a reference;<sup>3</sup> also an officer of a corporation may bind his body corporate.<sup>4</sup>

When the matter is referred it is effectually before the new forum and cannot be passed upon collaterally by an auditor appointed to make distribution.<sup>5</sup> It is irrevocable when made a rule of court and founded on a consideration; and if a party dies and his legal representatives come in and recognize the referee, it will continue in force.<sup>6</sup> After a report, the court cannot set aside the reference, even though all the papers, records and reports are burned.<sup>7</sup> The referee must be actually admitted to the Supreme court.<sup>8</sup>

<sup>1</sup> *Campbell v. Fayette County*, 127 Pa. 86.

<sup>2</sup> *Bartholomew v. Lehigh County*, 148 Pa. 82.

<sup>3</sup> *Spring Brook, Etc., Co. v. Pittston*, 10 Kulp, 406.

<sup>4</sup> *Lummis v. Big Sandy, Etc., Co.*, 188 Pa. 27.

<sup>5</sup> *Christy v. Sill*, 131 Pa. 492.

<sup>6</sup> *Grimm v. Sarmiento*, 2 C. C. 484.

<sup>7</sup> *Albright v. Leiser*, 2 Penny. 483.

<sup>8</sup> *Campbell v. Fayette County*, 127 Pa. 86.

### 2. Submission, acceptance, etc.

"Section 2. Said submission shall be filed of record in the office of the prothonotary or clerk of the court in which the suit is pending, and notice thereof, in writing, shall be duly served on the person thus selected as referee; if he accepts, he shall do so within twenty days after such service, by filing in the office of the said prothonotary or clerk, his written acceptance, with his oath or affirmation faithfully and impartially to perform his duties as referee, to the best of his ability, otherwise the appointment may be regarded as not accepted and the submission as void; and said referee shall also, within the said twenty days, by writing filed in said office, appoint the time and place of hearing; but the place shall be at the courthouse of the county or city where the case is pending, unless the parties and referee agree upon a different place."

### 3. Duties and powers of referee.

"Section 3. Said referee shall proceed, without undue delay, to perform the duties of his appointment, and shall, in all things pertaining to the trial and decision of the case, have the powers and perform the duties that would belong to the court under a like submission. The decision, with what pertains to it, shall be filed of record in the case, and shall, in like manner and to the same extent, be subject to exceptions and writ of error or appeal, as in cases submitted in like manner to the court; but this is not to be construed to prevent the parties from waiving the right to a writ of error or appeal."

The practice under this section not being very clear, the act of May 4, 1889, P. L. 80, was passed, which is as follows:

"That every referee \* \* \* shall give the parties interested in the cause, or their attorneys, ten days' previous notice of his intention to file his report, on a day to be fixed by him, during which time the said parties or their attorneys shall have access to said report, and may file exceptions thereto; and it shall be the duty of the referee on exceptions being filed, to re-examine his report and amend the same, if in his opinion such exceptions are well founded. If no exceptions shall be filed with the referee, his award shall be entered as a final judgment of the court, on the day it shall be filed. If exceptions have been filed with the referee, his report and the exceptions, with his action thereon, shall be heard by the court in which they shall have been filed, and said court shall have power to confirm the report of the referee, or alter, amend or reverse it, or send it back to the referee for further proceedings before him; and a writ of error or appeal from the final judgment of the court may be taken by either party, in like manner as in other cases of a similar kind, provided exceptions were duly filed with the referee."

"Section 2. That so much of the act to which this is a supplement, as is inconsistent herewith, be and the same is hereby repealed."

This act virtually follows the practice as outlined in the forms given herewith from *Tool v. Yeager*, affirmed by the Supreme court, *Sharswood, J.*<sup>9</sup>

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<sup>9</sup> *Yeager v. Tool*, 1 Dauphin Co., R. 120.



The purpose of filing exceptions with the referee is that he may consider them, and if well founded, revise his report accordingly before filing it.<sup>10</sup> But he has no power to make an award beyond the scope of submission.<sup>11</sup>

#### 4. Practice before the referee.

The referee, for the trial of the cause, has the same powers as the court, and his action in the premises is subject to the like rules and exceptions and review for the same causes, as the court. His award will be set aside if he rules out testimony which is proper,<sup>12</sup> or permits counsel to read from a journal discussing the merits of the case.<sup>13</sup> A tender before the referee of the amount calculated by him to be due, with costs to the time, will relieve the party from further costs, if refused.<sup>14</sup>

#### 5. The referee's report.

The report of the referee must conform to the requisites of the judge's decision under the act of April 22, 1874, P. L. 109, and must find the facts separately, answer the points submitted and give his conclusions of law, showing on what facts they are based.<sup>15</sup> He must find on every pertinent question of fact requested.<sup>16</sup> But if his general finding is equivalent to and covers the special finding requested, the party cannot complain.<sup>17</sup> It has been held that it is not necessary that the report should show that notice of the hearing was given to the defendant or that ten days' notice of intention to file it was given.<sup>18</sup> If it conforms substantially with the law, it will be sufficient.<sup>19</sup> His finding of facts, when approved by the court below, will have the force of a verdict, in the appellate court.<sup>20</sup>

#### 6. Notice of filing report.

Prior to the act of 1889, *supra*, the matter of giving notice of filing the report was regulated by section 2, of the act of April 22, 1874, which required the prothonotary or clerk forthwith to give the parties or their attorneys notice of such filing, and if no exceptions were filed within thirty days after service of such notice, judgment was entered thereon by the prothonotary or clerk.

It was held that without this notice judgment could not be validly entered;<sup>21</sup> and a rule of court relating to filing notices of reports

<sup>10</sup> Southern Maryland R. Co. v. Moyer, 125 Pa. 506.

<sup>11</sup> Beaumont v. Lane, 3 Supr. C. 73.

<sup>12</sup> Marr v. Marr, 103 Pa. 463.

<sup>13</sup> Hursh v. Gross, 2 York, 175.

<sup>14</sup> Miller v. Plymire, 1 Walker, 233.

<sup>15</sup> Harris v. Hay, 111 Pa. 562; Miller v. Dunlap, 21 W. N. C. 285; Lindsay v. Waymart Water Co., 1 Lack. L. N. 327; Marr v. Marr, 110 Pa. 69; Sweigard v. Wilson, 106 Pa. 207.

<sup>16</sup> Granby, Etc., Co. v. Laverby, 159 Pa. 287.

<sup>17</sup> Phila. Co. v. United Gas, Etc., Co., 180 Pa. 235.

<sup>18</sup> Peet v. Yeosack, 9 Kulp, 188.

<sup>19</sup> Rue v. Gentner, 7 Atl. 592.

<sup>20</sup> Alexander v. Hamilton, 31 Supr. C. 189; Ingram v. Phila., 35 Supr. C. 303; Guarantee, Etc., Co. v. Stover, 17 D. R. 684.

<sup>21</sup> Marr v. Marr, 103 Pa. 463.

was held not to apply,<sup>22</sup> nor could it be served on an attorney who had withdrawn from the case.<sup>23</sup> But a party who acquiesced might be held to have notice and waived the formalities.<sup>24</sup>

The act of 1889, *supra*, repeals the act of 1874, only so far as in conflict with it, and provides only for notice of the time when the referee intends to file his report, so that the parties may file exceptions thereto. If no exceptions are filed, no further notice is necessary. But if exceptions are filed and a further hearing given, must the referee give the parties further notice of a time when he will file his report, or may he file it and shall the prothonotary or clerk then give the notice required under the acts of 1874? One or the other would seem to be essential. Probably the intent is that the referee shall give the notice, though this is a matter which should be settled by a rule of court. The referee has exclusive jurisdiction to pass upon exceptions to his report, and if either party neglects to have exceptions noted, he will be held to have acquiesced.<sup>24a</sup>

#### 7. Power of the court over the award.

Another question was raised under the act of 1874, viz.: The power of the court to which the report was made to review the same upon exceptions. Some courts held power to review the report on questions of law,<sup>25</sup> but the Supreme court held otherwise in one case.<sup>26</sup>

This was made clear by the act of 1889, *supra*, and exceptions in the lower court must first be disposed of, before an appeal will lie to the higher court.<sup>27</sup>

The power of revision on a referee's report is generally confined to the matters of law,<sup>28</sup> but where the referee refuses to find upon any pertinent point requested, the court may examine the evidence and make its own finding.<sup>29</sup> Upon the facts a referee's report will generally be considered to have the same force as a verdict;<sup>30</sup> especially so when approved by the lower court.<sup>31</sup>

Where the evidence before the referee is susceptible of different

<sup>22</sup> *Eyster v. McCulla*, 3 W. N. C. 219.

<sup>23</sup> *Tennery v. Dickerson*, 3 W. N. C. 158.

<sup>24</sup> *Allison v. Gilton*, 24 W. N. C. 342; *Pittsburg, Etc., R. Co. v. Shaw*, 14 Atl. 323.

<sup>24a</sup> *Southern Maryland R. Co. v. Moyer*, 125 Pa. 506; *Harris v. Mercur*, No. 1, 202 Pa. 313.

<sup>25</sup> *Collins v. Phila.*, 8 W. N. C. 409; *Monaghan v. Ferry Co.*, 9 W. N. C. 368.

<sup>26</sup> *Phila. v. Linnard*, 97 Pa. 242.

<sup>27</sup> *Kille v. Reading Iron Works*, 134 Pa. 225.

<sup>28</sup> *Lee v. Keys*, 88 Pa. 175.

<sup>29</sup> *Leonard v. Smith*, 162 Pa. 284.

<sup>30</sup> *Bidwell v. Pitts., Etc., R. Co.*, 114 Pa. 535; *Southern, Etc., R. Co. v. Moyer*, 125 Pa. 506; *McGinn v. Benner*, 180 Pa. 396; *Hotchkiss v. Roehm*, 181 Pa. 65; *P. & L. Dig.*, vol. 1, cols. 1359-60; *C. R. A.*, vol. 1, col. 402.

<sup>31</sup> *Ridge Ave. Pass. R. Co. v. Phila.*, 187 Pa. 592; *Newlin v. Ackley*, 6 Supr. C. 337; *Snyder v. Rainey*, 198 Pa. 356; *Plymouth Cordage Co. v. Penna. Wood Co.*, 203 Pa. 206; *Rosbach v. Beebe*, 205 Pa. 652; *Bradley v. Gaghan*, 208 Pa. 511; *Chambers v. Chatley*, 15 Supr. C. 540.

interpretations, whereof he is fairly the judge, his decision will not be reversed.<sup>32</sup> Where the papers including the agreement of submission are lost, the referee's report will be accepted as correct.<sup>33</sup> Although the court below might have reached a different conclusion, the referee will not be reversed.<sup>34</sup> His findings, when they cover all the facts and requests, will be sustained.<sup>35</sup> But if it appears that he has not found facts which are pertinent, the court on appeal, will go into the evidence.<sup>36</sup> Where the lower court, in reversing a referee, leaves the matter in doubt, it will be reversed with a *procedendo*.<sup>37</sup> Upon exceptions to the report of the referee, the Common Pleas has refused to send the case back, with a substitution of the legal plaintiff as real plaintiff.<sup>38</sup> On an appeal from an order overruling exceptions to a referee's report, the appellant may not offer new objections.<sup>39</sup>

### 8. Appeals.

Sections 4 and 5 of the act of May 14, 1874, provided for appeals from the decision of the referee and remission direct to him and made him subject to control by the Supreme court. All this was changed by the act of 1889, which provides only for appeal from the judgment of the lower court.

These sections are as follows:

"Section 4. The Supreme court may, after the decision or judgment of such referee has been by due course of law brought before them, remit the case for further hearing before the referee, or make such other or further order, as may be proper to protect the rights of the parties.

"Section 5. The referee, so far as relates to the case and the duties he is to perform as referee, shall, after acceptance of his appointment, be subject to the same control by the Supreme court as the court below would be in regard to a cause submitted to them in like manner."

### 9. Waiver of jury — setting aside of agreement.

Section 6 of the act of 1874 is unaffected, and is as follows:

"Section 6. An agreement to submit under this act shall be a waiver of the right of trial by jury; but if the referee shall die before rendering his decision, or if it becomes impossible for him to act, or for the parties to obtain his decision in a reasonable time, through the fault of said referee, the court in which suit is pending, after proper application by a party in interest, may, after due notice to the other parties, set aside the agreement of submis-

<sup>32</sup> Bruch v. Phila., 181 Pa. 588.

<sup>33</sup> Johnson v. Allegheny City, 139 Pa. 330.

<sup>34</sup> Taylor v. Folz, 24 Supr. C. 1, vol. 1, C. R. A., col. 402.

<sup>35</sup> Weaver v. Cone, 12 Supr. C. 143; Phila. Co. v. United Gas, Etc., 180 Pa. 235; Fell v. Betz, 22 Supr. C. 418.

<sup>36</sup> Schwab v. Bickel, 11 Supr. C. 312; Granel v. Wolfe, 185 Pa. 83; Merchant's, Etc., Bank v. Kern, 193 Pa. 67.

<sup>37</sup> Horn, Etc., Co. v. Steelman, 24 Supr. C. 126.

<sup>38</sup> McManus v. Dennison Twp., Etc., 4 Kulp, 439.

<sup>39</sup> Scott v. Scott, 196 Pa. 132.

sion, and in such case the costs accrued shall be treated in all respects as part of the docket costs."

#### 10. Judgment on decision.

"Section 7, act of 1874. The judgment entered upon the decision of such referee shall be considered a judgment of the court, and thereafter the power of the referee in regard to it shall end, unless by order of the Supreme court the case is referred back to said referee."

The latter clause is changed by the act of 1889.

#### 11. Compensation of referee.

"Section 8. The said referee shall receive the sum of ten dollars per day for the time he is engaged in the performance of his duties as referee, to be taxed and paid as part of the costs of the case, and the said referee shall make out his bill, with affidavit attached, and submit the same to the court, and thereupon the court shall, after due examination, direct the taxation of so much costs as the referee is by law entitled to have."

#### 12. Form — agreement to refer.

Oliver Tool

v. } In the court of Common Pleas of Lycoming County,  
Simon Yeager. } No. 211. March Term, 1878.

And now, to-wit, October 10, 1878, it is hereby agreed that the questions of law and fact at issue in this case be referred to O. H. Reighard, Esq., as referee under the provisions of the acts of assembly in such case made and provided and that judgment in accordance with his final award be entered in said case, with the right of an appeal, as in other cases.

Witness our hands the day and year above written.

W. R. Bierly, P. Q.

Henry W. Watson, P. D.

#### 13. Acceptance by referee.

I hereby agree to accept the office of referee in accordance with the agreement filed in this case.

O. H. Reighard.

#### 14. Oath of referee.

Lycoming County ss.

Before me personally appeared, O. H. Reighard, who being duly sworn according to law, did depose and say that he will faithfully and impartially perform his duties as referee to the best of his ability.

O. H. Reighard,

Sworn to, etc.

Referee.

*Report of Referee.*

After reviewing the facts and points submitted, "Judgment for the defendant."

O. H. Reighard,

Referee.

#### 15. Form of notice by referee.

To \_\_\_\_\_.

You are hereby notified that my report as referee in the above-

entitled case is now ready to be filed and that I will file the same in the office of the prothonotary on — day of — A. D., —, unless exceptions be filed thereto sooner, and you may have free access to the same, meantime.

Date, — — —.

\_\_\_\_\_,  
Referee.

#### 16. Exceptions to report.

Oliver Tool

v. } Court of common pleas of Lycoming County.  
Simon Yeager. } No. 211. March T., 1878.

Now, to-wit, February 4, 1879, the plaintiff, at his earliest opportunity, excepts to the report of the referee in this case for the following reasons:

[Set forth the exceptions.]

W. R. Bierly, P. Q.

#### 17. Reversal of report.

The referee, after careful consideration, is of opinion that he erred in his former decision in this case and finds [here follow his findings and reasons].

Therefore the referee finds and awards in favor of the plaintiff in the sum of \$53.17 and costs.

December 5, 1879.

O. H. Reighard,  
Referee.

#### 18. Exceptions by defendant.

January 3, 1880, counsel for the defendant in this case files the following exceptions to the report of the referee:

[Here follow the exceptions.]

Henry W. Watson, P. D.

#### 19. Order overruling exceptions.

February 28, 1880, the several exceptions filed January 3, 1880, by Henry W. Watson, Esq., counsel for the defendant, to the findings of law and fact by the referee are hereby overruled, and it is ordered that judgment be entered in favor of the plaintiff in the sum of fifty-three dollars and seventeen cents (\$53.17) and costs.

O. H. Reighard,  
Referee.

## CHAPTER VI.

### COSTS AND FEES IN THE FEDERAL COURTS

- |                                  |                                   |
|----------------------------------|-----------------------------------|
| 1. Costs at the common law.      | 7. Costs determined by amount re- |
| 2. Costs in certain proceedings. | covered.                          |
| 3. Liability for costs.          | 8. Security for costs.            |
| 4. Costs in case of dismissal.   | 9. Costs and fees allowable.      |
| 5. Payment out of fund.          | 10. Counsel fees.                 |
| 6. Tender and costs.             |                                   |

#### 1. Costs at the common law.

At the common law no costs were allowed either party in the suit, but by statute of Gloucester, 6th Edward the Confessor, ch. 1, costs were allowed where the plaintiff recovered damages. So costs are only taxable where the law allows them and to the amount fixed by law.<sup>1</sup>

At the common law the state was not liable for costs, and therefore it is not liable in any case unless fixed by statute.<sup>2</sup> It is competent for the legislature to declare when and what costs may be given the successful party,<sup>3</sup> and that costs shall follow suit.<sup>4</sup>

#### 2. Costs in certain proceedings.

So it has been held that where the proceeding is *in rem*, costs may be taxed against the proceeds, though no personal liability follows as to the defendant.<sup>5</sup>

In a writ of dower judgment was given for the demandant, without damages or costs,<sup>6</sup> but a referee's report in ejectment, finding costs without damages was sustained in accord with usages of practice.<sup>7</sup>

If the action has abated no costs follow.<sup>8</sup>

Where costs are allowed they follow in all the suits against several defendants, severally liable, though but one recovery may be had.<sup>9</sup>

#### 3. Liability for costs.

Where costs follow suit, as against several defendants, each is

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<sup>1</sup>Day v. Woodworth, 13 Howard, 363; Lowe v. Kansas, 163 U. S. 85; U. S. v. Ringgold, 8 Peters, 150; Antoni v. Greenhow, 107 U. S. 769-781; Robert's Digest, 107.

<sup>2</sup>U. S. v. Gaines, 131 U. S. 220; dismissed without costs.

<sup>3</sup>Lowe v. Kansas, 163 U. S. 81.

<sup>4</sup>Kendall v. U. S., 12 Peters, 524; Lewis v. Hawkins, 23 Wallace, 119.

<sup>5</sup>Freeman v. Alderson, 119 U. S. 185.

<sup>6</sup>Sharp v. Pettit, 4 Dallas, 212.

<sup>7</sup>Austin v. Snow, 2 Dallas, 157.

<sup>8</sup>McCullough v. Virginia, 172 U. S. 102.

<sup>9</sup>Tarin v. Morris, 2 Dallas, 115.

liable for all the costs and there is no apportionment in action at law, though in equity the court may control this.<sup>10</sup>

Where the U. S. brings suit the defendants will be liable for costs when judgment goes against them, but the reporter's fee for transcript is not taxable;<sup>11</sup> but a judgment against the U. S. did not carry costs<sup>12</sup> prior to the act of Congress of 1887, but under that the court may award costs of witnesses and for subpoenaing same and the fees of the clerk.<sup>13</sup> In a suit against an officer of the U. S. to compel him to do a duty, costs may be awarded.<sup>14</sup> But where one holds funds as an officer, the costs of suit to recover them, as in escheat, where there was no delinquency, must be paid out of the fund itself.<sup>15</sup>

#### 4. Costs in case of dismissal.

Where a suit is dismissed for want of jurisdiction, no costs are taxable.<sup>16</sup> The same is true of a bill dismissed before decree,<sup>17</sup> but where the plaintiff receives the interest sought, costs may follow dismissal of his bill.<sup>18</sup>

#### 5. Payment out of fund.

As a general rule, costs will not be allowed out of a fund in the U. S. courts,<sup>19</sup> nor attorneys' fees,<sup>20</sup> but in exceptional cases, where the fund recovered is due to the exertions of the attorney, the court, in its discretion, may allow his compensation;<sup>21</sup> and under special circumstances.<sup>22</sup> So, also, on an interpleader, the plaintiffs are generally awarded their costs out of the fund;<sup>23</sup> and on a libel of a vessel.<sup>24</sup> But in a suit against an administrator who has wrongfully converted the estate, he is not entitled to his costs out of the fund.<sup>25</sup>

#### 6. Tender and costs.

To stop accruing of costs when a tender is made, such tender must

<sup>10</sup> *Kittredge v. Race*, 92 U. S. 116; *DuBois v. Kirk*, 158 U. S. 67.

<sup>11</sup> *Co. v. U. S.*, 186 U. S. 279.

<sup>12</sup> *U. S. v. Verdier*, 164 U. S. 213; *Stanley v. Schwalby*, 162 U. S. 255; *U. S. v. McLemore*, 4 Howard, 286; *U. S. v. Boyd*, 5 Howard, 29; *Reeside v. Walker*, 11 Howard, 272.

<sup>13</sup> *U. S. v. Harmon*, 147 U. S. 268.

<sup>14</sup> *McBride v. Schurz*, 102 U. S. 378, 407; *Lewis v. Boutwell*, 17 Wallace, 604.

<sup>15</sup> *Hauenstein v. Lynham*, 100 U. S. 483.

<sup>16</sup> *Hornthall v. Keary*, 9 Wallace, 560; *Smith v. Whitney*, 116 U. S. 167; *Co. v. Swan*, 111 U. S. 387; *Co. v. Brock*, 139 U. S. 219; *Nashville v. Cooper*, 6 Wallace, 247.

<sup>17</sup> *Peirsoll v. Elliott*, 6 Peters, 95; *Morris v. U. S.*, 174 U. S. 245.

<sup>18</sup> *Rhodes v. Farmer*, 17 Howard, 464.

<sup>19</sup> *Bank v. Whitney*, 103 U. S. 99.

<sup>20</sup> *Hauenstein v. Lynham*, 100 U. S. 483.

<sup>21</sup> *Harrison v. Perea*, 168 U. S. 311.

<sup>22</sup> *Cowdrey v. Co.*, 93 U. S. 352; *Trustees v. Greenough*, 105 U. S. 527.

<sup>23</sup> *Spring v. Ins. Co.*, 8 Wheaton, 268.

<sup>24</sup> *Post v. Jones*, 19 Howard, 150.

<sup>25</sup> *Harrison v. Perea*, 168 U. S. 311.

be kept good.<sup>26</sup> The costs must be calculated up to the time of payment or tender.<sup>27</sup>

Such offer must be made in court<sup>28</sup> and the court asked to act thereon, with notice to the opposite party.

#### 7. Costs determined by amount recovered.

In the common pleas where the amount sued for was over £10, and the amount recovered was reduced by set-off below £10 under the act of March 1, 1745, the plaintiff was entitled to his costs.<sup>29</sup> The same is true in the U. S. circuit court where the recovery is for a sum less than the jurisdictional amount.<sup>30</sup> In foreign attachment the garnishee is not liable unless more be recovered than he admitted due in his answer.<sup>31</sup>

#### 8. Security for costs.

Security for costs may be required at anytime as against a non-resident plaintiff, unless the trial be delayed thereby.<sup>32</sup> The U. S. is not required to give the bonds required by a state code.<sup>33</sup>

#### 9. Costs and fees allowable.

Plaintiffs may be allowed a reasonable amount for preserving the property attached.<sup>34</sup> The U. S. is entitled to have taxed as costs the necessary expenses of clerks of a department required to attend court.<sup>35</sup> Disbursements for briefs of counsel are not taxable in mandamus,<sup>36</sup> but a docket fee and costs of printing objections are. Nor expense of copying records.<sup>37</sup> Nor agency and traveling expenses of an *ex parte* commission, but the attendance and swearing of a witness is proper.<sup>38</sup> The fees and compensation of U. S. marshals are payable out of the treasury and are not taxable as costs.<sup>39</sup>

#### 10. Counsel fees.

Counsel fees in admiralty are limited to those allowed by act of Feb'y 26, 1853, \$20 on a recovery of \$50 or more and \$10 on recovery of less than \$50.<sup>40</sup> But under the anti-trust act of July 2, 1890, the court has power to fix a reasonable fee for a successful plaintiff, though it may seem to be a large one.<sup>41</sup>

<sup>26</sup> Bissell v. Heyward, 96 U. S. 580.

<sup>27</sup> U. S. v. Goldback, 102 U. S. 623.

<sup>28</sup> Twp. v. Halsey, 117 U. S. 336.

<sup>29</sup> Brailey v. Miller, 2 Dallas, 74; Cooper v. Coats, 1 Dallas, 308; Bunner v. Neil, 1 Dallas, 457.

<sup>30</sup> Green v. Litter, 8 Cranch, 229; R. Co. v. Ellis, 165 U. S. 166, on attorney's fee, declaring Texas statute unconstitutional.

<sup>31</sup> Walker v. Wallace, 2 Dallas, 113.

<sup>32</sup> Shaw v. Wallace, 2 Dallas, 179.

<sup>33</sup> U. S. v. Bryant, 111 U. S. 499.

<sup>34</sup> Burns v. Rosenstein, 135 U. S. 449.

<sup>35</sup> U. S. v. Sanborn, 135 U. S. 271; Co. v. U. S., 186 U. S. 296.

<sup>36</sup> In re Hughes, 114 U. S. 548.

<sup>37</sup> Caldwell v. Jackson, 7 Cranch, 276.

<sup>38</sup> Lynch v. Wood, 1 Dallas, 310.

<sup>39</sup> The Antelope, 12 Wheaton, 546.

<sup>40</sup> The Baltimore, 8 Wallace, 377; Tullock v. Mulvane, 184 U. S. 511.

<sup>41</sup> Co. v. Lowry, 193 U. S. 38.



Counsel fees are allowable the Cherokee Nation under the acts of July 1, 1902, and March 3, 1903, giving it a standing in court.<sup>42</sup>

But attorneys' fees are not allowable under a foreclosure of a mortgage in which the attorney is personally interested.<sup>43</sup>

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<sup>42</sup> U. S. v. Cherokee Nation, 202 U. S. 598.

<sup>43</sup> Groves v. Sentall, 153 U. S. 465.

## CHAPTER VII.

### COSTS IN THE STATE COURTS

1. Right to costs.
2. British statutes in force.
3. Costs when limited by damages.
4. Costs where one joint defendant is acquitted.
5. Costs defined — what costs are.
6. What costs are not.
7. Costs when due.
8. Costs on reversal.
9. Attorney's fees as costs.
10. Liability of plaintiff for costs.
11. Costs when suit is for \$100 or less — affidavit.
12. Costs when claim has been reduced.
13. Time of filing affidavit.
14. Where an affidavit is not required.
15. Tender of payment and costs.
16. Tender after suit — rules in Allegheny county.
17. Settlement — costs on.
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19. Interest on costs.
20. Security for costs — rule for.
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22. Form of affidavit.
23. Form of præcipe for rule.
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25. Rule in Philadelphia.
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28. Who may require security.
29. Time of application.
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67. Penalty for taking illegal fees.
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69. Extortion — penalty for.
70. Suits for fees in Lycoming and other counties.
71. Effect of service.
72. Suit before or after judgment.
73. Execution.
74. Certificate of prothonotary as evidence.
75. Costs on amendment.
76. Costs in subjects. treated in vol. 1.

### 1. Right to costs.

Costs of suit are the creature of statute. At the common law no costs were allowed the successful litigant.<sup>1</sup> By the statute of 6 Edward I, ch. 1, it was provided that "the demandant may recover against the tenant the costs of his writ purchased, together with the damages aforesaid. And this act shall hold place in all cases where the party is to recover damages." This act has been held to be in force in Pennsylvania;<sup>2</sup> and embraces all legal costs of suit,<sup>3</sup> and not incidental expenses, counsel fees, etc.;<sup>4</sup> nor stenographer's fees on *ex parte* depositions for plaintiff on a rule to open judgment;<sup>5</sup> nor fees of a clerk for copy of judgment, in another state as basis of a suit in this state.<sup>6b</sup>

### 2. British statutes in force.

By statute 3, Henry 7, ch. 10, 1486, the plaintiff was given costs in error, where defendant took a writ for delay, by discretion of the justice. And by 19 Henry 7, ch. 20, 1503, when defendant was nonsuited in error, plaintiff was allowed his costs.<sup>5</sup>

The statute of 11th Henry 7, ch. 12 (1494), provided writs in *forma pauperis*, without cost to plaintiff, he being a poor person, and also free counsel.<sup>6</sup>

By act of 23 Henry 8, ch. 15, 1531, the defendant was allowed costs where the plaintiff in any action was nonsuited, except he be a poor person authorized to sue without cost.<sup>7</sup>

By 8 Elizabeth, ch. 2, 1565, costs were allowed defendants arrested by *capias*, or attached, etc., where plaintiff failed to declare within three days, or where his suit was discontinued or nonsuited.<sup>8</sup>

The act of 4 James 1, ch. 3, 1606, gave defendant costs in actions of trespass, ejectment and other actions both real and personal where plaintiff was nonsuited or had a verdict given against him.<sup>9</sup> And by act 13 Charles 2, stat. 2, ch. 2, 1661, it was provided that where any one was arrested for trespass or trespass *quare*

<sup>1</sup> *Musser v. Good*, 11 S. & R. 250; *Maus v. Maus*, 10 Watts, 88; *Comth. v. Johnson*, 5 S. & R. 199; *Hoffman v. Slossan*, 2 W. & S. 36; *Stewart v. Baldwin*, 1 P. & W. 461; *Schick's Case*, 1 Pearson, 266; *Uhl v. Scholtz*, 4 Law Times (N. S.), 14; *Shaw v. Irwin*, 25 Pa. 347; *Steele v. Lineberger*, 72 Pa. 240; *School Dist.*, 23 C. C. 510.

<sup>2</sup> *Robert's Dig.*, p. 107; *Beardsley v. Honesdale, Etc., Co.*, 5 Clark, 306; *Ruth v. Edelman*, 2 Leg. Gaz. 125; *Small v. Arnhold*, 17 Phila. 256; *Maxwell v. Boro*, 7 D. R. 523; *Bennage v. Union County*, 22 C. C. 342; *Scott v. Boro*, 23 C. C. 114; *Savage v. McHale*, 8 D. R. 560; *Black's Ap.*, 106 Pa. 344.

<sup>3</sup> *Tappan v. Co.*, 2 Clark, 436.

<sup>4</sup> *Lyon v. Wood*, 1 Dallas, 310; *Alexander v. Herr*, 11 Pa. 537; *Winston's Ap.*, 87 Pa. 77; *Smith v. Equitable Trust Co. (No. 1)*, 215 Pa. 413.

<sup>5a</sup> *Adair v. Decker*, 17 D. R. 614.

<sup>6b</sup> *Stilwell v. Smith*, 17 D. R. 502.

<sup>7</sup> *Roberts' Digest*, 108-10.

<sup>8</sup> *Roberts' Digest*, 116.

<sup>9</sup> *Roberts' Digest*, 121. See as to liability of legal representatives, *Muntorf v. Muntorf*, 2 Rawle, 180; *Penrose v. Pawling*, 8 W. & S. 380; *Shaw v. Conway*, 7 Pa. 136; *Callender v. Ins. Co.*, 23 Pa. 472.

<sup>8</sup> *Roberts' Digest*, 126.

<sup>9</sup> *Roberts' Digest*, 129.

*clausum fregit*, and similar writs, and held to bail, the plaintiff might be nonsuited for want of a bill or declaration after appearance and before the end of the term following, with costs.<sup>10</sup>

### 3. Costs when limited by damages.

The act of 22 and 23 Chas. 2, ch. 9, 1670, provides that "in all actions of trespass, assault and battery, and other personal actions wherein the judge, at the trial of the cause, shall not find and certify under his hand upon the back of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount to; and if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit and recover his damages and costs of his suit, in any of the said courts of record."<sup>11</sup>

This act has been held to apply particularly to assault and battery and to trespass *quare clausum fregit*, from the character of the certificate required. It is also held that the certificate of the judge is in time if made before final judgment.<sup>12</sup> The "forty shillings" required by the statute are equivalent in Pennsylvania to \$5.33 1-3.

In trespass *quare clausum fregit* where the jury found specially for plaintiff "six cents damages and all costs of suit," it was held that the jury are not restricted by the act and may give full costs, but the court must give such certificate where the jury do not find costs.<sup>13</sup>

### 4. Costs where one joint defendant is acquitted.

The statute of 8 and 9, William 3, ch. 11, 1697, allows one or more joint defendants in trespass, assault, false imprisonment or *ejectione firmæ*, his costs on acquittal.<sup>14</sup>

The statutes are not strictly construed, as in England, where costs were originally adjudged as a penalty, but our courts consider them as compensatory.<sup>15</sup> As a general rule costs follow the verdict.<sup>16</sup> But no costs can be allowed at law, without statutory provision.<sup>17</sup> In chancery, courts are guided by a reasonable discretion.<sup>18</sup>

<sup>10</sup> Roberts' Digest, 134. See our acts of assembly as to pleadings, vol. 1, and see each form of action, vol. 2.

<sup>11</sup> Roberts' Digest, 138; Winger v. Rife, 101 Pa. 160.

<sup>12</sup> Simonds v. Barton, 76 Pa. 434.

<sup>13</sup> Hinds v. Knox, 4 S. & R. 417. The same rule applies in slander; Lewis v. England, 4 Binney, 5. See Williams v. Glenn, 2 P. & W. 137, which went by default and is erroneous. See also as to auditors and referees; Cornogg v. Cornogg, 1 Yeates, 252; Stuart v. Harkins, 3 Binney, 321; Wilkinson v. Grey, 14 S. & R. 345; Refowich v. Rice, 4 Penny, 449; Gower v. Clayton, 6 S. & R. 85; Moon v. Long, 12 Pa. 207.

<sup>14</sup> Roberts' Digest, 139.

<sup>15</sup> Steele v. Lineberger, 72 Pa. 239.

<sup>16</sup> Herbert v. Williamson, 1 Wilson, 324.

<sup>17</sup> Stewart v. Baldwin, 1 P. & W. 461; Strein v. Ziegler, 2 S. & R. 290; Irwin v. County, 1 S. & R. 509; Brosman v. Co., 3 Haz. Pa. Register, 146.

<sup>18</sup> Winton's Ap., 87 Pa. 77.

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On a feigned issue certified from the orphans' court costs may be taxed after verdict without an order to pay costs.<sup>18a</sup>

The rule is that the winning party is entitled to costs when they follow suit and the burden is on the losing party to show otherwise.<sup>18b</sup>

Where the plaintiff strikes off the name of one defendant, without objection, such defendant is not entitled to costs;<sup>19</sup> or when the suit fails as to one.<sup>20</sup> Where there are defendants severally sued and liable each is liable, but for single costs.<sup>21</sup>

Where defendants sever on trial a defendant against whom witnesses have not been called is not liable for their fees;<sup>22</sup> and where several actions are brought by the same plaintiff and one action decides as to all, but one charge for witnesses is legal.<sup>23</sup> If *nol pros.* be entered against some the others are not liable for service as to the former.<sup>24</sup> Where one defendant has the case opened and loses, he alone is liable for such costs as follow.<sup>25</sup>

On a *sci. fa. sur.* judgment where some plead *nul tiel record* and are sustained, they are entitled to costs;<sup>26</sup> but as to terre-tenants who plead independently, and are sustained, costs are not awarded.<sup>27</sup> Where there are distinct issues and plaintiff recovers on one, costs are confined to that one.<sup>28</sup> Costs may be awarded although the sum due was attached.<sup>29</sup>

##### 5. Costs defined — what costs are.

"Costs" which are taxable and must be paid by the loser, have been held to be not only the legal fees of the officers for services rendered, according to the fee bill, but also the charges for subpoenaing witnesses who were called and examined in the cause, as well as their fees and mileage as provided by law;<sup>1</sup> and this applies to witnesses sworn before commissioners.<sup>2</sup> It was held in one case that where judgment went for defendant the costs of defendants' witnesses were still properly taxed although plaintiff had volunteered to pay some of them;<sup>3</sup> and that the legal costs are taxable nathless a private settlement between plaintiff and his witness.<sup>4</sup> The costs of witnesses may be taxed, although the names were inserted in the subpoena after issu-

<sup>18a</sup> Shortlidge v. Walker, 10 Del. Co. 244.

<sup>18b</sup> Aubrey v. Greensburg Natl. Gas Co., 32 C. C. 431.

<sup>19</sup> Hotchkiss v. Harvey, 25 C. C. 80.

<sup>20</sup> Chesebrough v. Krupp, 17 W. N. C. 476; Ramsdell v. Owens, 12 C. C. 416.

<sup>21</sup> Tarin v. Morris, 2 Dallas, 115.

<sup>22</sup> Urich v. Forney, 1 Pearson, 91.

<sup>23</sup> Curtis v. Buzzard, 15 S. & R. 21.

<sup>24</sup> Guie v. Ash, 1 Chester Co., 400.

<sup>25</sup> Wyant v. Wyant, 2 Luz. L. R. 30.

<sup>26</sup> Steele v. Lineberger, 72 Pa. 239.

<sup>27</sup> Maus v. Maus, 10 Watts, 87.

<sup>28</sup> Bank v. Winder, 3 Clark, 223.

<sup>29</sup> Dean v. Rockwell, 2 Luz. L. Obs. 187.

<sup>1</sup> R. Co. v. Keiffer, 22 Pa. 356; Ranck v. Hill, 3 Pa. 423.

<sup>2</sup> Lynch v. Wood, 1 Dallas, 310; Tappan v. Co., 2 Clark, 436; Flemming v. Co., 4 Pa. 475; Delong v. R. Co., 1 Woodward, 195.

<sup>3</sup> Prescott v. Otterstatter, 85 Pa. 534.

<sup>4</sup> Triebel v. Deysher, 2 Woodward, 55.

ance.<sup>5</sup> The cost of service of a subpoena by plaintiff is taxable;<sup>6</sup> though an exception has been made in Philadelphia, without any apparent reason.<sup>7</sup> One though not a party or an officer, who serves subpoenas may have the costs of service taxed.<sup>8</sup> The fee for the oath annexed to the bill of costs is properly taxable;<sup>9</sup> and a garnishee is entitled to have taxed as costs, the expense of a printed answer to plaintiff's bill of discovery.<sup>10</sup>

In an amicable suit or voluntary arbitration the parties may agree that the award shall carry costs;<sup>11</sup> and in compulsory arbitration they may agree as to such expenses as are not fixed by statute.<sup>12</sup> The expense of a certificate in bankruptcy, to sustain plaintiff's cause has been held taxable.<sup>13</sup> Where the Supreme court affirmed a judgment with costs, it includes the expense of the return of the record for purpose of execution.<sup>14</sup>

#### 6. What costs are not.

"Costs" do not include plaintiff's trouble and expense in prosecuting suit in general;<sup>15</sup> nor the attorney's commission for collection, which must be made part of the judgment to hold real estate;<sup>16</sup> so costs cannot be taxed for exemplifications of deeds or other office papers, used on the trial;<sup>17</sup> or rejected;<sup>18</sup> nor a bill to perpetuate testimony;<sup>19</sup> nor expenses, such as agents or counsel fees;<sup>20</sup> even on a bond given in attachment under act of 1869, which provides for payment of "all legal costs, fees and damages."<sup>21</sup> The costs accruing before a nonsuit which is afterwards taken off, are not taxable in plaintiff's bill. They fall with the nonsuit.<sup>22</sup> In a sheriff's interpleader, the sheriff's costs of keeping the property before the issue made up, have been held not taxable to claimant.<sup>23</sup>

But section 14 of the act of 1897, provides that "in all issues framed under this act all the costs of the proceedings shall follow the judgment and be paid by the losing party as in other cases."

<sup>5</sup> *McWilliams v. Hopkins*, 1 Wharton, 275.

<sup>6</sup> *Carroll v. Petry*, 15 W. N. C. 416; *Patterson v. Anderson*, 16 W. N. C. 526; *Cody v. Clelam*, 1 C. C. 8; *Kepner v. Miller*, 1 Chest. Co. 369; *Horner v. Harrington*, 6 Watts, 331.

<sup>7</sup> *Bonnell v. Lance*, 17 W. N. C. 476.

<sup>8</sup> *Triebel v. Deysher*, 2 Woodward, 55.

<sup>9</sup> *De Haven v. Merath*, 7 C. C. 388.

<sup>10</sup> *Mills v. McLoughlin*, 27 W. N. C. 573.

<sup>11</sup> *Lindsay v. McConnell*, 11 W. N. C. 173; *Butcher v. Scott*, 1 Clark, 311.

<sup>12</sup> *Schneider v. Coal Co.*, 98 Pa. 470.

<sup>13</sup> *Schamo v. Ziegler*, 1 Leg. Rec. 119.

<sup>14</sup> *Hamilton v. Aslin*, 3 Watts, 222; *Bollinger v. Gallagher*, 18 C. C. 438.

<sup>15</sup> *Alexander v. Herr*, 11 Pa. 537; *Good v. Mylin*, 8 Pa. 51.

<sup>16</sup> *Miller v. Miller*, 147 Pa. 548.

<sup>17</sup> *Murphy v. Lloyd*, 3 Wharton, 356; *Christmas v. Biddle*, 1 Phila. 68.

<sup>18</sup> *Leeds v. Loud*, 2 Miles, 189.

<sup>19</sup> *McWilliams v. Hopkins*, 1 Wharton, 275.

<sup>20</sup> *Lynch v. Wood*, 1 Dallas, 310; *Winton's Ap.*, 87 Pa. 77; *Stark's Ap.*, 128 Pa. 545; *Callaghan v. Oldmixon*, 11 D. R. 13.

<sup>21</sup> *Comth. v. Meyer*, 170 Pa. 380; *Potter v. English*, 1 Phila. 85.

<sup>22</sup> *Hartley v. Lee*, 6 W. N. C. 560.

<sup>23</sup> *Landis v. Bear*, 2 Lanc. L. R. 41; *Miles v. Huber*, 1 Clark, 483; *Deal v. Tower*, 1 Phila. 268.

Where a cause is continued at costs of defendant, plaintiff cannot claim fees for notifying his witnesses not to attend.<sup>24</sup> But where a case was dismissed for want of jurisdiction of the cause of action the defendant has nevertheless been allowed his costs.<sup>25</sup> The plaintiff could discontinue without costs to defendant,<sup>26</sup> but if he sustained a nonsuit defendant could take out an execution for costs.<sup>27</sup> "A judgment *non obstante veredicto* carries costs regardless of the reasons which induced it."<sup>28</sup>

#### 7. Costs when due.

Costs cannot be collected by execution until there is a final judgment although liability attaches before;<sup>29</sup> so where there is a reversal with a *venire facias de novo*, costs are not due;<sup>30</sup> but a final decree of the Supreme court as to costs binds the lower court.<sup>31</sup>

When there is a final judgment it is not competent for the legislature to pass a law divesting costs.<sup>32</sup>

#### 8. Costs on reversal.

Where a judgment of a justice of the peace has been reversed on *certiorari* the plaintiff in error cannot have costs, since the act of March 20, 1810 (5 Sm. L. 161), only awards costs where the plaintiff does not, on a second trial recover an equally or more favorable judgment below;<sup>33</sup> nor is a defendant entitled to execution on reversal.<sup>34</sup> The same rule obtains on reversal of the Common Pleas without a *ven. fac. de novo*.<sup>35</sup> There must be an order of restitution.<sup>36</sup> Where the supreme court makes no order on a new *venire*, as to costs, they abide the event of the suit.<sup>37</sup> Costs of paper books are now taxable (see vol. 1.)

The successful party has been held to be entitled to all the costs where the court ordered the costs of the appeal to be paid by the appellees.<sup>38</sup>

#### 9. Attorney's fees as costs.

The attorney's fee of three dollars taxable as costs must be paid by the defendant, after final judgment;<sup>39</sup> notwithstanding sec-

<sup>24</sup> Ranck v. Brackbill, 13 D. R. 304.

<sup>25</sup> McDonald v. Jones, 11 D. R. 675.

<sup>26</sup> Summy v. Hiestand, 65 Pa. 300.

<sup>27</sup> Potts v. Steel Co., 44 W. N. C. 548.

<sup>28</sup> Reed, J., in McDonald v. Jones, 11 D. R. 675.

<sup>29</sup> Hinckley v. Reifsnnyder, 15 W. N. C. 175.

<sup>30</sup> Wright v. Small, 5 Binney, 204.

<sup>31</sup> Jane's Ap., 87 Pa. 428.

<sup>32</sup> Bechtol v. Cobaugh, 10 S. & R. 121; Grim v. School Dist., 57 Pa. 433.

<sup>33</sup> Hartman v. Bechtel, 1 Woodward, 140; Stewart v. Baldwin, 1 P. & W. 461.

<sup>34</sup> Alexander v. Figley, 2 D. R. 167; Leone v. Hammond, 41 Pitts. L. J. 368.

<sup>35</sup> Smith v. Sharp, 5 Watts, 292; Frackville Boro, 2 Leg. Rec. R. 328.

<sup>36</sup> Proper v. Campbell, 12 D. R. 203.

<sup>37</sup> Herr v. Keemer, 2 Del. Co. 192.

<sup>38</sup> Kraut v. Fox, 1 W. N. C. 401.

<sup>39</sup> Congregation v. Van Reed, 1 Woodward, 78.

tion 5 of the act of March 21, 1806 (4 Sm. L. 326).<sup>40</sup> The defendant's attorney is entitled to the fee in each of several suits when but one is tried on a joint and several bond and the verdict is for the defendant.<sup>41</sup> The fee is due on an unappealed award of arbitrators;<sup>42</sup> but not when an appeal is taken.<sup>43</sup> An attorney's fee is not taxable on a transcript of a judgment from a justice of the peace;<sup>44</sup> nor on confession for less than \$100;<sup>45</sup> nor on an issue to try the validity of a judgment;<sup>46</sup> nor in the supreme court where the judgment was satisfied before the return day of the writ of error;<sup>47</sup> nor upon an attachment execution, where no interrogatories were filed and no judgment was taken against garnishee.<sup>48</sup>

#### 10. Liability of plaintiff for costs.

Primarily the plaintiff is liable for the costs of his suit. The act of April 23, 1829, P. L. 355, was intended to make the equitable plaintiff liable for the costs where there is a general finding and judgment for costs in favor of the defendant; and he becomes liable whether named in the suit originally or not, when his name is suggested upon the record.<sup>49</sup> His status is determined by his interest in the thing in controversy, when suit is brought;<sup>50</sup> or if subsequently acquired.<sup>51</sup> If necessary the court will ascertain who is the actual plaintiff.<sup>52</sup> He who holds the equity is the real party.<sup>53</sup> An agent who discloses his principal is not liable;<sup>54</sup> but a stakeholder may be held liable if he prolongs the litigation.<sup>55</sup> An interest acquired after suit brought and divested before the trial fixes no liability.<sup>56</sup> The promise of an equitable plaintiff to pay costs is binding.<sup>57</sup> An active agent in the bringing of a suit may be held liable for witness fees.<sup>58</sup> The practice is to suggest the name of the real party and have him added to the record and issue a *fi. fa.* for costs against him.<sup>59</sup>

<sup>40</sup> *Ins. Co. v. Gilpin*, 1 Binney, 501; *Kemp v. Kemp*, 1 Woodward, 189. (See vol. 1, p. 278, pars. 53-4-5.)

<sup>41</sup> *Bank v. Haldeman*, 3 Clark, 167.

<sup>42</sup> *Butcher v. Scott*, 1 Clark, 311; *McCulla v. Oppler*, 1 Pearson, 150.

<sup>43</sup> *Bank v. Greider*, 5 Lanc. Bar, No. 1; *Schooley v. Turner*, 3 Kulp, 150; *Sharpless v. Creamery*, 1 C. C. 42; *Drake v. Parker*, 1 C. C. 675.

<sup>44</sup> *Farley v. Wright*, 18 W. N. C. 481; *Larkins v. Coffee*, 10 W. N. C. 537.

<sup>45</sup> Act May 5, 1876, P. L. 112; *Stranghellen v. Ward*, 13 W. N. C. 111.

<sup>46</sup> *Swiler v. Casey*, 1 Pearson, 126.

<sup>47</sup> *Bank v. Greider*, 5 Lanc. Bar, No. 1.

<sup>48</sup> *Hoover v. Landis*, 10 Lanc. Bar, 15.

<sup>49</sup> *Ritter v. Gundrum*, 3 Am. L. J. 63; *Camp v. Assn.* 8 D. R. 198.

<sup>50</sup> *Gallagher v. Milligan*, 3 P. & W. 177.

<sup>51</sup> *Gambers v. Robinson*, 1 Pearson, 67.

<sup>52</sup> *Armstrong v. Lancaster*, 5 Watts, 68.

<sup>53</sup> *Congregation v. Bank*, 5 Pa. 345; *Tomb's Ap.*, 9 Pa. 61.

<sup>54</sup> *Baird v. Sharrow*, 12 D. R. 21.

<sup>55</sup> *Haney v. Home, Etc., Soc.*, 8 D. R. 123.

<sup>56</sup> *Orphans' Court v. Woodburn*, 7 W. & S. 162.

<sup>57</sup> *Brewer v. Hayes*, 2 Watts, 12.

<sup>58</sup> *Utt v. Long*, 6 W. & S. 174.

<sup>59</sup> *Miller v. Lint*, 36 Pa. 447; *Canby v. Ridgway*, 1 Binney, 496; *Steele v. Ins. Co.*, 3 Binney, 306.



A judgment for defendant warrants an execution against either the legal or the equitable plaintiff;<sup>60</sup> unless the legal plaintiff has no interest in the suit.<sup>61</sup>

### 11. Costs when suit is for \$100 or less — affidavit.

The act of March 20, 1810, 5 Sm. L. 161, provides that where a judgment is recovered in the Common Pleas, on a contract whereof a justice of the peace has jurisdiction, the plaintiff cannot have costs if he recovers judgment for \$100 or less, unless when he brought the suit he filed an affidavit that he truly believes that the debt or damages, liquidated or unliquidated, exceed the sum of one hundred dollars, which was then the limit in amount, of a justice's jurisdiction.<sup>62</sup> This rule is unaffected by the act enlarging the jurisdiction of justices to \$300, nor by the act of May 25, 1887, P. L. 271, in regard to statements under it.<sup>63</sup>

An affidavit is required though the contract be under seal;<sup>1</sup> or the suit be for breach of warranty as to personality;<sup>2</sup> or by assignee of ground rent against assignee of the ground;<sup>3</sup> or in an action in form trespass, but in substance contract;<sup>4</sup> or if begun by foreign attachment, the test being whether a justice had jurisdiction of cognizance.<sup>5</sup> It is also required where a part of the claim was within the cognizance of a justice of the peace.<sup>6</sup>

#### *Form of Affidavit of Amount Claimed.*

Charles Tod	} In the court of common pleas of Washington County.	
v.		
Thomas Wad.		No. — Term, 19—.

Washington County, ss.

Charles Tod, the plaintiff above named, deposes and says that he truly believes that the damages in the above entitled case exceed the sum of \$100.

Charles Tod.

Sworn to, etc.

### 12. Costs when claim has been reduced.

The affidavit is necessary where the claim has been brought within

<sup>60</sup> Gifford v. Gifford, 27 Pa. 202; Kinley v. Donnelly, 6 Phila. 120.

<sup>61</sup> Horlacher v. Gernert, 11 C. C. 410; Coffey v. White, 14 W. N. C. 108; Wistar v. Walker, 2 Browne, 166.

<sup>62</sup> Stewart v. Mitchell, 13 S. & R. 287; Hale v. Ard, 48 Pa. 22; Zacharias v. Stoudt, 1 Woodward, 402; Sharpless v. Hibberd, 2 Del. Co. 254; Beaver v. Whitman, 2 Northam. 24; Deffenback v. Carr, 1 D. R. 129; McCafferty v. Crew, 153 Pa. 311; Lukens v. Ferguson, 21 W. N. C. 271.

<sup>63</sup> Steen v. Smucker, 24 W. N. C. 304; Buchen v. Gitt, 10 York, 163; Maloney v. Murphy, 173 Pa. 395; Rupert v. Rittenhouse, 8 D. R. 483; Alwine v. Turney, 24 C. C. 464; Bell v. Bell, 32 Pa. 309; Parrott v. Thompson, 19 W. N. C. 548; Pratt v. Darlington, 7 Del. Co. 510.

<sup>1</sup> Jones v. Jones, 3 Northam. 190; Buckley v. Quinn, 8 Lack. Jur. 1.

<sup>2</sup> Sneively v. Weidman, 1 S. & R. 417; Landis v. Powell, 2 Lanc. Bar, No. 49.

<sup>3</sup> Louer v. Hummel, 21 Pa. 450.

<sup>4</sup> Green v. Patterson, 3 Sup. C. 354.

<sup>5</sup> Randall v. Day, 17 C. C. 429.

<sup>6</sup> Levan v. Potteiger, 2 Woodward, 37; Minnich v. Lawall, 6 Kulp, 487.

the \$100 limit by payments before suit brought;<sup>7</sup> or by the act of the plaintiff, as where he re-let the premises and received payments from the new tenant.<sup>8</sup> But where the reduction occurs after the commencement, the affidavit is unnecessary to recover costs;<sup>9</sup> nor where the claim is reduced by set-off;<sup>10</sup> neither will a plaintiff be allowed to bring his claim within the jurisdiction of a justice by allowing a set-off or counter-demand for that purpose.<sup>11</sup> It seems set-off must be pleaded or notice of special matter, in order to carry costs for plaintiff where judgment is \$100 or less, and no affidavit is filed.<sup>12</sup> If the suit is compromised to bring it under the limit and no mention is made of costs, the judgment carries no costs.<sup>13</sup> But where the recovery was more than \$100 and the plaintiff released below at the suggestion of the court, costs are allowed.<sup>14</sup>

### 13. Time of filing affidavit.

The affidavit required must be filed at or before the suing out of the writ. The proper practice is to file it with the *præcipe*. It cannot be embraced in the statement of claim filed later under act of 1887.<sup>15</sup> The proper form is that the plaintiff "does truly believe the debt due or the damages sustained" exceed the sum of one hundred dollars. It is insufficient to say that "his claim and demand exceeds \$100."<sup>16</sup>

### 14. Where an affidavit is not required.

The necessity for such affidavit does not arise in an action of trespass *quare clausum fregit*;<sup>17</sup> nor in case for damages for unskillful workmanship, being substantially tort and not contract;<sup>18</sup> nor damages arising under a contract for sale of land;<sup>19</sup> nor trover and conversion, the act of March 22, 1814, 6 Sm. L. 182, conferring jurisdiction upon justices not having been contemplated by the act of 1810;<sup>20</sup> nor where plaintiff joined breach of warranty (of which

<sup>7</sup> Kreiter v. Burkholder, 5 Lanc. Bar, No. 50; Groff v. Ressler, 27 Pa. 71; Horrigan v. Ins. Co., 37 Leg. Int. 166; Cooper v. Coats, 1 Dallas, 308; Bunner v. Neil, 1 Dallas, 457; Wilcox v. Hutchinson, 4 Luz. L. Reg. 267.

<sup>8</sup> Graban v. Hirshfield, 20 Phila. 242.

<sup>9</sup> Samuel v. Scott, 7 W. N. C. 438.

<sup>10</sup> Spear v. Jamieson, 2 S. & R. 530; Sadler v. Slobaugh, 3 S. & R. 388; Grant v. Wallace, 16 S. & R. 253; Bartram v. McKee, 1 Watts, 39; Manning v. Eaton, 7 Watts, 346; Odell v. Culbert, 9 W. & S. 66; Barry v. Mervine, 4 Pa. 330; Reber v. Long, 1 Woodward, 284; Foltz v. Gockley, 3 Lanc. Bar, No. 21; Lazarus v. George, 3 Luz. L. R. 143; Shirley v. Entricken, 3 W. N. C. 51; Brailey v. Miller, 2 Dallas, 74; Kitchen v. Locher, 15 Lanc. L. R. 69; Minnich v. Minnich, 33 Pa. 378.

<sup>11</sup> Stroh v. Ubrich, 1 W. & S. 57.

<sup>12</sup> Rogers v. Ratcliff, 23 Pa. 184; Iron Co. v. Rhule, 53 Pa. 93; Hager v. Delb, 1 Woodward, 383.

<sup>13</sup> Bliss v. Becker, 1 Woodward, 481.

<sup>14</sup> Nelson v. Orr, 29 Pitts. L. J. 383.

<sup>15</sup> Maloney v. Murphy, 173 Pa. 395.

<sup>16</sup> Kelley v. Co., 86 Pa. 466; Custard v. Krause, 2 Northam. 251; Rickabaugh v. Beck, 1 Del. Co. 320.

<sup>17</sup> Clark v. McKisson, 6 S. & R. 87; Moyer v. Illig, 52 Pa. 444.

<sup>18</sup> Zell v. Arnold, 2 P. & W. 292.

<sup>19</sup> O'Neill v. McKick, 21 W. N. C. 496.

<sup>20</sup> Richards v. Gage, 1 Ashmead, 192; Devers v. Gething, 3 Luz. L. R. 24.

a justice has cognizance) with deceit (of which he has not);<sup>21</sup> nor of any form of suit not within the cognizance of a justice,<sup>22</sup> such as account render,<sup>23</sup> or where a city sues for costs of repaving.<sup>24</sup> When the verdict is for over \$100, the court will not set aside costs because the jury made up the amount in excess with an allowance of interest.<sup>25</sup>

#### 15. Tender of payment and costs.

Where the defendant has tendered a sum before suit, and paid it into court for the plaintiff, he is entitled to costs unless the plaintiff recovers a larger sum.<sup>26</sup> The money paid into court is the plaintiff's and if he proceed with the action and loses he shall pay costs, but he may lift the money paid in with leave of court.<sup>27</sup> The tender need not include the fees of the prothonotary for taking care of the money.<sup>28</sup> An averment of tender before suit brought stops costs, although plaintiff take judgment for want of a sufficient affidavit of defense.<sup>29</sup> A tender, though not pleaded nor paid into court may constitute a good equitable defense, and stop costs.<sup>30</sup> The court may impound a tender in court, until defendant's costs are paid by plaintiff.<sup>31</sup>

#### 16. Tender after suit — Rules in Allegheny County.

A tender after suit brought is regulated by act of March 12, 1867, P. L. 35, and to be legal and complete, must be for the full amount admitted to be due and all lawful costs incurred in the suit up to the time when it is made. If the plaintiff recovers no greater amount than thus tendered the defendant shall have all costs accruing thereafter.<sup>32</sup> A tender without including the costs to date is insufficient.<sup>33</sup> On a plea of set-off, a tender of the balance, with costs to date, is good.<sup>34</sup>

To make the tender available to recover costs, the defendant must pay the money into court.<sup>35</sup> On a tender before suit the money may be paid into court without a rule.<sup>36</sup>

<sup>21</sup> *Cauffman v. Baird*, 3 Foster, 9.

<sup>22</sup> *Williams v. Glenn*, 2 P. & W. 137.

<sup>23</sup> *Steffen v. Hartzell*, 5 Wharton, 448.

<sup>24</sup> *Pittsburg v. Daly*, 5 Supr. C. 528.

<sup>25</sup> *Knecht v. Freyman*, 86 Pa. 333.

<sup>26</sup> *Wheeler v. Woodward*, 66 Pa. 158; *Beaver v. Whitely*, 3 C. C. 613; *Pennypacker v. Umberger*, 22 Pa. 492; *Davis, Etc., Co. v. Phoenix, Etc., Co.*, 17 D. R. 889; *Steffe v. Fix*, 3 Schuylkill Co., 188; 3 C. R. A., cols. 535-6.

<sup>27</sup> *Cornell v. Green*, 10 S. & R. 14.

<sup>28</sup> *Beaver v. Whitely*, 3 C. C. 613.

<sup>29</sup> *Ins. Co. v. Ins. Co.*, 2 Pearson, 289; *McNicholl v. Ins. Co.*, 32 W. N. C. 472.

<sup>30</sup> *McConnel v. Hall*, 3 P. & W. 53.

<sup>31</sup> *Jenkins v. Cutchens*, 2 Miles, 65; *Sharpless v. Dobbins*, 1 Del. Co. 25.

<sup>32</sup> *Miller v. Plymire*, 1 Walker, 233. (See *Heckman v. Schmeck*, 35 Supr. C. 397.)

<sup>33</sup> *Horan v. Flanagan*, 3 Del. Co. 426; *George v. Sunday*, 1 Woodward, 364; *Aas'n v. Cardwell*, 1 Del. Co. 333; *Parker v. Martin*, 3 Pitts. 166.

<sup>34</sup> *Sharpless v. Dobbins*, 1 Del. Co. 25.

<sup>35</sup> *Harvey v. Hackley*, 6 Watts, 264; *Berkheimer v. Geise*, 82 Pa. 64; *Heavmer v. Tilli*, 19 Montg. 13; *Geller v. Freed*, 19 Montg. 212.

Rule 68, Allegheny County, is as follows:

"If the defendant in his affidavit admit a certain sum to be due and offer to confess judgment for the same, which is not accepted by the plaintiff, defendant shall be entitled to recover costs subsequently accruing, unless the plaintiff recovers a greater sum than the amount offered."

Rule 34, Allegheny County, provides:

"At anytime before the hearing of the cause the defendant may bring into court such sum or sums of money as he may admit to be due, together with the costs accrued to that time, which the opposite party may accept or refuse; and if he refuse, he shall pay all subsequent costs unless he recovers a sum greater than that already tendered."

#### 17. Settlement — Costs on.

Payment into court after suit brought is equivalent to tender and costs then due must be included.<sup>37</sup> The payment of the debt entitles the plaintiff to costs.<sup>38</sup> In case a suit is marked settled and discontinued, the defendant cannot have judgment for costs.<sup>39</sup> Where parties settle and make no provision for costs, each party pays his own costs.<sup>40</sup> On a *sci. fa. sur.* mechanic's lien, payment of debt and interest by defendant before plea or demurrer, the plaintiff takes no costs.<sup>41</sup>

#### 18. Costs in split suits.

Where the plaintiff might have consolidated his claims into one suit in the Common Pleas, but splits them into several so as to bring them before a justice of the peace, he shall be allowed costs in but one.<sup>42</sup> However, where suits were brought before a justice on six separate notes, on appeal the court consolidated all in one judgment, with costs, allowing the justice costs in but one suit.<sup>43</sup>

#### 19. Interest on costs.

Interest on costs is not allowable<sup>44</sup> except where a party has paid them, and then only as for money expended;<sup>45</sup> or where included as a part of the judgment.<sup>46</sup>

<sup>36</sup> Stokes v. Harrison, 2 W. N. C. 382.

<sup>37</sup> Summerson v. Hicks, 142 Pa. 344; Bracey v. Coal Co., 7 D. R. 310; Ferguson v. Cooper, 2 W. N. C. 16.

<sup>38</sup> Wagner v. Wagner, 9 Pa. 214.

<sup>39</sup> Posten v. Mead, 3 Lanc. L. R. 3.

<sup>40</sup> Schleufer's Est., 13 Phila. 348.

<sup>41</sup> McCoy v. Loughery, 2 W. N. C. 521; Stat. 8 & 9; William 3rd, c. 11. See *supra*.

<sup>42</sup> Bank v. Ballard, 7 W. & S. 434; Moneghan v. Twp., 2 Luz. L. R. 145; Batdorff v. Eckert, 3 Pa. 267.

<sup>43</sup> Boyle v. Grant, 18 Pa. 162; Ballinger v. Killam, 10 W. N. C. 372.

<sup>44</sup> Parrott v. Thompson, 19 W. N. C. 548.

<sup>45</sup> McCausland v. Bell, 9 S. & R. 388; Rogers v. Burns, 27 Pa. 525; Miller v. Hottenstein, 1 Woodward, 236; Baum v. Reed, 74 Pa. 320; Galbraith v. Walker, 95 Pa. 481.

<sup>46</sup> Wetherill v. Stillman, 65 Pa. 105.

## 20. Security for costs — Rule for.

A rule of court which provides for security for costs by a resident for the special reason assigned that the plaintiff is without means to satisfy the costs, conflicts with section 11, article 1, of the constitution, as it would be a practical denial of justice to one too poor to pay the costs.<sup>47</sup> A rule requiring security after affidavit of defense filed has no application to an action for libel, no affidavit of defense being required in actions *ex delicto*.<sup>48</sup> But a non-resident plaintiff may be ruled to give security for costs in form *ex delicto* as well as *ex contractu*;<sup>49</sup> and this applies to one who was a former resident;<sup>50</sup> and to a foreign corporation though it complied with the act of 1874, as to a resident agent;<sup>51</sup> also, to a foreign executor.<sup>52</sup> This rule does not conflict with section 2, article 4, of the Federal constitution as to "privileges and immunities of citizens in the several states."<sup>53</sup> This security may be required on an issue certified to the Common Pleas from the Orphans' court;<sup>54</sup> and where the defendant is also a non-resident.<sup>55</sup>

## 21. Rules of court.

This matter is properly regulated by rules of court, upon a formal application by affidavit;<sup>56</sup> which should aver that plaintiff was a non-resident when process issued, or is now.<sup>57</sup> Such security may be required in equity as well,<sup>58</sup> and no rule of court is necessary;<sup>59</sup> though in the Orphans' court it has been held otherwise.<sup>60</sup> When non-residence is shown, the rule for security will issue.<sup>61</sup>

## 22. Form of affidavit.

Marion Collins	} In the court of common pleas of Beaver County.	
v.		
Edan Hollingsworth.	No. —	Term, 19—.

Beaver County, ss.

Edan Hollingsworth, above named defendant, being sworn, says that Marion Collins, the plaintiff above named, was a non-resident

<sup>47</sup> Schade v. Luppert, 17 C. C. 460; under rule in Lycoming County; Lutz v. Heasley, 12 D. R., under rule in Clarion county. (See Jack v. McClure, 26 C. C. 59; Staley v. Oller, 28 Pitts. L. J. 131.)

<sup>48</sup> Schade v. Luppert, 17 C. C. 460; McFarland v. Brown, 11 S. & R. 121.

<sup>49</sup> Stewart v. Co., 39 W. N. C. 68.

<sup>50</sup> Thomas v. Gibbons, 25 C. C. 28.

<sup>51</sup> Mott Iron Works v. Faith, 23 C. C. 665.

<sup>52</sup> McPherson v. Blair, 10 D. R. 492.

<sup>53</sup> Kilmer v. Groome, 6 D. R. 540.

<sup>54</sup> Kaul v. McCort, 14 Lanc. Bar, 50.

<sup>55</sup> Muir v. Lewis, 10 D. R. 639. (But see Broat v. Knight, 10 D. R. 140, Wayne County.)

<sup>56</sup> Sheridan v. Cassidy, 1 W. N. C. 134; Ellison v. Co., 19 W. N. C. 131.

<sup>57</sup> Frost v. Earnest, sec. 741, Troubat & H. Pr. (Fish Ed.). (See McGarry v. Crispin, 3 Clark, 25.)

<sup>58</sup> Tyndall's Est., 6 W. N. C. 562.

<sup>59</sup> Freeman v. Refowich, 20 C. C. 15.

<sup>60</sup> Buckwalter's Est., 6 C. C. 20.

<sup>61</sup> Fisher v. Evans, 1 Browne, 256.

of the Commonwealth of Pennsylvania on the day when the summons [or writ] issued in this case, to-wit: On the 18th day of March, 1910 — and still is a non-resident of this commonwealth, and owns no real estate in Beaver County, and that he has a just defense to the whole of plaintiff's demand in this case.

Edan Hollingsworth.

Sworn to, etc.

[Averments above may be varied to meet the rule of court, in each jurisdiction.]

### 23. Form of præcipe for rule.

Marion Collins	} In the court of common pleas of Beaver County.	
v.		
Edan Hollingsworth.	} No. —	Term, 19—.
To — — — Esq.		

Prothonotary,

Issue rule on plaintiff, to enter security for costs in this action, within — days after notice, affidavit herewith filed.

D. F. Funkhouser,  
Attorney for defendant.

The time is regulated by rule of court.

The rule issues, of course, and is served as any other rule and may be answered and traversed — when it goes on the argument list.

### 24. Rule in Lycoming County.

Rule 54 in Lycoming County, provides:

"Where the plaintiff resides out of the state, the defendant, at any time before plea filed, upon filing affidavit of the fact of such non-residence and that he has a just defense against the whole demand, may have a rule on plaintiff, of course, to enter security for costs within thirty days after notice to the plaintiff or his attorney of record, and in the meantime proceedings shall be stayed. Upon proof of default filed, the prothonotary shall enter judgment of nonsuit."

[Compare your rule of court.]

### 25. Rule in Philadelphia.

Section 1 of rule 14, Phila., provides:

"In cases where the plaintiff resides out of the state at the time of suit brought, or subsequently removes therefrom, in *qui tam* actions, in suits on administration or office bonds, or where the plaintiff, after suit brought has taken the benefit of the insolvent laws, the defendant, on filing an affidavit of defense in actions in which an affidavit of defense is required, and in other actions, on filing an affidavit of a just defense against the whole of the plaintiff's demand, may enter a rule for security for costs; and in default of security being entered at the time named by the court, judgment of nonsuit may be entered by the prothonotary."

Under this rule it has been held that the rule for security must be taken before the cause is at issue and on the trial list.<sup>61a</sup>

<sup>61a</sup> *Mason v. Frick*, 12 W. N. C. 570; *Smart v. Chamberlin*, 26 W. N. C. 272.

**26. Rule in Allegheny County.**

Rule 66, Allegheny County, provides:

"In cases where the plaintiff resides out of the state, the defendant, upon filing a sufficient affidavit of defense, may have a rule, of course, on him to enter security for costs within thirty days after notice, and in the meantime proceedings shall be stayed; and upon proof of default filed, the prothonotary shall enter judgment of nonsuit.

"In all other cases, the defendant, after filing an affidavit of defense to the merits, may, for special reasons assigned and supported by affidavit, obtain a rule on the plaintiff to show cause why he should not give security for costs, and upon the hearing of the rule the court may make such order as the special circumstances of the case may seem to require."<sup>61b</sup>

**27. Non-residents who must give security.**

A plaintiff who was a resident of the state when the action was commenced, but has since removed, must give security.<sup>62</sup> One who has a legal residence beyond the state and is a mere sojourner here comes within the rule.<sup>63</sup> The fact that one owns a free-hold here does not excuse him.<sup>64</sup> A disclosed principal whose suit was brought in the name of his resident agent must give security, when a non-resident;<sup>65</sup> but not a use plaintiff, where the resident principal makes himself liable.<sup>66</sup> A non-resident claimant in a sheriff's interpleader must give security,<sup>67</sup> but it seems an execution creditor who is made defendant need not.<sup>68</sup> If there be one of several plaintiffs a resident, security will not be exacted on account of the non-residence of the others.<sup>69</sup>

The rule to give security applies to a garnishee in an attachment execution where the plaintiff is a non-resident<sup>70</sup> but not to claimants in interpleader under an execution,<sup>71</sup> unless a rule of court, as in Montgomery County, is broad enough to cover them.<sup>72</sup> This rule may be granted in the absence of a rule of court, if applied for at the earliest opportunity.<sup>73</sup>

To sustain an att.-ex. on an exemplified judgment for debt, in-

<sup>61b</sup> *Rubber Co. v. Small*, 3 Supr. C. 8; *Stewart v. Light Co.*, 39 W. N. C. 68; *Terriberry v. Broude*, 173 Pa. 48.

<sup>62</sup> *Sharp v. Buffington*, 2 W. & S. 454; *Raese v. Barry*, 1 W. N. C. 20; *Buck v. James*, 2 Lanc. L. R. 120.

<sup>63</sup> *Hansen v. Ackley*, 2 W. N. C. 569; *McCalley v. Moore*, 14 C. C. 37; *Appleton v. Ruth*, 15 W. N. C. 127.

<sup>64</sup> *Dalton v. Bateson*, 12 C. C. 544.

<sup>65</sup> *Pollock v. Ingram*, 5 D. R. 700.

<sup>66</sup> *Black v. Moltby*, 26 W. N. C. 97.

<sup>67</sup> *Spicer v. Sellers*, 1 T. & H. Pr., sec. 929.

<sup>68</sup> *Co. v. Gerhard*, 7 W. N. C. 51; *Smith v. Stoddart*, 8 W. N. C. 407; *Co. v. Granley*, 11 W. N. C. 255; *Palmer v. Cole*, 3 Kulp, 55; *Linton v. Pollock*, 5 C. C. 243.

<sup>69</sup> *Zimmerman v. Mendenhall*, 2 Miles, 402; *Rea's Est.*, 12 W. N. C. 306.

<sup>70</sup> *Valley Natl. Bank v. Mylin*, 25 Lanc. L. R. 326.

<sup>71</sup> *Pratt v. Phila., Etc., Co.*, 10 Del. Co. 553.

<sup>72</sup> *Schiller v. Cohen*, 24 Montg. Co. 30.

<sup>73</sup> *Sandman v. Ellis*, 3 Schuylkill Co. 40.

terest and costs, the exemplification must contain a copy of the bill of costs or record of taxation. A second exemplification and attachment against the same garnishees is equivalent to an abandonment of the first.<sup>14</sup>

### 28. Who may require security.

A garnishee in an attachment may require security from a non-resident plaintiff.<sup>1</sup> It has been held that even a non-resident defendant may require security under the rule,<sup>2</sup> but in another case the rule was discharged because defendant did not aver that he had a just defense to the whole of plaintiff's claim.<sup>3</sup> The rule has been granted where defendant averred a defense to only a part of plaintiff's claim.<sup>4</sup>

### 29. Time of application.

The application for a rule may be made although the statement has not yet been filed.<sup>5</sup> It is not too late on an appeal from a justice of the peace in the Common Pleas;<sup>6</sup> or after the cause has been put on the trial list;<sup>7</sup> or where the case was at issue but not on the trial list;<sup>8</sup> or after a jury has disagreed.<sup>9</sup> But in one case it was held to be too late after plea and the placing of the cause on the trial list.<sup>10</sup>

The courts have held the defendant to reasonable diligence in making this application;<sup>11</sup> so that the cause may not be delayed by the laches of a party.<sup>12</sup> What constitutes undue delay in the defendant is largely in the discretion of the court under the various rulings here cited.

Where the case was continued on motion of the plaintiff, the defendant was held not to be dilatory;<sup>13</sup> also where he took the rule after a rule to plead;<sup>14</sup> and after a continuance,<sup>15</sup> and after plea.<sup>16</sup> The rule is too late after judgment.<sup>17</sup> The real test seems

<sup>14</sup> Potts v. Potts, 27 C. C. 540.

<sup>1</sup> Wallace v. Williams, 9 C. C. 14.

<sup>2</sup> Stewart v. Co., 39 W. N. C. 68.

<sup>3</sup> Tyler v. Bannon, 30 W. N. C. 392; Heller v. Dreifuss, 34 W. N. C. 83.

<sup>4</sup> Murphy v. Hall, 1 Lack. Jur. 184.

<sup>5</sup> Ellison v. Co., 19 W. N. C. 131.

<sup>6</sup> Franklin v. Seitz, 15 York, 121; (but see Farmer's, Etc., Co. v. Harshbarger, 25 C. C. 456).

<sup>7</sup> Shaw v. Wallis, 1 Yeates, 176; Hallahan v. Murray, 3 W. N. C. 44; Rathbone v. Stetson, 4 W. N. C. 55.

<sup>8</sup> Dupanquet v. Brodhead, 1 Northam. 48.

<sup>9</sup> Knoll v. Tr. Co., 42 W. N. C. 232.

<sup>10</sup> Lutz v. Heasley, 12 D. R. 139.

<sup>11</sup> Lange v. Berkemeyer, 7 Northam. 385.

<sup>12</sup> McGarry v. Crispin, 3 Clark, 25; Bogardus v. Williams, 1 C. C. 673; Draper v. Hagar, 13 Lanc. L. R. 341; Frantz v. Dehart, 1 C. C. 4; Southmayd v. Henderson, 13 W. N. C. 78; Fuchs v. Wright, 6 W. N. C. 157; Bickford v. Ice Co., 8 W. N. C. 106; Voss v. Sensenig, 3 D. R. 633; Mason v. Frick, 12 W. N. C. 570; Smart v. Chamberlain, 26 W. N. C. 272; Costello v. Binns, 2 Miles, 86; Co. v. Lowenstein, 4 Kulp, 359.

<sup>13</sup> Hickok v. Park Assn., 14 W. N. C. 12.

<sup>14</sup> Hass v. R. Co., 5 Lanc. L. R. 253.

<sup>15</sup> Kirk v. Horn, 13 W. N. C. 281.

<sup>16</sup> Michael v. Forsythe, 2 Chester Co. 32.

<sup>17</sup> Co. v. McClintock, 11 Montg. 212; Firestone v. Christ, 2 C. C. 413;



to be that the application is made in good faith and with reasonable diligence and that there is a meritorious defense set up. The form, under the rules of court, may be "a just" or "a good" defense.<sup>18</sup> Under the Lancaster County rules a rule was discharged because premature, no statement or affidavit of defense having been filed, on an appeal from a *sci. fa.* to revive judgment before a justice after twenty years.<sup>19</sup> Under the Luzerne County rule, it was held that defendant must prove his service of the rule on the plaintiff or his attorney and that the facts averred must be proven.<sup>20</sup> The rule suspends proceedings until the return day, even if security be entered before.<sup>21</sup> Where a rule to plead had been entered, the rule for security merely suspends the former, and no new rule to plead is required.<sup>22</sup>

### 30. Nonsuit for failure to give security.

When the plaintiff fails to give security as ordered, he will suffer a nonsuit;<sup>23</sup> but if the affidavit of defense in the case is adjudged insufficient, the nonsuit will be set aside;<sup>24</sup> or, if no nonsuit has been entered, the rule made absolute may be revoked by the court.<sup>25</sup>

### 31. Form of security.

The security should be given in the regular form of recognizance, an informal entry that one becomes surety for costs in the case being insufficient as evidence.<sup>26</sup> Having once given security the plaintiff cannot be again required to enter security in that case.<sup>27</sup>

### 32. Bill of costs — Rule in Philadelphia.

A bill of costs, whether filed by the plaintiff or the defendant, should have the title of the case and the respective items of legal costs, or it may be excepted to and reformed;<sup>28</sup> and it should be sworn to by the party, his attorney or someone who shows that he has knowledge of the facts.<sup>29</sup> In Philadelphia, by section 2 of rule 14, the bill must be verified by the party filing it, or his attorney.<sup>30</sup> The rule is as follows:

"Bills of costs for attendance of witnesses at terms when a cause is either continued or tried, must be filed and a copy thereof served

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*Applegate v. R. Co.*, 12 W. N. C. 406; *Pub'g House v. Valentine*, 3 D. R. 242; *Barker v. Johnson*, 2 C. C. 414; *Dodge v. Chessman*, 10 Supr. C. 604.

<sup>18</sup> *Sheridan v. Cassidy*, 1 W. N. C. 134.

<sup>19</sup> *Mf'g Co. v. Templeton*, 13 Lanc. L. R. 243.

<sup>20</sup> *Flannery v. Silvius*, 4 Kulp, 500.

<sup>21</sup> *Haardt v. Wright*, 9 Del. Co. 399.

<sup>22</sup> *Am. Mf'g Co. v. S. M. Smith Co.*, 25 Supr. C. 176.

<sup>23</sup> *Fouse v. Carrick*, 5 W. N. C. 168.

<sup>24</sup> *Terriberry v. Broude*, 173 Pa. 48.

<sup>25</sup> *Rubber Co. v. Small*, 3 Supr. C. 8.

<sup>26</sup> *Ayres v. Sweigart*, 6 Watts, 191.

<sup>27</sup> *Kelley v. Barrett*, 4 Kulp, 94.

<sup>28</sup> *Baumgardner v. Shoff*, 1 Lanc. L. R. 57; *Simmons v. Miller Co.*, 13 Lanc. L. R. 59.

<sup>29</sup> *Hartley v. Weideman*, 28 Supr. C. 50; *Triebel v. Deysher*, 2 Woodward, 55.

<sup>30</sup> *McGerrin v. Wanamaker*, 10 D. R. 725; *Flisher v. Allen*, 141 Pa. 525.

### 33. Form of bill and affidavit.

.....day of.....  
A. D. 19—.

<sup>23</sup> *Rodgers v. Black*, 15 Supr. C. 498.

matter and so is the determination of who shall pay them.<sup>34</sup> The mere fact that costs have not been taxed, without averring error, is insufficient to stay an execution.<sup>35</sup>

### 35. Rule of court in Philadelphia.

Section 3, rule 14, Philadelphia, provides:

"All bills of costs shall be taxed by the prothonotary (if taxation is required) subject to an appeal to the court: *Provided*, That the party appealing shall within four days after the taxation, file a specification of the items to which he excepts, and the ground of his exceptions, otherwise the appeal shall be dismissed, and the costs awarded according to the taxation of the prothonotary. A copy of the exceptions must be served on the opposite party."

### 36. Rule when jury reduces plaintiff's judgment.

Section 4, rule 14, Philadelphia, provides:

"Whenever, after an appeal by the defendant, the amount recovered by the plaintiff is reduced by the jury, no writ of execution shall issue (except by agreement of the parties) until the costs have been taxed under section 2 of this rule."

### 37. Notice of taxation, after payment.

Section 5, of rule 14, Philadelphia, provides:

"When bills of costs are paid to and stopped in the hands of the prothonotary for taxation, either party may have the same taxed, on forty-eight hours' notice to the opposite party or his attorney."

Section 6. Any party intending to tax costs before the prothonotary, shall give him and the opposite party forty-eight hours' notice of such intention. The time to be fixed for such taxation shall be between two and three o'clock P. M."

### 38. Taxation of mileage.

Section 7, of rule 14, Philadelphia, provides:

"Mileage shall not be allowed to jurors or witnesses unless they come to the court by modes of travel other than the street passenger railway companies: *Provided*, That no more mileage shall be allowed than for the miles traveled, according to the act of May 19, 1887."

[Compare your rules.]

The rule in Philadelphia has been held to apply to a *capias ad respondendum*.<sup>36</sup>

### 39. Taxation in Allegheny County.

Rule 69, Allegheny County, provides (D. R. C. 56):

"All costs and fees shall be taxed in the first instance by the prothonotary, subject to an appeal to the court at anytime before the money is made and paid over: *Provided*, That the appellant shall file a specification of the items to which he objects and the

<sup>34</sup> Persch v. Quiggle, 57 Pa. 247; Hartman v. Wallach, 13 Lanc. L. R. 119.

<sup>35</sup> Irwin v. Hess, 12 Supr. C. 163; Smith v. McKee, 52 Pitts. L. J. 232.

<sup>36</sup> Becker v. Goldschild, 9 Supr. C. 50.

grounds of his objection; but no such appeal shall stay proceedings without a special order of court on sufficient cause shown; and when the money is made or paid pending the appeal, the amount in dispute shall remain in the officer's hands, or be paid into court to abide the event."

#### 40. Notice.

Rule 67, Allegheny County, provides:

"When a bill of costs exceeds twenty dollars, twenty-four hours' notice of the time of taxing the same shall be given to the opposite party or his attorney."

#### 41. Costs of taking depositions in Allegheny.

Rule 70, Allegheny County, provides:

"The actual expenses of taking depositions, either on rule of court or commission, shall be taxed and allowed as costs; but the amount shall not exceed twenty dollars in any case, unless specially allowed by the court for sufficient cause shown."

#### 42. Form of demand for taxation.

Mary Shoelock	}	In the court of common pleas of Lawrence County.
v. Carl Fehr.		
		No. ———
		Term, 19—.

To ——— Esq.,

Prothonotary: Defendant in above entitled action hereby demands a formal taxation of costs by you, on due notice *sec. reg.*

Richard Callahan, P. D.

Date ———

#### 43. Form of notice.

Mary Shoelock	}	In the court of common pleas of Lawrence County.
v. Carl Fehr.		
		No. ———
		Term, 19—.

Please take notice that the costs in this suit will be taxed by the prothonotary at his office on the ——— day of ——— A. D., 19—, at ——— o'clock ——— M., when you may attend if you see fit.

Richard Callahan, P. D.

To ——— [plaintiff, or his attorney of record].

#### 44. Necessity for taxation.

Unless a demand be made on the prothonotary for taxation, a formal taxation is not required before execution will issue. The prothonotary, as a matter of practice, enters upon the docket all fees fixed by law and the bills filed by the parties, subject to the demand of the parties for taxation. But an execution will issue without it,<sup>37</sup> and the party aggrieved may apply to have the costs taxed or retaxed, failing in which the appellate court will not reverse except for apparent error.<sup>38</sup>

<sup>37</sup> Hart v. Dickerson, 1 T. & H. Pr., sec. 947.

<sup>38</sup> McGibbeny v. Gas Co., 130 Pa. 193; Harger v. Commrs., 12 Pa. 251. Vol. 2 Practice—7

Where a bill is in dispute, the proper course is to take a rule for the prothonotary to tax the costs and serve it on the adversary.<sup>39</sup> A notice to the prothonotary not to pay over the costs is insufficient.<sup>40</sup> After bill filed the parties cannot alter it without taxation and exception.<sup>41</sup> That the costs have been duly taxed must be proven by the prothonotary's certificate.<sup>42</sup> In an action upon a bond for costs the taxation of the costs cannot be assailed.<sup>43</sup> It has been held that the costs may be taxed after a return of the record from the Supreme court.<sup>44</sup>

#### 45. Appeal from taxation.

Objection to a taxation cannot be raised by exception alone, but there must be an appeal to the court, averring specific and not general error.<sup>45</sup> Upon appeal the question is upon error alleged in the taxation; <sup>46</sup> but the court will also take cognizance of the larger question whether any costs were legally due or not and to whom, by the same power it has to control executions upon judgments.<sup>47</sup> The court will judge of the correctness of the taxation from the evidence offered before him alone.<sup>48</sup> Where a rule of court fixes the manner of taking exception, it must be followed.<sup>49</sup> The court may correct the taxation.<sup>50</sup> Exceptions must be taken within the time fixed by rule or the court.<sup>51</sup>

#### 46. Form of exceptions.

Mary Shoelock	} In the court of common pleas of Lawrence County.
v.	
Carl Fehr.	No. —, —Term — 19—.

Now, to-wit, — day of — 19—, Mary Shoelock, by her attorney, excepts to the taxation of costs in this case, by the prothonotary, on the following grounds:

First. Because the prothonotary failed to tax as costs [here set forth particularly the matters complained of], etc., and appeals thereon from said taxation to the court of Common Pleas of said county.

*Affidavit.*

Lawrence County ss.

Mary Shoelock, being duly sworn, says that the above exceptions are just and true to the best of her knowledge and belief.

Sworn to, etc.

Mary Shoelock.

<sup>39</sup> Kauffman v. Oatman, 4 Lanc. Bar, No. 38.

<sup>40</sup> Duffie v. Black, 1 Pa. 388.

<sup>41</sup> Guest v. Co., 6 D. R. 594.

<sup>42</sup> Kauffman v. Oatman, 4 Lanc. Bar, No. 38.

<sup>43</sup> Tomson v. Junkin, 18 W. N. C. 126.

<sup>44</sup> Miskey's Ap., 18 W. N. C. 100.

<sup>45</sup> Raisley v. Morgan, 1 Lack. L. N. 395.

<sup>46</sup> Yeagley v. Wenger, 5 Luz. L. R. 119.

<sup>47</sup> Ballinger v. Killam, 10 W. N. C. 372.

<sup>48</sup> Baumgardner v. Shoff, 1 Lanc. L. R. 57.

<sup>49</sup> Koser v. Bitner, 4 Lanc. Bar, No. 38; McDonald v. Co., 8 C. C. 460.

<sup>50</sup> Roth v. Steffe, 9 Lanc. Bar, 77.

<sup>51</sup> Comth. v. Selznick, 20 C. C. 128.

E. N. Reed } Court of common pleas of Armstrong County.  
v. }  
J. O. Crane. } No. 171, March Term, 1908.

### ***Specifications.***

[Names and amounts.]

Calvin Rayburn,

#### 48. Form of order of court.

By the court.

*Prima facie* the affidavit to the correctness of a bill is taken as being true;<sup>52</sup> therefore the burden of proof is upon the expectant;<sup>53</sup> unless notice is given the party that the bill or items are disputed.<sup>54</sup> That the witnesses attended may be proved by the oath of the one who subpoenaed them.<sup>55</sup> The filing of a bill raises no presumption that they were paid by the party, although they may demand their fees and mileage in advance.<sup>56</sup>

Exceptions cannot be made in the appellate court,<sup>57</sup> and as a general rule it will not review the adjudication in the court below;<sup>58</sup> but it may examine into the legality and will reverse where a bill or items are not legal.<sup>59</sup> The extent of liability will not be examined in the

<sup>50</sup> *Barnet v. Thrie*, 1 Rawle, 44; *Grubb's Ap.*, 82 Pa. 23.

appellate court.<sup>60</sup> An appeal will not lie where the supreme court has previously affirmed the cause.<sup>61</sup>

When an appeal is sustained and the prothonotary directed to retax the costs, an appeal to the Superior court will not lie until after such retaxation.<sup>61a</sup>

### 51. Compelling payment of costs.

Since the abolition of imprisonment for simple contract debts by the act of July 12, 1842, P. L. 339, costs may not be collected by attachment in such cases;<sup>62</sup> though the remedy still remains in proceedings to enforce a trust;<sup>64</sup> and it may issue against a married woman for failure to pay thirty shillings costs as ordered, on abatement of her *capias* against a freeholder, under act of March 20, 1724, 1 Sm. L. 164.<sup>63</sup>

In actions of tort, when judgment is for the plaintiff, he may have an attachment for costs against the defendant,<sup>66</sup> but if defendant wins, it seems he cannot attach the plaintiff.<sup>67</sup> An attachment will not lie for costs of continuance.<sup>68</sup> An exception has been made in case of costs of arbitration where an appeal is taken and all the costs taxed at the time are paid. The court has ordered the payment of other costs due at the time, to be enforced by attachment;<sup>69</sup> although an appeal could be taken *in forma pauperis* without payment of costs, under the English statute.

Mandamus will lie against a city to pay costs;<sup>70</sup> or a school district after judgment against it.<sup>71</sup>

### 52. Stay of proceedings until costs are paid.

Where there has been a former action, proceedings in a second suit will be stayed until the costs of the former are paid, as where plaintiff was nonsuited<sup>1</sup> or discontinued;<sup>2</sup> or where the writ was quashed before appearance;<sup>3</sup> or the party suing was a beneficial party in a former suit about the same cause of action;<sup>4</sup> or where the defendant in the

<sup>60</sup> Persch v. Quiggle, 57 Pa. 247.

<sup>61</sup> Gibson v. Cummings, 25 Pa. 231.

<sup>61a</sup> Klugh v. Penna. R. Co., 29 Supr. C. 583.

<sup>62</sup> Pierce's Ap., 103 Pa. 27; Lang v. Finch, 166 Pa. 255; Conway v. Judge, 11 Luz. L. R. 28; Peterson v. Geary, 3 C. C. 49.

<sup>64</sup> Church's Ap., 103 Pa. 263.

<sup>65</sup> Sonnon v. Mauss, 14 D. R. 607.

<sup>66</sup> Seldon v. Cozad, 13 C. C. 303.

<sup>67</sup> Meace v. Crump, 12 W. N. C. 534; Conway v. Judge, 2 Kulp, 24.

<sup>68</sup> Peterson v. Geary, 3 C. C. 49; Overpeck v. Sticker, 1 Northumb. Co. 138.

<sup>69</sup> Fraley v. Nelson, 5 S. & R. 234; Williams v. Hazlep, 14 Pa. 157; Flannery v. Wise, 2 Woodward, 431; Carr v. McGovern, 66 Pa. 457; Palmer v. Wilkinson, 73 Pa. 339.

<sup>70</sup> Hodges v. Scranton, 3 Law Times (N. S.), 77.

<sup>71</sup> Act May 8, 1854, P. L. 617; School Dist. v. Hill, 1 Walker, 400.

<sup>1</sup> Hurst v. Jones, 4 Dallas, 353; Gerety v. R. Co., 1 Foster, 300; Mullin v. Jackson, 2 Chester Co. 264; Barton v. Jones, 15 W. N. C. 568; Fleming v. Ins. Co., 4 Pa. 475.

<sup>2</sup> Jackson v. Thomson, 9 Montg. Co. 28.

<sup>3</sup> Arnsthal v. Fox, 13 W. N. C. 223.

<sup>4</sup> Newton v. Bewley, 1 Browne, 38; Gleim v. Reist, 3 Lanc. Bar, No. 40; Hartman v. Quay, 1 Chester Co. 542.

second suit is sued in a different capacity;<sup>5</sup> or where the plaintiff was one of the defendants in a former action of ejectment.<sup>6</sup> But it has been recently held that it is largely discretionary with the court whether or not a stay will be granted.<sup>7</sup>

### 53. Rule in Allegheny County.

Rule 2 of Allegheny County is as follows:

"Whenever an order shall be made in any cause staying proceedings by the plaintiff therein until the payment of costs in any previous action, it shall be the duty of the prothonotary, at any time after the expiration of one year from the making of such order, at the instance of any person interested, to enter judgment of *non pros.*, unless the person liable to pay such costs shall have previously filed written evidence of the fact of payment."

A stay may be allowed;<sup>8</sup> but a defendant who has appealed waives his right for a stay.<sup>9</sup> The principle is the same where the parties and cause of action are the same though the form may be varied;<sup>10</sup> or the suit be brought in another forum.<sup>11</sup> It is immaterial that no bill of costs was filed in the former suit,<sup>12</sup> or that application was made for stay before filing of statement.<sup>13</sup>

If the cause of action is not the same, the stay will not be allowed;<sup>14</sup> nor where the parties or interests are different;<sup>15</sup> nor where the Supreme court has reversed without a *venire de novo*, in such case each party being liable for his own costs.<sup>16</sup> A stay will not be granted unless there be an element of vexation;<sup>17</sup> or where the second suit is in equity and an order to stay would be an adjudication prejudicial to the cause;<sup>18</sup> or where the first action is non-suited on account of minority and the second is brought by guardian or next friend, the suit being not vexatious.<sup>19</sup> An execution cannot be stayed because the costs on an attachment were not paid before issuance of the *fi. fa.*<sup>20</sup>

An appellate court will not review the refusal of the rule to stay in the court below.<sup>21</sup>

<sup>5</sup> Zimmerman v. Kuebler, 9 C. C. 128; Reehling v. Writer, 3 York, 95.

<sup>6</sup> Altman v. Altman, 12 Pa. 246.

<sup>7</sup> Smith v. Smith, 15 Supr. C. 366.

<sup>8</sup> Miller v. Cramer, 5 Lack. Jur. 22.

<sup>9</sup> Long v. Caffrey, 2 Kulp, 374.

<sup>10</sup> Koons v. Patterson, 1 Phila. 288.

<sup>11</sup> Smith v. Urian, 11 W. N. C. 284; McDowell v. R. Co., 19 W. N. C. 568.

<sup>12</sup> Flemming v. Ins. Co., 4 Pa. 475.

<sup>13</sup> Stiles v. Woodruff, 1 Phila. 67.

<sup>14</sup> Helm v. Katerman, 2 Woodward, 433.

<sup>15</sup> Pusey v. Wickersham, 1 Chester Co. 147; Cornelius v. Vanarsdallen, 3 Pa. 434; Beck v. Clark, 1 W. N. C. 268.

<sup>16</sup> Schrader v. Schiffer, 5 Law Times (N. S.), 141.

<sup>17</sup> Cochran v. Perry, 2 Clark, 521.

<sup>18</sup> Rankin v. Thompson, 8 C. C. 201.

<sup>19</sup> Dehart v. Kerlin, 4 C. C. 396.

<sup>20</sup> Hamilton v. Dawson, 2 Clark, 357.

<sup>21</sup> Withers v. Haines, 2 Pa. 435.



#### 54. Exemption against costs.

Where an execution issues for costs against a plaintiff in an action of tort, he may still claim exemption of \$300.<sup>22</sup>

This does not apply to an action of ejectment, however.<sup>23</sup> But in a proceeding to remove a guardian, the latter may claim the exemption of the act of April 9, 1849, P. L. 533, as against an execution for the costs;<sup>24</sup> also against an order to pay master's fees in equity.<sup>24a</sup>

Where more than legal costs have been levied and collected, the plaintiff may be compelled on a rule to refund, even after the sheriff's distribution.<sup>25</sup> Where the costs are taxed in another state and the record properly certified, the courts of this state will not inquire into the merits of the taxation.<sup>26</sup>

#### 55. Fees as costs — Execution for.

The plaintiff is primarily liable to the officers for their fees;<sup>27</sup> but they may have an execution in the name of the plaintiff, for the costs due them.<sup>28</sup>

The plaintiff is liable to the prothonotary for his fees when they cannot be collected from the defendant;<sup>29</sup> and, although charged to his attorney;<sup>30</sup> but he cannot sue while the case is still pending;<sup>31</sup> this does not apply to a *scire facias*, however, after judgment;<sup>32</sup> where the sheriff collected the costs by execution, the prothonotary cannot fall back on the sheriff's bond for the attorney fee of plaintiff, which had not been paid.<sup>33</sup>

The prothonotary of the Supreme court must look to the plaintiff in error for his fees, and not to his attorney, unless he has become security for them; nor can he look to the recognizance.<sup>34</sup>

The prothonotary cannot issue execution against plaintiff for his fees, on affirmance; nor where there is a reversal and no *venire de novo*, can he have an execution for his fees in the lower court.<sup>35</sup> By a local act of assembly<sup>36</sup> the officers are authorized to bring suit against plaintiffs for their fees, though non-resident, and justices have jurisdiction to the limit fixed by law.<sup>37</sup>

<sup>22</sup> Lane v. Baker, 2 Grant, 424; Harting v. Grant, 2 Woodward, 127; Strohecker v. Buffington, 1 Pearson, 124.

<sup>23</sup> Danner v. Fritz, 2 Northam, 67.

<sup>24</sup> Taylor Minor's Est., 27 W. N. C. 316.

<sup>24a</sup> Bradley v. West Chester St. R., 160 Pa. 72.

<sup>25</sup> Harris v. Fortune, 1 Binney, 125; Wright v. Small, 5 Binney, 204.

<sup>26</sup> Parker Mills v. Krause, 1 Pearson, 531.

<sup>27</sup> Downing v. Bloom, 2 Luz. L. R. 226; Brosman v. Canal Co., 3 Haz. Reg. 146.

<sup>28</sup> Ranck v. Hill, 3 Pa. 423; Altman v. Klingensmith, 6 Watts, 445; Ellsbree v. Ellsbree, 28 Pa. 172; Moyer v. Opie, 3 Foster, 52; Dodson v. Born, 7 Kulp, 122.

<sup>29</sup> Lyon v. McManus, 4 Binney, 167.

<sup>30</sup> Banks v. Juniata Bank, 16 S. & R. 155.

<sup>31</sup> Lyon v. McManus, 4 Binney, 167.

<sup>32</sup> Banks v. Juniata Bank, 16 S. & R. 155.

<sup>33</sup> Pontius v. Comth., 4 W. & S. 52; Beale v. Comth., 7 Watts, 183.

<sup>34</sup> Moore v. Porter, 13 S. & R. 100.

<sup>35</sup> Moore v. Porter, 13 S. & R. 100.

<sup>36</sup> March 20, 1869, P. L. 452.

<sup>37</sup> Moore v. Porter, 13 S. & R. 100.

**56. Costs on stay of execution.**

Where the court orders a stay of execution the plaintiff may claim the costs of execution out of a fund arising in partition or from an assignee's sale,<sup>1</sup> although his claim is not reached in distribution, but not including judgment fee.<sup>2</sup> But if the plaintiff voluntarily stays the writ and pays the sheriff's costs, he cannot recover them on distribution.<sup>3</sup> A stay will not be vacated after a long delay to enable an attorney to collect his commissions.<sup>4</sup>

**57. Costs when lien creditor receipts.**

Under section 1, act of April 20, 1846, P. L. 411, where the sheriff takes the receipt of a lien creditor, he is entitled to demand "a sum sufficient to cover all legal costs entitled to be paid out of the proceeds of said sale."

Where a reference is made to an auditor, under section 2, and the exceptions prove unfounded, the exceptant must pay the costs, unless he satisfies the court that he had probable cause to object.<sup>5</sup> Where the exceptions are based on good cause the costs of the audit are payable out of the fund.<sup>6</sup> If it be referred back to the auditor and no additional evidence is produced, the costs will be placed on the exceptant.<sup>7</sup> The costs of a feigned issue follow the verdict.<sup>8</sup>

Where a junior execution has a waiver and it inures to a prior lien, the costs of the junior execution must be paid out of the fund.<sup>9</sup>

A judgment on a *sci. fa.* against bail, for want of an affidavit of defense, it was said long since, did not cover costs.<sup>10</sup>

**58. Fees of prothonotaries.**

The act of April 2, 1868, P. L. 3, provides for fees of prothonotaries throughout the state. The acts of April 6, 1871, P. L. 476, and March 6, 1872, P. L. 208, as to Allegheny County; the act of May 1, 1907, P. L. 142, as to counties having a population of over 1,000,000. For this act, applying to Philadelphia, see Appendix.

Every writ of summons, <i>capias</i> or <i>certiorari</i> , and docketing the same, including stationery, filing papers, entering return and services at first court.....	\$1.50
Every alias summons and <i>capias</i> .....	.60
Every other writ, and filing papers, stationery and services at first court.....	1.75
Every <i>alias scire facias</i> .....	.90
Every subsequent court, where cause is put down for trial, including issue list.....	.25

<sup>1</sup> Woodward's Est., 1 Chester County, 402.

<sup>2</sup> McDannel's Est., 1 Chester Co. 494.

<sup>3</sup> Myers v. Harris, 8 Luz. L. R. 240.

<sup>4</sup> Davis v. Shryock, 25 C. C. 649.

<sup>5</sup> Larimer's Ap., 22 Pa. 41.

<sup>6</sup> Sansenbacher v. Schnickendantz, 141 Pa. 418.

<sup>7</sup> Hamnett's Ap., 72 Pa. 337.

<sup>8</sup> Sansenbacher v. Schnickendantz, 141 Pa. 418.

<sup>9</sup> Kiefer v. Kiefer, 14 C. C. 545.

<sup>10</sup> Renschler v. Harres, Brightly on Costs, 184.

All services during trial of cause, including swearing of jury, witnesses and constable.....	1.00
Taking a recognizance.....	.25
Entering motions and filing reasons in arrest of judgment or for a new trial.....	.25
Entering satisfaction of judgment or discontinuance of suit.....	.20
Issuing subpoena under seal, with two names.....	.30
Every name after the first.....	.03
Issuing attachment and motion therefor.....	.50
Copy of record or paper filed, for every ten words.....	.02
Certificate and seal.....	.30
Drawing special jury, striking the same, and copies for parties and on verdict of jury, including judgment, docket entry and every search, where no other service is performed to which any fee is attached.....	.15
<i>Fi. fa.</i> or <i>ca. sa.</i> and entering return.....	.60
<i>Vend. ex. lev. fa.</i> or other writ in nature of an execution and entering return.....	.90
Entering judgment on bond, or on warrant of attorney, or upon confession by defendant, or on motion in open court, or for want of an appearance, plea, or an affidavit of defense, and on verdict of jury, including judgment, docket entry and statement of plaintiff.....	.75
Entering amicable action, filing papers, stationery and services at first court.....	1.25
Taxing bill of costs other than prothonotary's.....	.25
Re-taxing bill of costs and report thereon.....	.50
Taking testimony in same, for every ten words.....	.02
Making return to writ of error.....	1.00
Entering proceedings of supreme court.....	.50
Entering transcript of judgment from justice of the peace, including judgment docket entry.....	.50
Entering appeal from justice, including stationery, filing papers, and services at first court.....	1.25
Citation and seal and motion therefor.....	.50
Suggesting death of a party, or diminution of record, or substituting a party, each.....	.15
Administering oath other than on trial of cause.....	.10
Amending record on motion <i>et cet.</i> .....	.20
Entering appointment of guardian <i>ad litem</i> .....	.20
General certificate for jurors' and constable's pay, to be paid by the county.....	.75
Filing petition and all papers relating to application of insolvent debtors, recording order, etc.....	1.00
Subpoena in divorce, or alias subpoena, all other proceedings in divorce except subpoenas for witnesses or commission to take testimony.....	2.50
Reading and filing bill to perpetuate testimony, order of court thereon, and recording the same.....	1.35
Commission to take testimony and entering return.....	1.00
Certified copy of rule to take depositions.....	.30
Certified copy of any other rule.....	.30
All proceedings on application to enforce contract.....	1.00
All proceedings on petition of administrator to make deed..	1.00

## COSTS IN STATE COURTS.

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All proceedings on petition for sheriff to make deed for land sold by former sheriff.....	1.00
Entering acknowledgment of sheriff's or treasurer's deed, including certificate of the same.....	1.00
All proceedings in acknowledging a deed barring estate tail..	1.00
Filing all election returns, at each general election, to be paid by the county.....	1.00
Filing and docketing balances due from collectors, including judgment docket entry, each case.....	.25
Filing and entering county auditor's reports, each case to be paid by the county.....	.50
Notifying county commissioners, auditors or directors of the poor, of their elections and time of meeting, to be paid by the county, each.....	.15
Filing any paper not relating to any suit pending, and not hereinbefore provided for.....	.25
Every docket entry not relating to any suit pending or judgment entered, and for which no provision is made in this fee bill, filing papers in same.....	.75
Entering rule of reference and copy under seal.....	.60
Appointment of arbitrators and docketing the same, including proof of service of rule.....	.50
Each copy of rule or notice to arbitrators.....	.25
Filing and entering report of arbitrators, including judgment docket entry.....	.50
Receiving and entering appeal from award of arbitrators, taking recognizance and affidavit, receiving and paying costs..	.75
Filing petitions in lunacy or habitual drunkard and entering order of court thereon.....	1.00
Issuing commission and entering return.....	1.00
Writ to sheriff.....	.75
Entering confirmation of inquisition and appointment of committee.....	1.00
Taking and filing bond of committee.....	.50
All services on sale of lunatic's estate or habitual drunkard, including the filing of committee's account.....	2.00
Filing each subsequent annual account thereafter.....	.50
Transmitting to secretary of the commonwealth copies of election returns, for each person returned, to be paid by the county.....	.25
Writ of <i>habeas corpus</i> and proceedings thereon.....	1.00
Application for maintenance or alimony.....	1.00
Filing and entering mechanic's lien.....	1.00
Entering <i>scire facias</i> to continue lien on judgment docket....	.25
Entering ejectment suit on ejectment index.....	.25
Entering <i>testatum fi. fa., ca. sa. or vend. ex.</i> .....	1.00
Furnishing list of liens, except certificate and seal, each judgment.....	.10
Receiving and distributing money paid into court, for each dollar under five hundred.....	.02
For each dollar exceeding five hundred.....	.01
The fee for services not herein specially provided shall be the same as for similar services.	

Adoption of minors, act May 26, 1893, P. L. 145, each petition and order.....	.25
Certified copy of proceedings, same.....	.50

When an attachment is issued for more than one witness the prothonotary is entitled to but one fee.<sup>1</sup>

#### 59. Fees of sheriff.

The act of July 11, 1901, P. L. 663, provides a bill of fees for the sheriff as follows:

"For receiving, making endorsements thereon, docketing and making return thereof, to each writ, rule, process, decree, order, bill in equity, subpoena, citation, statement or notice issued out of any court..... \$1.00

"For serving personally or by copy, each writ of *scire facias*, replevin, foreign attachment, attachment, attachment execution, injunction, mandamus, *quo warranto*, partition, inquisition or other writ; each bill in equity, summons, rule, process, decree, order, citation, subpoena or subpoena in divorce, statement of claim, series of interrogatories, proclamation, or notice of any kind issued out of any court, one dollar for the first service and fifty cents for every other defendant or other party served, and forty cents for each copy served or posted, in addition to mileage; or for serving the same by publication in one or more newspapers, when required by law or order of court, two dollars and seventy-five cents in each case, in addition to the printer's bill.

"For executing landlord's warrants, writs of *levari facias*, *feri facias*, *venditioni exponas*, *venire facias*, *habeas corpus*, *retorno habendo*, and replevin, one dollar, and mileage on each writ, in addition to the following: For each levy on personal property, one dollar and mileage; for levying on each piece or parcel of land, one dollar and mileage; for advertising personal property to public sale, two dollars and seventy-five cents, and mileage; for advertising real estate to public sale, by publication in newspaper, two dollars and seventy-five cents for each tract in addition to printer's bill; for advertising real estate to public sale, by hand-bills, two dollars and seventy-five cents for each tract or set of bills and mileage; for summoning and swearing jury and making return to inquisitions held on said writs, four dollars in addition to jury fees and fee for serving notices, and mileage, where the inquisition is held on the premises; for crying any sale of personal property, one dollar, and when the same continues longer than three hours, three dollars per day; for crying the sale of each tract of land and each adjourned sale, one dollar; for clerk hire at said sales, when necessary, two dollars per day; for watchman taking charge of property levied on, when necessary, two dollars per day (by act May 25, 1907, P. L. 243, said day to consist of not more than twelve hours); also reasonable expenses of insurance, arranging goods for sale, heat, light, storage, rent, transportation, feeding live stock, and similar expenses incurred in caring and keeping goods and

<sup>1</sup> Payran v. McWilliams, 9 W. & S. 154.

chattels levied upon, when the same is advantageous, or when requested by the plaintiff or defendant to incur such expense; for delivering lands to plaintiff in inquisition or similar proceedings, two dollars and seventy-five cents, and no commission in such case to be taken.

"For executing writs of *habere facias*, *liberari facias*, dower, possession, or any possessory process requiring the delivery of possession of real estate, or the ejecting or dispossessing of any person or persons or their effects, five dollars and mileage, and reasonable costs for help, when absolutely necessary, in addition to costs of sale when made.

"For executing writs of partition, inquisition, appraisement of real estate, or similar writs issued out of any court, the following costs: For receiving, docketing and making return thereto, one dollar; for each copy served, forty cents; for summoning jury, four dollars; for advertising notice two dollars and seventy-five cents, in addition to printer's bill; for holding inquisitions, four dollars per day and mileage, in addition to jury fees and expenses; for executing writ, three dollars, in addition to artist's or surveyor's fees.

"For executing any process, warrant, *capias*, attachment, decree, sentence or order of court, where the defendant's body is to be taken in custody, as follows: For receiving, docketing and making return, one dollar; for each arrest, one dollar and mileage; for transportation of each prisoner, six cents per mile, in addition to necessary help and expenses.

"For paying out money made or received on any writ, process, decree, order or sentence of court, two cents on every dollar awarded and applied or paid, on any judgment, mortgage, encumbrance or other claim, provided that the amount of same does not exceed five hundred dollars; in which case, one-half cent on every dollar in excess of this amount awarded and applied, or paid as aforesaid; said commission to be allowed whether the money is paid with or without sale, and also in all cases where, after levy, the debt has been paid direct to plaintiff or a compromise made, without the money going through the sheriff's hands.

"For levying or paying out fines, three cents per dollar, to be paid by party receiving fine.

"For advertising general or special elections, two dollars and seventy-five cents, in addition to printer's bill, to be paid by the county.

"For advertising general or special elections by hand-bills, two dollars and seventy-five cents for each polling place, and mileage, to be paid by the county.

"For each commitment in any criminal matter, fifty cents.

"For discharging prisoners in any criminal or civil case, fifty cents.

"For executing bail-piece or taking bond in any matter, whether civil or criminal, one dollar.

"For executing death-warrant, twenty-five dollars, in addition to all necessary expenses, the same to be paid by the county.

"For drawing juries for each general or special term or session of the court, three dollars, in addition to one dollar for executing each *venire* and thirty cents for summoning each juror to attend court; all of these fees to be paid by the county.

"For fee on indictment: On every capital case, three dollars; in every other criminal case, one dollar and twenty-five cents, to be paid by the county.

"For appraisement of personal property by virtue of any act of assembly, four dollars for each appraisement; this to include fees of appraisers if they are not employed over one day.

"For making and acknowledging deeds, three dollars to be paid by the purchaser, and to include fee of prothonotary for acknowledging deed; but not to include fee for recording.

"For attending court, bringing into and removing therefrom prisoners for arraignment, trial and sentence, the sum of three dollars per day for the sheriff or each deputy, for each and every day of criminal court, where the sheriff or deputy is actually present.

"For traveling expenses or mileage, in serving or executing any of the writs, rules, orders, decrees, processes, or performing any of the duties or services herein specified and intended so to be or authorized by law, the sheriff shall be entitled to receive and have taxed as costs ten cents a mile, for each mile actually traveled and necessary, the same to be allowed on each separate writ, rule, order, decree, process or service performed: *Provided*, That he shall not receive more than one mileage, where the plaintiff and defendant, or plaintiffs and defendants, in two or more contemporaneous writs are the same.

"For traveling expenses on an execution returned *nulla bona* and *non est inventus*, where the sheriff has been at the defendant's last residence, each mile traveled, ten cents.

"For services performed in his capacity as conservator of the peace or police officer, in suppressing riots, mobs and insurrections, and where discharging a duty requiring the summoning of a *posse comitatus* or special deputy sheriffs, the said sheriff shall receive a *per diem* compensation of not less than three dollars, and as much more as is commensurate with the services performed, together with mileage and necessary expenses, including subsistence of himself and of those under him; the same to be paid by the county.

"For all services performed by the sheriff but more properly belonging to the jurisdiction of a constable, he shall receive the same fees as constables, unless otherwise provided by law.

"For serving any rule, process, decree or order of court, not herein before specially provided for, one dollar, in addition to mileage.

"For the execution of any matter directed to the sheriff, or authorized by law or rule of court, or for services not herein provided for, the sheriff shall receive the same fees as for similar services herein provided for."

The sheriff's salary act of July 2, 1895, P. L. 494, has been held to be unconstitutional. (*Zeigler v. County*, 26 Lanc. L. R. 377.)

#### 60. Sheriff's costs when payable.

Section 2 of the act of 1901, *supra*, provides:

"All sheriff's costs shall be due and payable when the services are performed and it shall be lawful for him to demand and receive from the party instituting the proceedings, or any party liable for the costs thereof, all unpaid sheriff's fees on the same before he shall be obliged by law to make return thereof; and in case he does

not choose to collect his fees in this manner, he shall file with each return he makes, an itemized list of his costs, on or before the return day thereof, and if no exceptions are filed to the same on or before the next ensuing return day, the same shall be considered taxed and confirmed absolutely; and the said sheriff may issue an execution to collect the same, without further suit."

**61. Stay of execution — refusal to return writ.**

Section 3 of the act of 1901, *supra*, provides:

"Where real estate or personal property has been advertised on any writ of execution and the said writ has been stayed by the plaintiff or the court, it shall be lawful for the sheriff to refuse to return the said writ so far as relates to all unpaid sheriff's costs; and unless the same be paid by the parties at whose instance the writ was stayed, the said sheriff may proceed with the execution of said writ so far as to collect the said costs."

**62. Posting table of fees in office.**

Section 4 of the same act, *supra*, further provides:

"The several sheriffs in this commonwealth shall and are hereby required to make fair tables of their respective fees, according to this act, and to publish and keep a copy of the same in their respective offices, within six months from the passage of this act, in some conspicuous part, for the inspection of all persons who have business in said offices."

**63. Bill and receipt on demand.**

Section 4 of the act, *supra*, further provides:

"It shall be the duty of every sheriff, their deputies or agents, if a demand for that purpose shall be made, immediately after receiving any of their fees, or any written security therefor, to deliver a bill of particulars, specifying the several items contained therein and the amount thereof; and to give the party paying such fees a receipt in full therefor, or to indorse on such written security, when taken, that the same was given for fees, and to sign the indorsements so made."

Section 5 provides that local or special laws are not repealed by it.

The act of May 5, 1899, P. L. 246, places Lancaster County under the general fee bill.

**64. Collection in Luzerne and other counties.**

Section 1 of the act of Feb'y 17, 1859, provides:

"Where any writ of execution shall be issued out of the court of Common Pleas of Luzerne County, directed to the sheriff of said county, and a sale of real estate shall have been advertised, either upon said writ or upon any previous writ issued upon the same judgment, and the same not sold, and the plaintiff, his agent or attorney, shall order the said writ stayed, in every such case, it shall be lawful for the said sheriff to refuse to return the said writ stayed so far as relates to all unpaid sheriff's and prothonotary's costs, legally taxed on said writ; and unless the said costs be paid by the parties, the said sheriff may proceed with the execution of said writ, so far as to collect the same: *Provided*, That this



act shall in no wise affect the rights of the plaintiff to issue subsequent writs for the collection of the judgment and balance of costs." <sup>1</sup>

**65. Refusal to return *capias* and subpoena in divorce.**

Section 2 of the act of Feb'y 17, 1859, P. L. 54, in relation to Luzerne County, provides:

"In all cases where the said sheriff shall have in his hands any writ of *capias* in trespass or case, or any subpoena in divorce, it shall be lawful for him to demand and receive from the party, his agent or attorney, issuing the same, all unpaid sheriff's fees on the same, before he shall be obliged by law to make return thereof."

**66. Refusal to pay when no bill of particulars is given.**

Section 27 of the act of March 28, 1814, 6 Sm. L. 228, provides:

"It shall and may be lawful for any person to refuse payment of fees to any officer who will not make out a bill of particulars as prescribed by this act, signed by him, if required, and also a receipt or discharge, signed by him, of the fees paid."

**67. Penalty for taking illegal fees.**

Section 1 of the act of May 26, 1897, P. L. 100, provides:

"If any officer, whether while in office or after his term shall have expired, shall charge or demand any fee for any service or services other than the fee provided by law, such officers shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable."

**68. Misdemeanor to take illegal fees in Philadelphia.**

Section 2 of the act of March 27, 1821, 7 Sm. L. 418, provides:

"If any person whose fees are fixed by this act, by color of his office or occupation, by custom or under any other pretence whatsoever, shall take any other or greater fees for services performed in pursuance of this act than are hereby allowed, he shall be deemed guilty of a misdemeanor, and on conviction thereof before any alderman of the city, or justice of the peace of the county of Philadelphia pay a fine of \$50, one-half to the commonwealth and one-half to the party injured."

**69. Extortion — penalty for.**

Section 12 of the act of March 31, 1860, P. L. 382, provides:

"If any justice, clerk, prothonotary, sheriff, coroner, constable, or other officer of this commonwealth, shall wilfully and fraudulently receive or take any reward or fee to execute and do his duty and office, but such as is or shall be allowed by some act of assembly of this commonwealth, or shall receive or take by color of his office, any fee or reward whatever, not or more than is allowed as aforesaid, he shall be deemed guilty of a misdemeanor in office, and, on

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<sup>1</sup> Extended to Clearfield, Perry and Philadelphia counties by acts of Mar. 26, 1867, P. L. 279; to Cumberland by act of April 4, 1864, P. L. 277; Dauphin and Northampton Co's by act April 5, 1862, P. L. 265; Lancaster Co. April 9, 1862, P. L. 361; Wayne Co., see act Mar. 23, 1865, P. L. 585.

conviction, be sentenced to pay a fine, not exceeding five hundred dollars, or to undergo an imprisonment, not exceeding one year."

**70. Suits for fees in Schuylkill and other counties.**

Section 1 of the act of March 20, 1869, P. L. 452, relating to Schuylkill County, provides:

"That hereafter it shall be lawful for any prothonotary or sheriff in the county of Schuylkill, within six years after the expiration of the official term of such officer, to sue any person or persons residing out of said county for the recovery of any fee or fees in an action or actions of debt for official service performed or hereafter to be performed during such official term, before any justice of the peace within the said county; that the writ of summons in any such case shall be directed to a constable in said county, which said constable is hereby authorized, by writing endorsed on such writ of summons, to depute any constable in any other county in the state of Pennsylvania, in which the defendant or defendants shall reside, to execute said writ."

**71. Effect of service.**

Section 2 of the same act provides:

"Service of such writ so made upon the defendant or defendants shall have the same force or effect as if served by a constable of the said county of Schuylkill within said county; and upon return of such writ the said justice of the peace shall proceed to trial and judgment, upon which there shall be no stay of execution, as if such writ had been duly served within said county."

**72. Suit before or after judgment.**

Section 3.

"That it shall be lawful for such officer or officers to sue for and recover such fees in the manner aforesaid from the plaintiff before judgment, and from either the plaintiff or defendant after judgment in any suit or suits in the court of Common Pleas of said county of Schuylkill, in which such fees shall have accrued."

**73. Execution.**

Section 4.

"That the execution upon any such judgment shall be issued to a constable of said county of Schuylkill, and may be executed in any county of the state of Pennsylvania by any constable deputed so to do in the manner above provided for service of writ of summons."

**74. Certificate of prothonotary as evidence.**

Section 5.

"That in all suits hereafter to be brought in said county by such officer or officers for the recovery of fees, a certificate of the prothonotary of said county for the time being, under his hand and the seal of his office, that any bill of fees appears by the records of his office to be correct, shall be *prima facie* evidence that such fees are lawfully due and correct."

This act was extended to Lycoming County by the act of March 3, 1871, P. L. 163.

By act of Feb'y 17, 1859, P. L. 54, the sheriff of Luzerne County may refuse to return the writ stayed until his fees are paid.

By act of May 6, 1854, the limitation of the right of action for fees of any sheriff, proth'y, recorder of deeds, register of wills, or clerk of orphans' court was extended three years in Westmoreland, Washington and Lycoming.

By act of April 30, 1855, P. L. 383, this was extended to Luzerne and Monroe Counties.

#### 75. Costs on amendment.

When the plaintiff, on the trial moves to amend, the defendant may plead surprise and have the court fix terms as to costs.<sup>2</sup> But under act of May 10, 1871, P. L. 265, costs need not be paid, when the cause of action is not affected.<sup>3</sup>

#### 76. Costs in subjects treated in vol. 1.

- Appeals. Act May 19, 1897, P. L. 67. Vol. 1, p. 113, par. 21  
 " Paper books, April 15, 1907, and April 27, 1909, P. L. 263. Vol. 1, p. 113, par. 22.  
 " Supersedeas on order for payment of costs. Vol. 1, p. 111, par. 13.  
 " Attorney, on charge of professional misconduct. Act May 19, 1897, P. L. 66.  
 Garnishee in foreign attachment. Vol. 1, p. 694, par. 83.  
 Execution in foreign att. Vol. 1, p. 695, par. 85.  
 Appeals from justices. Vol. 1, p. 235-6, par. 84-5-6.  
 Bail for costs on appeal. Vol. 1, p. 109, par. 7-8; p. 110, par. 11.  
*Capias*, on quashing. Vol. 1, p. 427, par. 47.  
 Warrant of arrest. Vol. 1, p. 435, par. 70.  
 Removal of cause. Vol. 1, p. 603, par. 20.  
 Commissions to take depositions. Vol. 1, p. 643, par. 22.  
 Trespass or trover in C. P. *Devers v. Gosling*, 3 Luz. L. R. 24.  
 Contempts. Vol. 1, p. 559, par. 2.  
 Discontinuance. Vol. 1, p. 616, par. 7-8.  
 Dismissal, U. S. Cir. Ct. Vol. 1, p. 78, par. 26.  
 Remand U. S. Cir. Ct. Vol. 1, p. 76, par. 1.  
*Nol pros.* Vol. 1, p. 616, par. 4; p. 614, par. 1.  
 Dissolution of domestic attachment. Vol. 1, p. 724, par. 40.  
 Sheriff, foreign attachment. Vol. 1, p. 666, par. 23.  
 Fraudulent judgment, appeal from. Vol. 1, p. 202, par. 9.  
 Nonsuit. Vol. 1, p. 618, par. 1.  
 Rule for security, effect on rule to plead. Vol. 1, p. 588, par. 42.  
 Rule of court on rule for security. Vol. 1, p. 87, par. 2.  
 State tax on justice's transcript. Vol. 1, p. 214, par. 35.  
 Payment into court. Vol. 1, p. 647, par. 2.  
 Trespass certified from justice. Vol. 1, p. 148, par. 26.  
 Trial by court. Vol. 1, p. 153, par. 36.  
 Suit in C. P. for less than \$100. Vol. 1, p. 147, par. 22.  
 See also each form of action in this volume.

<sup>2</sup> *Baker v. Hagey*, 177 Pa. 128; *Turton v. Co.*, 158 Pa. 406; *Hart v. Co.*, 201 Pa. 234; *Rowland v. Phila.*, 202 Pa. 50.

<sup>3</sup> *Crellin v. White Haven*, 15 D. R. 963; *Heslop v. Heslop*, 82 Pa. 537. (See par. 44, p. 463, vol. 1, *Johnson's Practice*.)

## CHAPTER VIII.

### MOTION AND RULE FOR NEW TRIAL AND IN ARREST OF JUDGMENT

1. Motion and rule defined.
2. Form of motion.
3. Order of court on granting motion.
4. Motion for judgment N. O. V.
5. Order of court granting rule, etc.
6. Time within which to move.
7. Rules of court — Berks county.
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9. Rules of court — Allegheny county.
10. Motion in arrest of judgment.
11. Who may move for a new trial.
12. Power to grant a new trial.
13. Authority on issues *devisavit vel non*, etc.
14. When two or more verdicts have been given.
15. Formal and technical errors.
16. Causes concerning the jury.
17. Causes concerning witnesses or preparation.
18. Surprise on the trial.
19. Matters transpiring during the trial.
20. Charge of court.
21. Verdict contrary to law.
22. Reasons based on character of verdict.
23. After-discovered evidence.
24. Effect of entry of judgment.
25. Power of court to revise or correct order.
26. Review by Appellate Court.

#### 1. Motion and rule defined.

"A motion is an application to a court by a party or his counsel, and the order made by a court on any motion, when drawn into form, is called a rule. A motion is either for a rule absolute, in the first instance; or, it is only for a rule to show cause; or, as it is frequently called, a rule *nisi*, which is afterwards discharged or made absolute by the court, on argument. By the general practice, all motions made by counsel must be put in writing, and delivered to the prothonotary, to be entered on the minutes and filed, the time of delivery to be indorsed by the prothonotary. Motions are of a civil or criminal nature. Rules for attachments are the only criminal rules granted which have any relation to a civil suit."<sup>1</sup>

The affidavit of a party is sufficient to lay ground for the motion and rule but not to be heard on the argument;<sup>2</sup> unless there be a rule of court providing that what is not denied in an answer shall be taken as admitted by it, or unless the facts are admitted by the answer.

Rule 108, Allegheny County, is as follows:

"All motions and rules with the reasons in support thereof, shall be reduced to writing, with the names of the parties in interest and the name and office address of their attorneys, if there be an attorney of record; and no motion or rule shall be entered by the

<sup>1</sup> 2 Archbold's Pr. 266; Troubat & Haly, vol. 1.

<sup>2</sup> Hoar v. Mulvey, 1 Binney, 145.

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prothonotary until this rule has been complied with. The prothonotary shall without further order place on the argument list all rules and motions conforming to these requirements."

This rule applies where the grounds for the rule appear on the face of the record, as well as in other cases.<sup>2a</sup>

## 2. Form of motion.

Following is a form of motion for rule:

<p>"William F. Weber, for the use of Sallie A. Roland, v. Emma C. Roland, executrix of Anna E. Roland, deceased.</p>	}	<p>In the court of common pleas of Berks County. No. 103, Feb'y T., 1901, J. D. (D. S. B.)</p>
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Now, Sept. 19, 1906, plaintiff respectfully moves the court for a rule to show cause why a new trial should not be granted on questions one and two of the issue framed by the court and assigns the following reasons therefor:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The court erred in negating plaintiff's first, second, third and fourth points.
5. The court erred in its charge to the jury in giving undue prominence to the contention and testimony of the defendant and not sufficiently commenting upon plaintiff's testimony.

The plaintiff reserves the right to file additional reasons and to set forth the above reasons fully, and at large after the notes of testimony and charge of the court shall have been transcribed.

Jos. R. Dickinson,  
Attorney for plaintiff.

## 3. Order of court on granting motion.

"And now, to-wit, September 19, 1906, the above motion being presented, whereupon, the court direct the same to be filed and grant a rule to show cause as prayed for.

By the court.  
G. A. Endlich, Judge."

## 4. Motion for judgment N. O. V.

At the same time a motion may be made for judgment *N. O. V.* which is in the following form:

<p>Same. v. Same</p>	}	<p>No. 103, Feb'y T., 1901. J. D.</p>
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"The plaintiff requests the court to have all the evidence certified and filed so that it become a part of the record, and moves for judgment *non obstante veredicto* (upon questions numbers one and two of the issue) upon the whole record, under the provisions of the act of assembly approved April 22, 1905.

Joseph R. Dickinson, P. Q."

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<sup>2a</sup> Fair v. Hamlin, 9 C. C. 8.

**5. Order of court granting rule, etc.**

"And now, to-wit, September 19, 1906, the above motion being presented, on motion of Joseph R. Dickinson, attorney for plaintiff, the court direct the same to be filed and grant a rule for judgment in favor of the plaintiff *non obstante veredicto*, upon the whole record.

By the court.

G. A. Endlich, Judge.

**6. Time within which to move.**

By immemorial usage four days after verdict are allowed in which to make the motion, and by the act of June 20, 1883, P. L. 136, if the last day comes on a Sunday or any day made a legal holiday by the laws of this commonwealth or of the United States, such day shall be omitted from the computation.<sup>3</sup> For cause shown, a motion may be entertained later, especially during the term, *nunc pro tunc*.<sup>4</sup>

But a long delay, as five months, is not to be tolerated.<sup>5</sup> The granting or refusal of a motion *nunc pro tunc* is discretionary and not reviewable.<sup>6</sup>

**7. Rules of court — Berks county.**

The time and manner of moving for a new trial is regulated by the rules of court. For example, rule 41, Berks County, is as follows:

"Section 1. Motions for new trials, in arrest of judgment and to take off a nonsuit must be made, and the reasons on which the motion is grounded must be filed, within four days after the verdict or nonsuit (excluding an intervening Sunday): *Provided*, That, where the verdict is rendered or nonsuit entered on the last day of the trial term, such motions may be made upon the first day thereafter when the court shall be in session, the reasons being filed within four days as above stated.

"Section 2. No motion shall be made for a new trial after a motion in arrest of judgment; but both may be made at the same time."

[Compare your rules of court.]

**8. Rule of court — Philadelphia.**

Rule 27 of the Common Pleas rules of Philadelphia provides:

"All motions for new trials, for judgment on points reserved, to take off a nonsuit and in arrest of judgment, with the reasons therefor, must be made and filed within four days after the verdict. A copy of the reasons must be furnished to the judge before whom the cause was tried and served on the opposite party within the four days. All such motions shall be heard and determined upon the new trial argument list."

<sup>3</sup> *Parkinson v. Snyder*, 2 W. N. C. 428.

<sup>4</sup> *Lance v. Bonnell*, 105 Pa. 46, citing authorities, *q. v.*, P. & L. Dig., vol. 13, cols. 23079-80-1-2.

<sup>5</sup> *Syracuse, Etc., Co. v. Carothers*, 63 Pa. 379; P. & L. Dig., vol. 13, cols. 23083-84.

<sup>6</sup> *Ley v. Union Canal*, 5 Watts, 104.

### 9. Rules of court — Allegheny county.

Rule 111 (D. R. C., p. 85) Allegheny County, is as follows:

"Motions for new trials shall be made and reasons filed within four days after the verdict. The day on which the verdict is given, and Sunday, are to be excluded in calculating the four days."<sup>6a</sup>

Rule 112 (D. R. C., p. 85) Allegheny County, is as follows:

"On motion for a new trial, the court will determine on the showing of the party by whom it is made whether to grant a rule to show cause or not, without hearing the opposite party; if a rule is granted, the cause will be set down for argument; if not, judgment will be entered on the verdict unless a motion in arrest of judgment is pending."

When the court orders "rule absolute for new trial," it is implied in such order that the judgment if any is vacated, the verdict set aside and a new trial granted.<sup>6b</sup>

*Affidavit required when motion is based on after-discovered evidence.*

Rule 113, Allegheny County (D. R. C. 85), provides:

"No motion for new trial will be entertained upon the ground of after-discovered evidence, unless based upon affidavit containing the names of the witnesses and what they are expected to prove."

But it is only addressed to the discretion of the court, and if refused, is not reviewable.<sup>6c</sup>

### 10. Motion in arrest of judgment.

"A motion in arrest of judgment is an application to the court on the part of the defendant to withhold judgment for the plaintiff on the ground that there is error appearing on the face of the record which vitiates the proceedings. In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to this period, the court are bound to arrest the judgment. It is, however, only with respect to objections apparent on the record, that such motions can be made, nor can they be made, generally speaking, in respect to formal objections. . . . The effect of the statutes of amendments and jeofails<sup>7</sup> is such that judgment cannot be arrested for matters of form."<sup>8</sup>

If in slander it be proved that the words were spoken after the writ issued, judgment will be arrested. It is a general rule that whatever is delayed in matter of law, in arrest of judgment must be such matter as would, on demurrer, have been sufficient to overturn the action or plea.<sup>9</sup> But the converse is not true, as to such matters as are cured by the verdict; and if the judgment be erroneously arrested the appellate court will direct judgment to be entered on the verdict.<sup>10</sup> On an order arresting judgment it was

<sup>6a</sup> Murray v. Harvey, 57 Pitts. L. J. 13.

<sup>6b</sup> Fisher v. R. Co., 185 Pa. 602.

<sup>6c</sup> Hanforth v. R. Co., 213 Pa. 365; Dietrich v. Lancaster, 212 Pa. 566.

<sup>7</sup> Jeofails — Law-French — I have failed; am in error.

<sup>8</sup> 3 Blackstone's Com. 407; Stephen on Pleading, 117; Haldeman v. Martin, 10 Pa. 309; Quick v. Miller, 103 Pa. 67; Harley v. Lebanon, Etc., Co., 120 Pa. 182; P. & L. Dig., vol. 10, cols. 15912-3.

<sup>9</sup> Skinner v. Robeson, 4 Yeates, 375.

<sup>10</sup> Wilson v. Gray, 8 Watts, 25.

held that a writ of error lay.<sup>11</sup> Judgment will be arrested for objections on the face of the record, although not assigned when the motion is filed.<sup>12</sup> Judgment has been arrested when entered for want of a plea when the declaration set forth a promissory note payable to a third person;<sup>13</sup> where the verdict was for the defendant, the plaintiff and his counsel being absent;<sup>14</sup> but judgment will not be arrested where, on the trial, a stranger personated a juror on the panel;<sup>15</sup> or where the verdict is uncertain, but a new trial will be granted.<sup>16</sup> On this motion judgment cannot be entered for the defendant although the verdict is special.<sup>17</sup> A new venire may be obtained at the term in which judgment is arrested for insufficiency of the verdict.<sup>18</sup>

"An arrest of judgment is, in effect, nothing more than superseding a verdict, for some cause apparent upon the record, which shows that the plaintiff is not entitled to the benefit of the verdict. It is often followed by a judgment for the defendant that he go without day, but it is not of itself a judgment for the defendant. The court may, after an arrest of judgment, award a repleader or a *venire de novo*, without a repleader. Which of these courses is the proper one depends upon the nature of the defect for which the judgment is arrested. If it appears by the record that the plaintiff has no cause of action, the court will give judgment on the verdict that the plaintiff take nothing by his writ and that the defendant go without day. If issue be joined upon an immaterial point, there being a subsequent cause of action alleged in the declaration, the proper course is to award a repleader. If the pleadings be sufficient, and the issue well joined, but the verdict is imperfectly found, it is usual to award a *venire de novo*."<sup>19</sup>

On a motion in arrest of judgment a defendant may be allowed to plead specially to the jurisdiction.<sup>20</sup> Where the reasons urged for the motion relate solely to the evidence and its insufficiency, it is improper. In such cases the rule should be for a new trial.<sup>21</sup>

#### 11. Who may move for a new trial.

The motion for a new trial must be made by one whose interest is affected.

At the common law a new trial cannot be granted on motion of the commonwealth. Since the act of May 19, 1874, P. L. 219, in cases of nuisance, forcible entry and detainer or forcible detainer, exceptions may be taken by the commonwealth and the appellate court alone can grant a new trial.<sup>22</sup> A prosecutor who has been

<sup>11</sup> Benjamin v. Armstrong, 2 S. & R. 392.

<sup>12</sup> Grasser v. Eckhart, 1 Binney, 575; Hilty v. Knox, 39 Pitts L. J. 325.

<sup>13</sup> Barriere v. Nairac, 2 Dallas, 249.

<sup>14</sup> Crumley v. Lutz, 180 Pa. 476.

<sup>15</sup> Hoar v. Flegel, 1 Penny. 208.

<sup>16</sup> Tryon v. Carlin, 5 Watts, 371.

<sup>17</sup> Kauffman v. Kauffman, 2 Wharton, 139.

<sup>18</sup> Butcher v. Metts, 1 Miles, 233.

<sup>19</sup> Jones, J., in Butcher v. Metts, 1 Miles, 233.

<sup>20</sup> Baugh v. Bertram, 1 T. & H. Pr. 621 (Fish Ed.).

<sup>21</sup> Comth. v. Hanley, 15 Supr. C. 271; Ward v. Lakeside R. Co., 20 C. C. 494.

<sup>22</sup> Comth. v. Wallace, 7 Supr. C. 405; U. S. v. Sanges, 144 U. S. 310.



mulcted with the costs cannot move for a new trial; his remedy is a rule to be relieved of the costs.<sup>23</sup>

### 12. Power to grant a new trial.

It was long since settled that the power to grant a new trial is purely judicial and the legislature may not encroach upon it;<sup>24</sup> it is inherent in the courts, both civil and criminal,<sup>25</sup> but a criminal court cannot grant a new trial where the verdict is for the defendant.<sup>26</sup> Where the verdict is for the commonwealth but is rendered in the absence of the defendant the court may on its own motion set the verdict aside and order a new trial and the plea of former jeopardy does not avail.<sup>27</sup> The court has the same power in a civil case.<sup>27a</sup> Until judgment is entered, the court has power over the verdict and may in its discretion set it aside<sup>28</sup> and grant a new trial.<sup>29</sup> The granting or refusing of a new trial, except for causes like errors of law by the judge or misconduct of the jury where it may be matter of right, is an exercise of judicial discretion by the court in furtherance of right and justice according to the circumstances of the case.<sup>30</sup> It may even reinstate the rule after having been erroneously discharged.<sup>31</sup>

In granting a motion for a new trial the court has also power to impose terms upon either or both of the parties as conditions meeting the exigency of the case, but such conditions must have direct relation to the issue between the parties and be a reasonable exercise of discretion, so as not to deprive the party of a legal right.<sup>32</sup> The court in exercising its power will take into consideration not only the evidence but all the incidents of the trial.<sup>33</sup>

### 13. Authority on issues *devisavit vel non*, etc.

Upon an issue *devisavit vel non*, certified from the register, the Common Pleas may award a new trial after the will was sustained,<sup>34</sup> the register having no power in the premises.<sup>35</sup> The court, sitting in equity, has power to grant a new trial only after an issue has been sent to the law side for the verdict of a jury, but never of an original action of which the law side has exclusive jurisdic-

<sup>23</sup> Comth. v. Kocher, 23 Supr. C. 65.

<sup>24</sup> De Chastellux v. Fairchild, 15 Pa. 18 (Ch. J. Gibson).

<sup>25</sup> Comth v. Flanagan, 7 W. & S. 415; Fisher v. Hestonville, Etc., R. Co., 185 Pa. 602.

<sup>26</sup> Guffy v. Comth., 2 Grant, 66.

<sup>27</sup> Comth. v. Gabor, 209 Pa. 201.

<sup>27a</sup> Brown v. Smith, 26 Lanc. L. R. 388; Mahler v. Ruth, 12 Northam. 162.

<sup>28</sup> Cronrath v. Border, 27 Supr. C. 15.

<sup>29</sup> King v. Brooks, 72 Pa. 363 (Sharswood, J.).

<sup>30</sup> Stauffer v. City of Reading, 206 Pa. 479; Cronrath v. Border, 27 Supr. C. 15.

<sup>31</sup> Lingenfelter v. Riddlesburg, Etc., Co., 84 Pa. 328.

<sup>32</sup> Stauffer v. City of Reading, 206 Pa. 479; Lehr v. Brodbeck, 192 Pa. 535; Bradwell v. Pittsburg, Etc., R. Co., 139 Pa. 404.

<sup>33</sup> Comth. v. Reilly, 22 Lanc. L. R. 281.

<sup>34</sup> Hambleton v. Real Estate, Etc., Co., 16 W. N. C. 376; Starrett v. Douglass, 2 Yeates, 46; Graham v. Graham, 1 S. & R. 330.

<sup>35</sup> Heister v. Lynch, 1 Yeates, 108; P. & L. Dig., vol. 13, col. 22349.

tion.<sup>36</sup> This right belongs to the chancellor alone, in ease of whose conscience the verdict was taken and by which he is not bound.<sup>37</sup> So in a *habeas corpus* case where an issue is awarded and a verdict obtained.<sup>38</sup> The court will rarely grant a new trial on grounds which should have been known to the party on the trial and apparently were reserved. If the verdict be for the defendant the court has power to grant a new trial in ejectment, on motion of plaintiff.<sup>39</sup>

#### 14. When two or more verdicts have been given.

It is only in exceptional cases that a court will grant a new trial where there have been two verdicts.<sup>40</sup> But there is no limit where each successive verdict is against the law or the instructions of the court; <sup>41</sup> or where by sympathy or prejudice the verdicts are tainted and unwarranted<sup>42</sup> and against the indisputable evidence; for as Finletter, J., said:

"To permit a verdict without evidence to stand is to plunder the citizen under the forms and solemnities of the law and under the pretence of administering justice."<sup>43</sup> Where a second verdict does not satisfy the conscience of the court, a new trial may be made conditional upon remission of part, or otherwise.<sup>44</sup> If the court has reason to believe that the jury were improperly influenced, a new trial will be granted.<sup>45</sup>

The question which appeals to the judicial mind is not whether exact justice has been done but whether substantial justice under the circumstances, which it surveys.<sup>46</sup> If injustice has been done or one party derives an unfair advantage by the verdict, it should grant a new trial.<sup>47</sup> The court may consider the probable costs to the parties, of a new trial and whether any substantial gain would accrue to the party suing for it.<sup>48</sup> A motion for a new trial is an appeal to the sound discretion of the court, under the entire cause.<sup>49</sup>

<sup>36</sup> Hill v. Jefferson, Etc., 1 Am. L. J. 256.

<sup>37</sup> Gray v. Simon, 2 Phila. 348; Baker v. Williamson, 2 Pa. 116; Armstrong v. Armstrong, 3 Mylne & Keen, 45 (chancery).

<sup>38</sup> Graham v. Graham, 1 S. & R. 330.

<sup>39</sup> Ross v. Eason, 1 Yeates, 14.

<sup>40</sup> Clemson v. Davidson, 5 Binney, 392; P. & L. Dig., vol. 13, col. 22854.

<sup>41</sup> Burkart v. Bucher, 2 Binney, 455; P. & L. Dig., vol. 13, col. 22855.

<sup>42</sup> Howard Exp. Co. v. Wile, 64 Pa. 201.

<sup>43</sup> Lodge v. R. Co., 10 Phila. 153.

<sup>44</sup> Clayton v. B. & P. R. Co., 3 Del. Co. 167; P. & L. Dig., vol. 13, col. 22857.

<sup>45</sup> Stewart v. Richardson, 3 Yeates, 200; Hasson v. R. Co., 21 W. N. C. 96.

<sup>46</sup> Moore v. Webster, 14 C. C. 433; Comth. v. Duff, 7 Supr. C. 415; P. & L. Dig., vol. 13, cols. 22858, 22859; Comth v. Thompson, 4 Phila. 215.

<sup>47</sup> Cowperthwaite v. Jones, 2 Dallas, 55; Turnbull v. O'Hara, 4 Yeates, 446.

<sup>48</sup> Bitting v. Mowry, 1 Miles, 216.

<sup>49</sup> Boyd v. Boyd, 1 Watts, 365.

### 15. Formal and technical errors.

The rule is not to grant a new trial for formal or technical irregularities when the verdict does substantial justice.<sup>50</sup> If, however, the pleadings were of such a nature as to mislead a party a new trial will be granted.<sup>51</sup> Misjoinder of parties defendant has been held to be ground for new trial;<sup>52</sup> also of plaintiffs,<sup>53</sup> and refusal of amendments or continuance, if the party was put at disadvantage thereby;<sup>54</sup> a new trial may be granted for a substantial variance between the *allegata* and the *probata*.<sup>55</sup>

### 16. Causes concerning the jury.

Irregularities in selecting, drawing, summoning and returning the jury are cured by the verdict and are no longer grounds for new trial.<sup>56</sup> But where a stranger personates a juror and serves, or otherwise becomes a member of the jury a new trial will be granted;<sup>57</sup> or where one properly challenged afterwards gets on the jury.<sup>58</sup> But if such irregularity is known to a party he cannot be heard to complain after he took the chances of a verdict.<sup>59</sup> Where there is a mere confusion of names the verdict will not be disturbed for that reason.<sup>60</sup> A new trial will be granted where a juror denied on his examination before being sworn, that he had made prejudicial remarks of the defendant, when in fact he had done so.<sup>61</sup> A party is entitled to a jury composed of men who have not prejudged the case.<sup>62</sup> The mere expression of opinion not amounting to prejudice, however, is insufficient.<sup>63</sup> But where it transpires that a juror had talked with a witness and inspected evidence before the trial, the court will grant a new trial.<sup>64</sup> But where a case of prejudice is not made out, even in a murder trial, a new trial will not be awarded.<sup>65</sup> Relationship of a juror to either party if not known at the trial is a good ground,<sup>66</sup> though this does not extend to relationship to the murdered person in a homicide case.<sup>67</sup> A new trial will be granted where the winning party

<sup>50</sup> *Ralston v. Cummins*, 2 Yeates, 436; *Mercer v. Watson*, 9 Lanc. Bar, 53; P. & L. Dig., vol. 13, col. 22862.

<sup>51</sup> *Comth. v. Manson*, 2 Ashmead, 31; P. & L. Dig., vol. 13, col. 22862; *Moles v. Crozier*, 48 Pitts. L. J. 216.

<sup>52</sup> *Krauss v. McGlone*, 3 W. N. C. 272.

<sup>53</sup> *Roberts v. Parsons*, 1 Northam. 337.

<sup>54</sup> *Jones v. Linden*, 1 D. R. 725; P. & L. Dig., vol. 13, col. 22, 865-6.

<sup>55</sup> *Rogers v. Waltz*, 5 D. R. 645; P. & L. Dig., vol. 13, cols. 22866-7.

<sup>56</sup> *Zell v. Comth.*, 94 Pa. 258; P. & L. Dig., vol. 13, cols. 22869, 70, 71; vol. 2, C. R. A., col. 3599.

<sup>57</sup> *Hoar v. Flegal*, 1 Penny. 208; P. & L. Dig., vol. 13, cols. 22877-8.

<sup>58</sup> *Haller v. Peoples*, 48 Pitts. L. J. 164.

<sup>59</sup> *Burton v. Ehrlich*, 15 Pa. 236; *Eakman v. Sheaffer*, 48 Pa. 176; *Hieter v. Kaufman*, 20 C. C. 198.

<sup>60</sup> *Loucks v. Lightner*, 11 York, 157; *Comth. v. Beucher*, 10 C. C. 3.

<sup>61</sup> *Comth. v. Bruner*, 11 C. C. 428.

<sup>62</sup> *Scott v. Reyer*, 5 Leg. Gaz. 73; *Heiss v. Lancaster*, 18 Lanc. L. R. 289.

<sup>63</sup> *Comth. v. Flanagan*, 7 W. & S. 415; P. & L. Dig., vol. 13, cols. 22881-2-3; *Comth. v. Hurd*, 177 Pa. 481; vol. 2, C. R. A. 3599.

<sup>64</sup> *Mench v. Bolbach*, 4 Phila. 68.

<sup>65</sup> *Comth. v. Heidler*, 191 Pa. 375.

<sup>66</sup> *Spong v. Leasher*, 1 Yeates, 126; P. & L. Dig., vol. 13, col. 22886.

<sup>67</sup> *Traviss v. Comth.*, 106 Pa. 597.

approached a juror, or jurors, or in any way directly or indirectly sought to influence their verdict.<sup>1</sup> But the facts should sustain an imputation of unfairness; mere surmise is not enough.<sup>2</sup> If the parties are cognizant of the facts on the trial and do not complain they will be concluded by the verdict.<sup>3</sup> The furnishing of refreshments to a juror either before or after the verdict, under the circumstances attending, may be a ground for new trial.<sup>4</sup> Conversations by the winning party or his witnesses with jurors about the case may be ground for new trial.<sup>5</sup> If the jurors receive evidence after they leave the box and from independent sources, a new trial will be awarded.<sup>6</sup> A new trial will not be granted merely because a juror used intoxicating liquor, unless it appear that it interfered with the discharge of his functions.<sup>7</sup>

#### 17. Causes concerning witnesses or preparation.

A new trial will not be granted because a party neglected to subpoena his witnesses;<sup>8</sup> or when he knew that his witnesses were likely to fail to attend and did not ask for an attachment or a continuance;<sup>9</sup> or where no diligent effort was made to procure their attendance;<sup>10</sup> but where there is a question, it will be resolved in favor of a new trial;<sup>11</sup> where a material witness becomes intoxicated at the trial and no continuance is asked and the opposite party is not responsible for it a new trial will be refused.<sup>12</sup> A new trial will not be granted because a party had not prepared properly for the trial;<sup>13</sup> or that the case was tried on a wrong theory.<sup>14</sup>

A new trial will be granted on payment of costs where a party and his attorney were both necessarily absent;<sup>15</sup> but not where the absentees do not furnish an appealing excuse;<sup>16</sup> and the want

<sup>1</sup> *Chahoon v. Hackley*, 5 Kulp, 397; *Snyder v. Haas*, 18 C. C. 597; P. & L. Dig., vol. 13, cols. 22888-9-90; 2 C. R. A., col. 3600.

<sup>2</sup> *Comth. v. Snyder* (No. 2), 21 Lanc. L. R. 166; *Johnson v. Chester, Etc.*, R. Co., 8 Del. Co. 346.

<sup>3</sup> *Lycoming County v. Wheeland*, 14 D. R. 790.

<sup>4</sup> *Boreland v. St. Clair*, 4 C. C. 541; *Montgomery v. Scott Twp.*, 26 Pitts. L. J. 193; P. & L. Dig., vol. 13, cols. 22889-90.

<sup>5</sup> *Ritchie v. Holbrook*, 7 S. & R. 458; P. & L. Dig., vol. 13, cols. 22890-22891-2-3.

<sup>6</sup> *Brunson v. Graham*, 2 Yeates, 166; *Helme v. Kingston*, 8 Kulp, 221; 191 Pa. 191; *Force v. Scholl*, 22 C. C. 107; P. & L. Dig., vol. 13, cols. 22895-6-7.

<sup>7</sup> *Comth. v. Cleary*, 148 Pa. 26.

<sup>8</sup> *Hillary v. Duross*, 5 Phila. 170; P. & L. Dig., vol. 13, col. 22906.

<sup>9</sup> *Keim v. Maurer*, 2 Woodward, 412; P. & L. Dig., vol. 13, col. 22907.

<sup>10</sup> *Clark v. Cochran*, 1 Miles, 282.

<sup>11</sup> *Scherff v. Darby Boro'*, 9 Del. Co. 331.

<sup>12</sup> *Gillespie v. Home, Etc., Assn.*, 17 Phila. 617; *Farmer's Bank, Etc., v. Miller*, 2 Dauphin, 105.

<sup>13</sup> *Leedom v. Pancake*, 4 Yeates, 183; P. & L. Dig., vol. 13, cols. 22909-10.

<sup>14</sup> *Safe Dep. Bank, Etc., v. Schuylkill Co.*, 190 Pa. 188; P. & L. Dig., vol. 13, cols. 22911-2.

<sup>15</sup> *Cheshire v. Hevner*, 2 W. N. C. 83; P. & L. Dig., vol. 13, cols. 22913-4.

<sup>16</sup> *Ranck v. Morton*, 5 Law Times (N. S.), 111; *Hilty v. Knox*, 39 Pitts. L. J. 325; *O'Donnell v. Flanigan*, 9 Supr. C. 136.

of notice generally is not such an excuse;<sup>17</sup> nor errors of a trivial character in the trial list;<sup>18</sup> nor failure to employ counsel to represent him;<sup>19</sup> nor is illness of counsel or a party, which is not brought to the attention of the court;<sup>20</sup> nor a mistake of the party or counsel as to the time or place of trial—they are bound to be alert and informed when and where the court sits;<sup>21</sup> nor mere absence of an attorney on other legal business, but if in attendance at the Supreme court in a cause, a trial in his absence will be reversed.<sup>22</sup>

#### 18. Surprise on the trial.

"In some cases justice can be done only by granting new trials in order to enable the party surprised to be prepared to meet that which he ought to have been apprized of by the record."<sup>23</sup> So where the defendant is surprised on the trial by added pleadings, a new trial may be granted<sup>24</sup>—if he was not given a continuance.<sup>25</sup>

But the granting or refusal is in the discretion of the trial judge.<sup>26</sup> If the plaintiff is surprised with unexpected testimony he can and ought to suffer a nonsuit and not take his chances on a verdict. If he does the latter he is bound by it.<sup>27</sup> The same rule applies to the defendant and his witnesses.<sup>28</sup> But there may be cases where a new trial is necessary.<sup>29</sup> The usual practice in case of surprise is to plead it at once and ask for a continuance, and if this is not done, courts will not readily set aside a verdict on the ground of surprise.<sup>30</sup>

#### 19. Matters transpiring during the trial.

Where a rule of court provides that the defendant who offers no evidence is entitled to the closing address to the jury, the refusal of a new trial on that ground is discretionary.<sup>31</sup>

An inquiry into a charge of attempt to influence the jury, instituted during the trial is not a ground for the motion;<sup>32</sup> nor the remarks of the judge upon the absence of defendant's husband;<sup>33</sup> nor the refusal of time to have the plaintiff's books produced

<sup>17</sup> *Mussi v. Lorain*, 2 Browne, 99; *Leader v. Dunlap*, 6 Supr. C. 243.

<sup>18</sup> *Lincoln v. Parmentier*, 1 Phila. 25.

<sup>19</sup> *O'Donnell v. Flanigan*, 9 Supr. C. 136; P. & L. Dig., vol. 13, col. 22917.

<sup>20</sup> *Meyer v. Smith*, 7 Phila. 105.

<sup>21</sup> *Turnbull v. O'Hara*, 4 Yeates, 446; P. & L. Dig., vol. 13, col. 22919.

<sup>22</sup> *Peterson v. Reading R. Co.*, 4 D. R. 327; reversed, 177 Pa. 335; P. & L. Dig., vol. 13, cols. 22919-20-21-22.

<sup>23</sup> *Bitting v. Mowry*, 1 Miles, 216.

<sup>24</sup> *Laird v. Harrison*, 2 W. N. C. 427.

<sup>25</sup> *Shupp v. Sturdevant*, 2 Kulp, 13.

<sup>26</sup> *Wilson v. Van Leer*, 127 Pa. 371; *Taylor v. Lyon Lumber Co.*, 13 C. C. 235.

<sup>27</sup> *Withers v. Ralston*, 3 Phila. 412; P. & L. Dig., vol. 13, col. 22926.

<sup>28</sup> *Sitler v. Spring Garden, Etc., Co.*, 14 York, 153.

<sup>29</sup> *Moore v. Webster*, 14 C. C. 433; P. & L. Dig., vol. 13, col. 22929.

<sup>30</sup> *McCormick v. Goff*, 2 Lanc. L. R. 193; *Beaumont v. Gray*, 3 Luz. L. R. 129; P. & L. Dig., vol. 13, col. 22929.

<sup>31</sup> *Twaddell v. Chester Traction Co.*, 6 Del. Co. 399.

<sup>32</sup> *Owen v. Schmidt*, 14 Phila. 183; 10 W. N. C. 5.

<sup>33</sup> *Marshall v. Katz* (No. 2), 19 York, 25.

when no notice was given and no subpoena *duces tecum* served;<sup>34</sup> nor where counsel was a witness and also addressed the jury contrary to the unwritten rule of practice that counsel who is a witness shall not address the jury.<sup>35</sup>

Improper remarks of counsel in addressing the jury may be ground for new trial where exception is taken and put upon the record immediately.<sup>36</sup> But the withdrawal of a juror and the continuance of the case is discretionary with the court;<sup>37</sup> and it will not be reversed for refusal.<sup>38</sup> If the remarks complained of are a fair inference from the evidence, a new trial will not be given.<sup>39</sup>

The question which appeals to the court is whether such remarks wrought injury to the complainant.<sup>40</sup> Where the defendant himself addresses the jury and wins a verdict a new trial will not be awarded, notwithstanding the old saw that "He who pleads his own cause hath a fool for a client."<sup>41</sup> But a new trial will be granted where counsel persists in discussing evidence excluded by the court.<sup>42</sup> The objection must be taken before verdict, in order to move for a new trial for this reason.<sup>43</sup>

Where the court in reproving a juror for misconduct leaves the jury under suspicion of improper influences, a new trial should be granted.<sup>44</sup>

In an action for breach of promise where the defense is unchastity, a new trial will not be granted because the court directed the stenographer to take down the testimony for the use of the district attorney.<sup>45</sup> Where the stenographer's notes are lost and these become important on review, a new trial will be ordered.<sup>46</sup> But it is not ground for a new trial that a list of short causes was selected by a bar committee, for an adjourned court, under ancient practice;<sup>47</sup> nor in a case where minority was raised after the verdict and the court was not satisfied that the appearance for the minors was bad or unauthorized.<sup>48</sup> But if it appear that counsel in the course of examination prompted the witness a new trial may be awarded.<sup>49</sup>

<sup>34</sup> *United Ice Co. v. Haar*, 22 *Lanc. L. R.* 301.

<sup>35</sup> *Connellee v. Ziegler*, 16 *York*, 169.

<sup>36</sup> *Szuchy v. Traction Co.*, 12 *Kulp*, 123; *Groff v. Groff*, 21 *Lanc. L. R.* 137; *Littell v. Young*, 5 *Supr. C.* 205; *Moore v. Neubert*, 21 *Supr. C.* 144; *Guckaven v. Traction Co.*, 203 *Pa.* 521; *United, Etc., Co. v. Reynolds*, 224 *Pa.* 577; *Emery v. Eagle Co.*, 36 *C. C.* 419.

<sup>37</sup> *Holden v. R. Co.*, 169 *Pa.* 1; *Shaffer v. Coleman*, 35 *Supr. C.* 386.

<sup>38</sup> *Thompson v. Stevens*, 71 *Pa.* 161.

<sup>39</sup> *Phoenix Brewing Co. v. Weiss*, 23 *Supr. C.* 519.

<sup>40</sup> *Sweeney v. Lehigh V. R. Co.*, 2 *Kulp*, 391; *Seranton v. Chase*, 4 *Law Times (N. S.)*, 17; *Thompson v. Barkley*, 27 *Pa.* 263; *Shaylor v. Chase*, 19 *C. C.* 621; *Ruddy v. Ruddy*, 5 *C. C.* 544.

<sup>41</sup> *Brown v. Tees*, 2 *Phila.* 161.

<sup>42</sup> *Emery v. Christman*, 4 *Phila.* 118.

<sup>43</sup> *Reese v. Payne*, 2 *Kulp*, 361.

<sup>44</sup> *Kramer v. Kister*, 187 *Pa.* 227.

<sup>45</sup> *Hushour v. Nye*, 4 *Dauphin Co.* 109.

<sup>46</sup> *James v. French*, 5 *C. C.* 270.

<sup>47</sup> *Harrington v. Hamill*, 3 *Montg. Co.* 35.

<sup>48</sup> *Mercer v. Watson*, 9 *Lanc. Bar*, 53; 89.

<sup>49</sup> *Derr v. Schweitzer*, 2 *Woodward*, 420.

Statements of counsel in the opening of matters which were subsequently ruled out when offered in evidence are not ground for a new trial.<sup>50</sup>

Reference to a former award or verdict furnish grounds for a new trial, if promptly objected to.<sup>51</sup> After verdict it is too late.<sup>52</sup>

The improper ruling of the court upon an offer of evidence, material to the issue, is ground for a new trial.<sup>53</sup>

This is true both as to rejection of proper evidence<sup>54</sup> or the admission of improper evidence.<sup>55</sup>

But if it be immaterial and no injury is done the opposing party, it is not sufficient ground for a new trial.<sup>56</sup> If evidence offered is rejected but afterwards substantially admitted though in another form, a new trial will not be granted;<sup>57</sup> nor where it is admitted or excluded at the request of the defeated party;<sup>58</sup> or where the court instructs the jury to disregard evidence improperly admitted.<sup>59</sup> The objection must be noted at the time of the offer, in order to ground a motion for a new trial.<sup>60</sup>

Where papers are sent out with the jury without consent of the parties or leave of court, a new trial may be granted.<sup>61</sup>

If it appears that incompetent testimony was given a new trial may be granted.<sup>62</sup> The stenographer's notes are conclusive as to the trial, unless clear mistake be pointed out therein.<sup>63</sup>

## 20. Charge of court.

For error of law in the charge of the judge to the jury a new trial should be granted;<sup>1</sup> or erroneous answers to points.<sup>2</sup>

Upon a motion for error in instructions the court may grant a motion for a new trial as an alternative motion unless the plaintiff files a remitter of damages.<sup>3</sup> Unimportant phrases in the charge can-

<sup>50</sup> *Keim v. Maurer*, 2 Woodward, 412.

<sup>51</sup> *Hyslop v. Crozier*, 1 Miles, 267; *Shaeffer v. Kreitzer*, 6 Binney, 430; *Jones v. Cleveland*, 8 Kulp, 461; *Henry v. Wilson*, 1 W. N. C. 506.

<sup>52</sup> *Lawrence v. Scranton Traction Co.*, 3 Lack. L. N. 101; *Steele v. Con. Tr. Co.*, 47 Pitts. L. J. 290; P. & L. Dig., vol. 13, col. 22945.

<sup>53</sup> *Miller v. Miller*, 4 Pa. 317; P. & L. Dig., vol. 13; cols 22948-9.

<sup>54</sup> *Comth. v. McGowan*, 2 Parsons, 341.

<sup>55</sup> *Manbeck v. Shaffer*, 16 Lanc. L. R. 321; P. & L. Dig., vol. 13, cols. 22948-9; 2 C. R. A., col. 3602.

<sup>56</sup> *Boyd v. Boyd*, 1 Watts, 365; P. & L. Dig., vol. 13, cols. 22950-1; *Spahr v. Dissinger*, 17 York, 174; 2 C. R. A., col. 3602.

<sup>57</sup> *Jacoby v. W. Chester Fire Ins. Co.*, 10 Supr. C. 171; P. & L. Dig., vol. 13, cols. 22952-3.

<sup>58</sup> *Fraley v. Peale*, 2 Phila. 269; P. & L. Dig., vol. 13, col. 22954.

<sup>59</sup> *Whitely v. Billington*, 18 Phila. 288; P. & L. Dig., vol. 13, col. 22955.

<sup>60</sup> *Bee v. Fisher*, 6 S. & R. 339; P. & L. Dig., vol. 13, col. 22956.

<sup>61</sup> *Sheaff v. Gray*, 2 Yeates, 273; P. & L. Dig., vol. 13, cols. 22958-9.

<sup>62</sup> *Comth. v. McEwen*, 1 Clark, 140; P. & L. Dig., vol. 13, col. 22960.

<sup>63</sup> *Thomas v. Henderson*, 4 Kulp, 390.

<sup>1</sup> *Norton v. Breitenbach*, 1 Pearson, 467; *Rogers v. Waltz*, 5 D. R. 645; P. & L. Dig., vol. 13, col. 22963.

<sup>2</sup> *Blaine v. Chambers*, 1 S. & R. 169; P. & L. Dig., vol. 13, col. 22963.

<sup>3</sup> *Tomlinson v. R. Co.*, 4 Del. Co. 406; *Bailey v. Huckestein Co.*, 44 Pitts. L. J. 56; P. & L. Dig., vol. 13, cols. 22964-5.

not avail for a new trial;<sup>4</sup> but misstatements of the evidence,<sup>5</sup> or misdirection because of the court's misapprehension of the facts proven are grounds for a new trial.<sup>6</sup> However, if the matter is not material and the error was harmless, the rule is different.<sup>7</sup>

A new trial must be granted where binding instructions are erroneously given.<sup>8</sup> But where the matter is fairly submitted to the jury to judge of the weight of the evidence no new trial will be granted.<sup>9</sup>

Fair comments by the trial judge upon the nature of the cause and the circumstances are not reasons for a new trial.<sup>10</sup> The failure of the judge to answer points is ground for a new trial,<sup>11</sup> but not on abstract propositions of law or irrelevant or incongruous points.<sup>12</sup> Where the court sends out instructions to the jury in the absence of the parties it is such error as can only be rectified by a new trial.<sup>13</sup>

## 21. Verdict contrary to law.

Where the verdict is contrary to law a new trial will be granted.<sup>14</sup> A general verdict by which injustice is done can only be righted by a new trial;<sup>15</sup> and it is the duty of the trial judge to consider the verdict by this criterion.<sup>16</sup> A mere conjecture, however, is insufficient.<sup>17</sup> The court must exercise a sound discretion so as to do justice and yet not uselessly prolong litigation and clog the wheels of justice.<sup>18</sup> Where the jury wilfully disregards the instructions of the court, as to the law, the remedy is not by appeal, but new trial.<sup>19</sup> This is also the rule as to measure of damages.<sup>20</sup> As a rule a judge should not presume to set up his opinion on the weight of the evidence against that of the jury.<sup>21</sup>

<sup>4</sup> Farquhar v. Stick, 5 York, 53; P. & L. Dig., vol. 13, cols. 22966-7.

<sup>5</sup> Tewksberry v. Boyle, 5 Kulp, 349.

<sup>6</sup> Edwards v. Edwards, 4 Phila. 11; Smith v. Brown, 26 Lanc. L. R. 388; Gerhard v. Raser, 2 Berks, 77.

<sup>7</sup> Ide v. Lake Twp., 9 Kulp, 192; 191 Pa. 182; Evans v. D. & H. Canal Co., 6 Kulp, 465; Immel v. Herb, 1 Berks, 169.

<sup>8</sup> Simes v. Blair, 5 W. N. C. 235; York Felt Paper Co. v. York Haven Paper Co., 14 York, 171.

<sup>9</sup> Long v. Reed, 16 C. C. 110. (See P. & L. Dig., vol. 13, cols. 22971-2-3-4, for various cases on this point.)

<sup>10</sup> Comth. v. Credit Mobilier, 1 Legal Opinion, 57; P. & L. Dig., vol. 13, cols. 22972-3-4.

<sup>11</sup> Slocum v. Heath, 1 Lack. Jur. 162.

<sup>12</sup> Long v. Reed, 16 C. C. 110.

<sup>13</sup> Sommer v. Huber, 183 Pa. 162; Helme v. Kingston, 8 Kulp, 221.

<sup>14</sup> Welsh v. Duser, 3 Binney, 329; Garrigues v. Vogdes, 2 Browne, 262.

<sup>15</sup> Mercer v. Watson, 9 Lanc. Bar, 53.

<sup>16</sup> Keller v. Labaugh, 1 D. R. 544; Jones v. Mackey, 3 Lack. L. N. 375; Hunt v. Bruner, 6 Phila. 204.

<sup>17</sup> Jordan v. Meredith, 3 Yeates, 318.

<sup>18</sup> For various cases, see P. & L. Dig., vol. 13, cols. 22980-1, 2-3.

<sup>19</sup> Reading, Etc., R. Co. v. Balthaser, 126 Pa. 1; Lehr v. Brodbeck, 192 Pa. 535; P. & L. Dig., vol. 13, cols. 22985-6-7; vol. 2, C. R. A. 3603; Trexler v. Trexler, 1 Berks, 282.

<sup>20</sup> Stroud v. Smith, 194 Pa. 502; vol. 13, P. & L., cols. 22989-90; Mahler v. Ruth, 12 Northam. 162.

<sup>21</sup> Campbell v. Sproat, 1 Yeates, 327; P. & L. Dig., vol. 13, col. 22990;



But where the verdict is plainly against the weight of the evidence, it may be set aside and a new trial awarded.<sup>22</sup> But it must be for caprice, prejudice or plain disregard of the undoubted evidence.<sup>23</sup> A distinction is drawn as to the rule in actions purely at common law and those in which an equitable principle controls.<sup>24</sup>

A new trial will not be granted in general, where the cause was impartially submitted to the jury, and the question on the evidence was fairly for the jury and by them considered without prejudice and in good faith, although the judge may entertain a different opinion on the whole case.<sup>25</sup>

## 22. Reasons based on character of verdict.

Where the verdict is uncertain, irregular or inconsistent it may be set aside and a new trial granted.<sup>26</sup> In case it is excessive the court may fulcrum a condition for its reduction on the alternative of a new trial, if the excess be not remitted.<sup>27</sup> This rule is vigorously applied in actions of tort,<sup>28</sup> and the plaintiff is required to file a remitter within a certain time or rule for new trial to become absolute.<sup>29</sup> This remitter (improperly termed *remittitur* in the cases) may be filed after the time, *nunc pro tunc*, to save the delay and expense of another trial,<sup>30</sup> but not after the term.<sup>31</sup> Where a remitter is filed but the money is not paid over the verdict will stand.<sup>32</sup>

The exercise of this mode of correction of a verdict is within the

Seilverd v. Wolfinger, 2 Berks, 48; Williamsport, Etc., Co. v. Slipp, 2 Berks, 50.

<sup>22</sup> Lohr v. Somerset, Etc., R. Co., 2 Mona. 507; McBride v. Rinard, 172 Pa. 542; Smith v. Weaver, 5 Schuylkill Co. 95; 2 C. R. A., cols. 3603-4; Gregory v. Hulslander, 9 Lack. Jur. 344; Prussian Remedy Co. v. Krick, 1 Berks, 132.

<sup>23</sup> Kohler v. Penna. R. Co., 135 Pa. 346; P. & L. Dig., vol. 13, col. 22994; Holden v. Penna. R. Co., 169 Pa. 1; Pringle v. Gaw, 6 S. & R. 298; P. & L. Dig., vol. 13, cols. 22995-6-7-8; Sloan v. R. Co., 225 Pa. 52.

<sup>24</sup> Lotz v. Reading Iron Co., 10 C. C. 497; Bentzel v. Bentzel, 12 York, 61; Todd v. Campbell, 32 Pa. 250; Nicolls v. McDonald, 101 Pa. 514.

<sup>25</sup> Peters v. Phoenix Ins. Co., 3 S. & R. 25; Megargel v. Waltz, 21 C. C. 633; Heft v. Griswold, 5 Phila. 365; Becker v. Maurer, 2 Woodward, 264; Flower v. Houghton, 12 D. R. 8; P. & L. Dig., vol. 13, cols. 23003-5-6; 2 C. R. A., cols. 3605-6; P. & L. Dig., vol. 13, cols. 23007-9-10-11-12.

<sup>26</sup> Pulhamus v. Pursel, 2 Clark, 141; Munley v. Scranton, 4 D. R. 117; Irvine v. McCullough, 1 Pitts. 433; P. & L. Dig., vol. 13, cols. 23013-4-5; 2 C. R. A. 3606.

<sup>27</sup> Spence v. Burt, 18 Lanc. L. R. 251; P. & L. Dig., vol. 13, cols. 23018-9-20-21; 2 C. R. A. 3607; Rothmund v. R. Co., 26 Lanc. L. R. 129.

<sup>28</sup> P. & L. Dig., vol. 13, cols. 23023-4-5-6-7; 2 C. R. A. 3608-9; Mahler v. Ruth, 12 Northam. 162.

<sup>29</sup> Meckes v. Pocono Mount'n, Etc., Co., 203 Pa. 13; Campbell v. Pittsburgh Bridge Co., 23 Supr. C. 138; P. & L. Dig., vol. 13, cols. 23029-30-31-32-33.

<sup>30</sup> Hutton v. Morrison, 10 Supr. C. 364.

<sup>31</sup> Crew v. McCafferty, 124 Pa. 200.

<sup>32</sup> Fleming v. Dixon, 194 Pa. 67.

discretion of the trial court and it will not be reviewed except for an abuse of it.<sup>33</sup>

There is no good reason why the same rule as is applied to excessive verdicts should not be applied to inadequate verdicts. At the common law there is no distinction. But the rule is not so frequently invoked or enforced in the latter case.<sup>34</sup>

Although quotient verdicts are under the ban under the common law, they are tolerated in Pennsylvania in civil cases and a new trial will not be granted, on that ground alone;<sup>35</sup> nor where the jury came to an agreement by a compromise.<sup>36</sup>

If there be evidence that the verdict was arrived at by fraud or collusion, a new trial will be granted;<sup>37</sup> or to enable a witness who was confused to correct a mistake in his testimony;<sup>38</sup> or where it appears that a witness had sworn falsely to a material fact.<sup>39</sup>

### 23. After-discovered evidence.

Motions for a new trial on the ground of after-discovered testimony are entertained only when it is shown to have come to the knowledge of the party since the trial; that it could not have been procured by the exercise of due diligence; that it relates to the merits of the case and is not merely cumulative or incidental, or tends to impeach a witness and must be of such a character as probably to change the verdict.<sup>40</sup> The one who moves on this ground must satisfy the court upon each of these points.<sup>41</sup>

A new trial will not be granted when the evidence is in public records;<sup>42</sup> or in papers in possession of the mover at the trial.<sup>43</sup> He must have been ignorant of the existence of such evidence on the trial;<sup>44</sup> and it must not be merely cumulative or corroborative;<sup>45</sup>

<sup>33</sup> *Penna. R. Co. v. Fuller*, 3 Penny. 176; *Bennett v. Biddle*, 150 Pa. 420; *Kaster v. Welsh*, 157 Pa. 590; *Lehr v. Brodbeck*, 192 Pa. 535.

<sup>34</sup> *Evans v. Del. & H. Canal Co.*, 6 Kulp, 465; *Palmer v. Leader Pub. Co.*, 7 Supr. C. 594; *P. & L. Dig.*, vol. 13, cols. 23037-8; 2 C. R. A., col. 3608.

<sup>35</sup> *Cleland v. Carlisle Boro.*, 186 Pa. 110; *P. & L. Digest*, vol. 13, col. 23039.

<sup>36</sup> *Sloan v. Johnson*, 20 Supr. C. 643; 2 C. R. A., col. 3609.

<sup>37</sup> *Hambleton v. Real Est., Etc., Co.*, 16 W. N. C. 376; *Gazzam v. Reading*, 202 Pa. 231; *P. & L. Dig.*, vol. 13, col. 23040-41; 2 C. R. A., col. 3609.

<sup>38</sup> *Wilmarth v. Tull*, 3 W. N. C. 475; *P. & L. Dig.*, vol. 13, cols. 23043-4.

<sup>39</sup> *Shanahan v. Agl. Ins. Co.*, 6 Supr. C. 65; *Van Steuben v. Central R. Co.*, 178 Pa. 367.

<sup>40</sup> *Heiss v. Lancaster*, 18 Lanc. L. R. 289; *Taylor v. Lyon Lumber Co.*, 13 C. C. 235; *P. & L. Dig.*, vol. 13, col. 23046; 2 C. R. A., col. 3610; *Comth. v. Yocum*, 12 Dauphin Co. 292; *Luellen v. Boyd*, 57 Pitts. L. J. 435.

<sup>41</sup> *Stewart v. Press Co.*, 119 Pa. 584; *P. & L. Dig.*, vol. 13, cols. 23047-8-9.

<sup>42</sup> *Dodson v. Branson*, 7 Phila. 193.

<sup>43</sup> *Aubel v. Ealer*, 2 Binney. 582; *Machell v. Anderson*, 5 Kulp, 433; *P. & L. Dig.*, vol. 13, col. 23051.

<sup>44</sup> *Slattery v. Supreme Tent*, 19 Supr. C. 108; *P. & L. Dig.*, vol. 13, cols. 23051-2-3-4-5.

<sup>45</sup> *Moore v. Webster*, 14 C. C. 433; *P. & L. Dig.*, vol. 13, cols. 23058-9, 60-1; 2 C. R. A., col. 3610; *Mellinger v. R. Co.*, 26 Lanc. L. R. 233.

or merely impeaching evidence;<sup>46</sup> or insufficient and immaterial to the issue.<sup>47</sup> If the case measures up to the rules laid down here a new trial may be granted, in the discretion of the court.<sup>48</sup> But such motion must be founded on an affidavit setting forth the name or names of the witnesses and what it is intended to prove by them;<sup>49</sup> that this evidence was unknown to affiant at the time of the trial and could not have been produced by use of due diligence,<sup>50</sup> and that it is material to the issue. Where the newly-discovered evidence consists of books or papers in the affiant's possession he must not only aver that they were lost but that they are material, and that he used due diligence in his search for them.<sup>51</sup> Pending the rule the deposition of a newly-discovered witness should be taken.<sup>52</sup> This reason may be assigned anytime before judgment.<sup>53</sup>

#### 24. Effect of entry of judgment.

Whilst a judgment stands a motion for a new trial cannot be entertained, unless made within the four days,<sup>1</sup> or when allowed *nunc pro tunc* before the end of the term.<sup>2</sup> After the end of the term the motion will not be entertained even in a hard case.<sup>3</sup> But where judgment has not been entered the court may receive a motion *nunc pro tunc*.<sup>4</sup> When judgment is entered the rule must be based on petition setting forth the grounds and the order of the court thereon should be "judgment vacated, verdict set aside and new trial granted."<sup>5</sup> The court should state its reasons concisely and place them on the record.<sup>6</sup> Rules of court must be followed as prescribed in each jurisdiction.<sup>7</sup> So where a rule of court requires the reasons, when not founded on the evidence in the cause, to be verified this is a reasonable requirement.<sup>8</sup> As a rule the

<sup>46</sup> P. & L. Dig., vol. 13, cols. 23062-3-4; Comth. v. Dorwart, 27 Lanc. L. R. 106.

<sup>47</sup> Rodel v. Bell, 6 Phila. 207; P. & L. Dig., vol. 13, cols. 23065-6-7-8-9-70-71; 2 C. R. A., col. 3610-1.

<sup>48</sup> Wurtz v. Walton, 6 Phila. 578; Struthers v. Wagner, 6 Phila. 262; P. & L. Dig., vol. 13, cols. 23073-4-5; 2 C. R. A., col. 3611.

<sup>49</sup> Knorr v. Beck, 1 Phila. 145; Kenderdine v. Phelin, 1 Phila. 343; Benedict v. Penna. Coal Co., 6 Kulp, 221; Gazzam v. Reading, 202 Pa. 231.

<sup>50</sup> Comth. v. Seybert, 4 Kulp, 4.

<sup>51</sup> Evans v. Bitner, 4 Lanc. Bar, No. 15.

<sup>52</sup> Greenwood v. Iddings, 1 Phila. 28; P. & L. Dig., vol. 13, col. 23078.

<sup>53</sup> Price v. Guardian, Etc., Co., 2 W. N. C. 405.

<sup>1</sup> Syracuse, Etc., Co. v. Carothers, 63 Pa. 379; Conrad v. Commercial, Etc., Co., 61 \* Pa. 66; Moravian Seminary v. Bethlehem, 153 Pa. 583; P. & L. Dig., vol. 13, cols. 23085-6.

<sup>2</sup> Lance v. Bonnell, 105 Pa. 46.

<sup>3</sup> Hill v. Egan, 2 Supr. C. 596; O'Donnell v. Flanagan, 9 Supr. C. 136; Hill v. Harder, 3 Supr. C. 473.

<sup>4</sup> King v. Brooks, 72 Pa. 363; Lingenfelter v. Riddlesburg, Etc., Co., 84 Pa. 328.

<sup>5</sup> Fisher v. Hestonville, Etc., R. Co., 185 Pa. 602; Gazzam v. Reading, 202 Pa. 231.

<sup>6</sup> Hill v. Egan, 2 Supr. C. 596.

<sup>7</sup> Comth. v. Reber, 10 D. R. 683; 2 C. R. A., col. 3611.

<sup>8</sup> Dietrich v. Lancaster, 212 Pa. 566; 2 C. R. A., col. 3612.

reasons must all be filed when the motion is made;<sup>9</sup> though there are cases in which the court may allow additional reasons to be filed.<sup>10</sup> As already stated the affidavit of the mover cannot be heard on the argument of the rule,<sup>11</sup> but depositions taken and filed with the motion may be heard.<sup>12</sup> Where there are several judges and they are equally divided the motion falls<sup>13</sup> under the old general rule, but see the acts in counties having two Common Pleas judges wherein it is provided that the opinion of the trial judge shall stand.<sup>14</sup> An opinion not filed until after the commission of the judge, if filed by his associates or by himself as *amicus curiæ* is valid.<sup>15</sup>

But where an order for a new trial is not signed, it does not bind his successor.<sup>16</sup> A special judge presiding has the same power as the resident judge and may make the rule absolute in vacation,<sup>17</sup> and the associates cannot vacate the order,<sup>18</sup> nor will he be mandamusd to vacate it on the request of the associates.<sup>19</sup> The associates cannot hear and determine a motion for a new trial in the absence of the law judge.<sup>20</sup> But there are circumstances when it is both the right and duty of the associates to act upon such motion.<sup>21</sup>

#### 25. Power of court to revise or correct order.

Having made an order discharging the rule, the court may on the same day hear a motion to re-argue the case,<sup>22</sup> but not after some delay.<sup>23</sup> It may revise and correct mistakes.<sup>24</sup> It has discretionary power to reinstate a rule erroneously discharged.<sup>25</sup> In granting a motion and awarding a new trial, the court may impose conditions which are equitable and have direct relation to the matter at issue,<sup>26</sup> such as payment of costs;<sup>27</sup> or other reasonable requirements suitable to the case.<sup>28</sup> This is equally

<sup>9</sup> *Schultz v. Bear Creek Oil Co.*, 6 Del. Co. 393.

<sup>10</sup> *Medalis v. Weimer*, 8 D. R. 454.

<sup>11</sup> *Hoar v. Mulvey*, 1 Binney, 145.

<sup>12</sup> *Llewellyn v. Levy*, 12 C. C. 527; P. & L. Dig., vol. 13, col. 23095.

<sup>13</sup> *Cahill v. Benn*, 6 Binney, 99.

<sup>14</sup> Vol. 1, p. 167.

<sup>15</sup> *Reiber v. Boos*, 110 Pa. 594.

<sup>16</sup> *Wentz v. Lowe*, 2 Mont'g Co. 68.

<sup>17</sup> *Bartolet v. Faust*, 5 Phila. 316.

<sup>18</sup> *Glamorgan Iron Co. v. Snyder*, 84 Pa. 397.

<sup>19</sup> *Korman's Appl.*, 162 Pa. 151.

<sup>20</sup> *Kolb's Case*, 4 Watts, 154.

<sup>21</sup> *Van Vliet v. Conrad*, 95 Pa. 494; *Reiber v. Boos*, 110 Pa. 594. (See vol. 1, p. 156, par. 42.)

<sup>22</sup> *Van Vliet v. Conrad*, 95 Pa. 494.

<sup>23</sup> *Dean v. Munhall*, 11 Supr. C. 69.

<sup>24</sup> *Law v. Kennedy*, 2 Walker, 497; P. & L. Dig., vol. 13, cols. 23101, 23102.

<sup>25</sup> *Cronrath v. Border*, 27 Supr. C. 15.

<sup>26</sup> *Stauffer v. Reading*, 206 Pa. 479; 208 Pa. 436.

<sup>27</sup> *Cheshire v. Hevner*, 2 W. N. C. 183; *Devinney v. Reeder*, 1 P. & W. 399; *Kelsey v. Murphy*, 30 Pa. 340.

<sup>28</sup> P. & L. Dig., vol. 13, cols. 23103-4-5.

true of an order discharging the rule.<sup>29</sup> But plaintiff may refuse to accept and cannot be deprived of his right to appeal.<sup>30</sup>

Where the party complies with the condition, his right to the new trial is fixed and irrevocable without his consent.<sup>31</sup> The court may permit the condition to be performed *nunc pro tunc*.<sup>32</sup> The right may be lost by laches.<sup>33</sup>

The court has power to put the verdict in legal form to avoid a new trial, where justice requires it.<sup>34</sup> Where the custom is to allow a motion for a new trial and in arrest of judgment contemporaneously, the latter will not be a waiver of the former.<sup>35</sup> Where there is a motion for judgment *non obstante veredicto*, as well as for a new trial, the granting of the former overrules the latter.<sup>36</sup> Where a party dies pending a motion for a new trial, judgment may be entered on the verdict, if a new trial is refused.<sup>37</sup>

## 26. Review by appellate court.

The order of the court will not be reviewed except for an abuse of discretion<sup>38</sup> whether tried by a jury or by the court.<sup>39</sup> Under the act of May 21, 1891, P. L. 101, the appellate court will not reverse except for a clear abuse of discretion.<sup>40</sup>

The opinion of the court below, though not conclusive, is persuasive.<sup>41</sup> The discretion of the lower court will rarely be reversed.<sup>42</sup> On the question of damages, under the act of 1891, *supra*, the appellate court may set aside a verdict deemed by it excessive, said act being held constitutional.<sup>43</sup> The power given is exceptional and will be exercised only in extreme cases.<sup>44</sup>

The verdict must be so excessive as to be grossly unjust.<sup>45</sup> It will not be exercised where the excessiveness has not shocked the judicial discretion below.<sup>46</sup>

<sup>29</sup> *Ganzer v. Fricke*, 57 Pa. 316; P. & L. Dig., vol. 13, col. 23106.

<sup>30</sup> *Lehr v. Brodbeck*, 192 Pa. 535; *Bradwell v. Pitts*, Etc., R. Co., 139 Pa. 404.

<sup>31</sup> *Reiber v. Boos*, 110 Pa. 594.

<sup>32</sup> *Homestead, Etc., Co. v. McBroom*, 4 W. N. C. 410.

<sup>33</sup> *Ward v. Patterson*, 46 Pa. 372.

<sup>34</sup> *Clouser v. Patterson*, 122 Pa. 372; P. & L. Dig., vol. 13, col. 23110.

<sup>35</sup> *Rohrbacker v. Pugh*, 10 W. N. C. 275; P. & L. Dig., vol. 13, col. 23111.

<sup>36</sup> *Building Assn. v. Anderson*, 7 Phila. 106; *Penna. Salt Mfg. Co. v. Neel*, 54 Pa. 9; *Freiler v. Kear*, 126 Pa. 470.

<sup>37</sup> *Fitzgerald v. Stewart*, 53 Pa. 343.

<sup>38</sup> P. & L. Dig., vol. 13, col. 23115; *Mix v. North American Co.*, 209 Pa. 636; 2 C. R. A. 3615.

<sup>39</sup> *Comth. v. Del., Etc., Co.*, 165 Pa. 44; 14 C. C. 440.

<sup>40</sup> *Reno v. Shallenberger*, 8 Supr. C. 436.

<sup>41</sup> *Gazzam v. Reading*, 202 Pa. 231; *McNeile v. Cridland*, 6 Supr. C. 428; *Drenning v. Wesley*, 189 Pa. 160.

<sup>42</sup> *Johnson v. Watson*, 157 Pa. 454; *'Smith v. Boro'*, 3 Supr. C. 495; *Barton v. Reynolds*, 17 Supr. C. 504.

<sup>43</sup> *Smith v. Times Pub'g Co.*, 178 Pa. 481.

<sup>44</sup> *Begley v. Penna. R. Co.*, 201 Pa. 84; *Neff v. Penna. R. Co.*, 202 Pa. 371; *Marcy v. Brock*, 207 Pa. 95.

<sup>45</sup> *Quigley v. Penna. R. Co.*, 210 Pa. 162.

<sup>46</sup> *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316; *Stauffer v. Reading*, 208 Pa. 436; *McGroarty v. Lehigh, Etc., Co.*, 212 Pa. 53.

Prior to the act of 1891, *supra*, the only way to reach an excessive verdict was by a motion for a new trial and when refused, the discretion was seldom reviewed.<sup>47</sup> This also applied to inadequacy of damages.<sup>48</sup>

An assignment of error for refusing a new trial will be considered only in exceptional cases,<sup>49</sup> or for granting a new trial.<sup>50</sup> Nothing short of a manifest abuse of discretion will appeal to the Superior court on the review of an order granting or refusing a motion for a new trial.<sup>51</sup>

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<sup>47</sup> Vallo v. U. S. Ex. Co., 147 Pa. 404.

<sup>48</sup> Woodward v. Con. Tr. Co., 17 Supr. C. 576; Reddig v. Eberly, 27 Lane. L. R. 123; Sweeney v. Traction Co., 14 Luz. Leg. Reg. 215.

<sup>49</sup> Wike v. Wolverton, 26 Supr. C. 561; Geist v. Rapp, 206 Pa. 411.

<sup>50</sup> Dougherty v. Andrews, 202 Pa. 633.

<sup>51</sup> Halahan v. Cassidy, 12 Supr. C. 227; Zugsmith v. Rosenblatt, 15 Supr. C. 296.

## CHAPTER IX.

### APPEALS

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### 1. General term of review.

In these days of inordinate desire to simplify practise so "that he may run that readeth it," or *vices versa*, many of the long-established distinctions were erased from the tablet of the law.

Thus was passed the act of May 9, 1889, P. L. 158, section one being as follows:

"That all appellate proceedings in the Supreme court heretofore taken by writ of error, appeal or *certiorari* shall hereafter be taken in a proceeding to be called an appeal."

### 2. Form of præcipe — certiorari.

"Section 2. The names of the parties, estate or matter shall be set forth in the præcipe for the appeal in the order and sequence in which they were recorded at the trial or hearing in the court from which the appeal shall be taken, with a substitution of proper parties in case of death or amendment, and the appeal shall be entitled as the appeal of — —, (who was plaintiff or defendant, as the case may be), from the (judgment or decree) of the court of — —, and the record shall be brought to the Supreme court by a writ of *certiorari*. The record, on any appeal perfected in the court from which the appeal may be taken, may be filed in the Supreme court without requiring a writ of *certiorari*."

### 3. Exemptions abolished.

"Section 3. Hereafter there shall not be any exemption in favor of any person from the acts of assembly limiting the time within



which writs of error, appeals or *certiorari* must be sued out." Whence it may be inferred that the change is one of form and not of substance.

#### 4. Distinctions of appeals.

The constitution of 1873 has imbedded in it all the distinctions in practice at its adoption which generally embraced as modes of review a writ of error for all actions and proceedings at the common law, appeal for all decrees in equity or equitable procedure whether in a court of equity or the common-law side, and a writ of *certiorari*, where only the record was reviewable. The learned judges of to-day are loth to let go the judicial grasp upon these distinctions as will be seen before the end of this chapter, and with good reason. The federal courts maintain the distinction in form as well as substance, as pointed out in volume 1 of this series.

Since the act of 1889, *supra*, the appellate court will look into the substance of the "appeal," to determine whether it is in fact an appeal, a writ of error or a *certiorari*.<sup>1</sup> If the proceeding in the court below be purely statutory and not savoring of common-law jurisdiction, but summary in its nature, the appeal will still have the effect of a *certiorari* only, and neither the evidence nor the opinion of the court will be reviewed,<sup>2</sup> unless an appeal be given by the statute itself.<sup>3</sup> It matters not that the court below granted a bill of exceptions, if the matter be purely for *certiorari*.<sup>4</sup>

If the statute gives no right of appeal, the appellate court by virtue of its common-law powers to review the records of inferior courts will treat the appeal as a *certiorari*;<sup>5</sup> for thus alone can the lower court be constrained to remain within the pale of its jurisdiction and "due process of law" be guaranteed.<sup>6</sup> An appeal from an order quashing a warrant of arrest has the effect of a *certiorari* only;<sup>7</sup> also, from an order dissolving an attachment under the act of 1869.<sup>8</sup>

#### 5. Appeals on proceedings by petition.

Where a statute provides for a proceeding by petition, as in nomination and election matters, an appeal from the adjudication below, is not confined to the strict common-law rule of *certiorari*, but it will inspect the whole record to ascertain whether the court exceeded its jurisdiction or legal discretion. It was held by Mitchell, C. J., that, in general the opinion of the court below is not strictly part of the record, and in common-law actions the review on *certiorari*

<sup>1</sup> Thompson v. Preston, 5 Supr. C. 154; Hapgood Shoe Co. v. Saupp, 7 Supr. C. 480; Diamond Street, 196 Pa. 254.

<sup>2</sup> Middletown Road, 15 Supr. C. 167; Katharine Water Co., 32 Supr. C. 94.

<sup>3</sup> Lyon v. Dunn, 196 Pa. 90; Miller v. Summers, 13 Supr. C. 127; Gabler v. Black, 210 Pa. 541; Lower Merion Twp. v. Cline, 211 Pa. 559.

<sup>4</sup> Comth. v. Supt. of Phila. Prison, 220 Pa. 401; 33 Supr. C. 594.

<sup>5</sup> Schmuck v. Hartman, 222 Pa. 190.

<sup>6</sup> Katharine Water Co., 32 Supr. C. 94.

<sup>7</sup> Phoenix Press v. MacKenzie, 32 Supr. C. 183.

<sup>8</sup> Ingram v. Orangers, 33 Supr. C. 316.

is confined to the judgment without reference to the reasons of the court in entering it. In equity suits, the reasons and opinion of the chancellor are always open to examination to discover the grounds of his action. Proceedings on summary petitions occupy a middle ground.<sup>9</sup> Still, under the act of February 17, 1906, P. L. 49, relating to registration of voters, it was held that no appeal is given.<sup>10</sup>

#### 6. Writ of error — where it obtained.

Thus, the substance remaining, it is important to outline where a writ of error was the proper mode of review. Generally, in every action at common law, and upon every proceeding or order in the nature of common law, the review was by writ of error.<sup>11</sup> So also if the proceeding was statutory but according to the course of the common law.<sup>12</sup> But where an appeal was provided for a writ of error would not lie; as on an award of arbitrators.<sup>13</sup>

Upon judgments in feigned issues the remedy was by writ of error;<sup>14</sup> also on inquest on habitual drunkard;<sup>15</sup> in libel upon a vessel the court having entered judgment instead of a "decree," a writ of error was sustained.<sup>16</sup> But where the proceeding was equitable as a feigned issue on a bill, appeal was the proper method.<sup>17</sup> Proceedings for possession under the landlord act of 1830, were not reviewable by writ of error;<sup>18</sup> nor the refusal of the Common Pleas to set aside a *testatum fi. fa.* to recover costs on *certiorari* to a justice of the peace.<sup>19</sup> A writ of error lay only where the judgment was final.<sup>20</sup> Where error was alleged as to an execution the writ must set forth the execution.<sup>21</sup> Objections were taken by plea or motion to quash the writ,<sup>22</sup> and this motion might be made before the return day.<sup>23</sup> The supreme court allowed a writ to be withdrawn so that the lower court might open proceedings on a *testatum fi. fa.*<sup>24</sup> Where a *non pros.* was granted under the act of

<sup>9</sup> Independence Party Nomination, 208 Pa. 108.

<sup>10</sup> Saurman's Case, 218 Pa. 291.

<sup>11</sup> McClemon's Lessee v. Graham, 3 Binney, 88; Klein's Ap., 11 W. N. C. 449; Fisher v. Kean, 1 Watts, 259.

<sup>12</sup> McGinnis v. Comth., 74 Pa. 245; Schuylkill Nav. Co. v. Thoburn, 7 S. & R. 411; Hanover Turnpike Co. v. Craighead, 5 Pa. 470; Harris v. Sheldon, 1 Mona. 183; Grubb's Ap., 82 Pa. 23; Feagley v. Norbeck, 24 W. N. C. 227; Phila. v. Dungan, 124 Pa. 52; Comth. v. Rhoads, 9 Pa. 488; Laird v. Walkinshaw, 15 Atl. 898.

<sup>13</sup> Sullivan v. Weaver, 9 Pa. 223; Taggart v. McGinn, 14 Pa. 155.

<sup>14</sup> Reed's Ap., 71 Pa. 378; Brown v. Parkinson, 56 Pa. 336.

<sup>15</sup> McGinnis v. Comth., 74 Pa. 245.

<sup>16</sup> Portland v. Lewis, 2 S. & R. 197.

<sup>17</sup> Baker v. Williamson, 2 Pa. 116.

<sup>18</sup> McKeon v. King, 9 Pa. 213. (See P. & L. Dig., vol. 1, col. 734.)

<sup>19</sup> Palmer v. Lacock, 107 Pa. 346.

<sup>20</sup> Hawk v. Jones, 24 Pa. 127; Horner, Etc., R., 37 Pa. 333.

<sup>21</sup> McFarlin v. McDowell, 3 S. & R. 413; Jarrett v. Tomlinson, 3 W. & S. 114.

<sup>22</sup> Showers v. Showers, 27 Pa. 485.

<sup>23</sup> Davis v. Hood, 13 Pa. 170.

<sup>24</sup> Compher v. Anawalt, 2 Watts, 490.

June 8, 1881, P. L. 80, any justice could grant a rule to show cause why it should not be taken off.<sup>25</sup> The supreme court would presume that the return was regularly made<sup>26</sup> and would amend the writ by the record, under statute of 5th Geo. I. C. 13,<sup>27</sup> following the *præcipe*.<sup>28</sup> A writ not made returnable to the first day of the *teste* was quashed.<sup>29</sup> If regularly issued but not served until after the return day it would not quash but remit, on motion.<sup>30</sup>

#### 7. Writ of error — effect of.

The effect of a writ of error was to bring up for review only so much of the cause as was embraced in the bill of exceptions.<sup>31</sup> An issue framed by a register of wills, could not be reviewed by writ of error on the question as to whether or not it was properly framed by the register.<sup>32</sup> The record on a case stated was brought up without a *certiorari*.<sup>33</sup>

#### 8. Appeal, when the proper mode.

Appeal was the proper mode of review in all equity proceedings whether in the Common Pleas or the Orphans' court, and where the remedy was equitable in its character. For example, subrogation;<sup>34</sup> feigned issue on an alleged nuncupative will;<sup>35</sup> rule to set aside an execution on equitable principles;<sup>36</sup> rule to show cause why one judgment should not be set off against another;<sup>37</sup> a decree refusing an issue on distribution;<sup>38</sup> refusal of a motion to amend a bill in equity;<sup>39</sup> refusal of a preliminary injunction under act of Feb'y 14, 1866, P. L. 28.<sup>40</sup> But unless an express right of appeal was given, the supreme court refused to entertain it.<sup>41</sup>

An appeal was allowed on a partnership bill for account.<sup>42</sup>

#### 9. Equity cases of account.

The act of June 24, 1895, P. L. 243, authorizing appeals in equity cases of account, where the liability to account is in issue from the preliminary order or decree of court requiring an account, is as follows:

"That in all cases wherein any court of Common Pleas of this

<sup>25</sup> *Lebanon, Etc., Co. v. Erb*, 1 Atl. 571.

<sup>26</sup> *Gailey v. Beard*, 4 Yeates, 418.

<sup>27</sup> *Finney v. Crawford*, 2 Watts, 294.

<sup>28</sup> *Guhr v. Chambers*, 8 S. & R. 157.

<sup>29</sup> *Guthrie v. Fitzgerald*, 2 Pitts. L. J. 110.

<sup>30</sup> *Jones v. Schock*, 1 T. & H. Pr., section 848.

<sup>31</sup> *Warsaw Twp. v. Knox Twp.*, 107 Pa. 301; *Montoursville Boro' Overseers v. Fairfield Twp. Overseers*, 112 Pa. 97.

<sup>32</sup> *Shay v. Henk*, 49 Pa. 79.

<sup>33</sup> *Rouse v. Crawford County Poor Directors*, 118 Pa. 1.

<sup>34</sup> *Springer's Admrs. v. Springer*, 43 Pa. 518; *Steele's Ap.*, 72 Pa. 110.

<sup>35</sup> *Werkheiser v. Werkheiser*, 6 W. & S. 184.

<sup>36</sup> *Gordonier v. Billings*, 77 Pa. 493.

<sup>37</sup> *Horton v. Miller*, 44 Pa. 256.

<sup>38</sup> *Providence, Etc., Co. v. Chase*, 108 Pa. 319.

<sup>39</sup> *Dick's Ap.*, 106 Pa. 589.

<sup>40</sup> *Hilbish v. Catherman*, 60 Pa. 444.

<sup>41</sup> *Patterson v. Schoyer*, 10 Watts, 333.

<sup>42</sup> *Lafferty v. Lafferty*, 174 Pa. 536; *Clark v. Clark*, 180 Pa. 186.

commonwealth, in the exercise of its powers as a court of chancery in matters of account, wherein the complainant prays for an account from the defendant or defendants, or from some of them, and on the part of the defendant there is a denial of liability to account, upon this preliminary question of liability, the decision or decree of the court is in favor of plaintiff and requires an account, then an appeal to the supreme court of the proper district shall be allowed to any of the defendants or parties aggrieved, in the same manner as is allowed by law from final decrees, and upon perfecting such appeal, further proceedings shall be suspended until such appeal is determined: *Provided*, However, that such appeal must be taken within twenty days after such order or decree has been entered of record in the case to which it belongs. And all such appeals shall be heard by the supreme court in any district in which it may be in session, as is provided in cases in equity originating in the supreme court, and pending such appeal."

#### 10. Appeals in cases not according to the common law.

Where the proceeding was statutory and not according to the course of the common law, neither a writ of error nor an appeal would lie.<sup>43</sup> The only remedy was by *certiorari*.<sup>44</sup> From a decree of divorce an appeal lay under act of 1815.<sup>45</sup> Without a provision for an appeal the appellate court took no jurisdiction and dismissed the appeal.<sup>46</sup>

In appeals under the poor laws, an appeal only brought up matters on which exceptions were taken.<sup>47</sup> Appeals from the quarter sessions were not encouraged, as to liquor licenses,<sup>48</sup> fines,<sup>49</sup> or bail on recognizance.<sup>50</sup> So, generally, without common law authority, in the absence of a statutory provision, no appeal was allowed.<sup>51</sup> Where an appeal was allowable no *certiorari* was required to bring up the record. The appeal necessarily brought it up.<sup>52</sup>

#### 11. Certiorari.

Where no appeal was provided for a statutory proceeding the only method of review was by *certiorari* which only brought up

<sup>43</sup> *Aurentz v. Porter*, 48 Pa. 335; *Lewis v. Wallick*, 3 S. & R. 410; *Young's Ap.*, 2 P. & W. 380.

<sup>44</sup> *Haines Twp. v. Penn Twp.*, 1 Am. L. J. 26; *Todd v. Patterson*, 17 S. & R. 345; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Lefever v. Witmer*, 10 Pa. 505.

<sup>45</sup> *Andrews v. Andrews*, 5 S. & R. 374; *Robbarts v. Robbarts*, 9 S. & R. 197.

<sup>46</sup> *Hall's Ap.*, 56 Pa. 238; *Davenport v. Jones*, 126 Pa. 271; *Gangwere's Ap.*, 61 Pa. 342; *Gifford v. Erie County*, 142 Pa. 408; *Thomas v. Upper Merion Twp.*, 148 Pa. 116.

<sup>47</sup> *Wayne Twp. v. Jersey Shore*, 81 \* Pa. 264; *Laporte Overseers v. Hills Grove Twp. Overseers*, 95 Pa. 269; *Elk Twp. Overseers v. Beaver Twp. Overseers*, 18 W. N. C. 438.

<sup>48</sup> *Toole's Ap.*, 90 Pa. 376.

<sup>49</sup> *Comth. v. Gillespie*, 146 Pa. 546.

<sup>50</sup> *Bross v. Comth.*, 71 Pa. 262.

<sup>51</sup> See P. & L. Dig., vol. 1, cols. 745-6.

<sup>52</sup> *Konigmacher v. Kimmel*, 1 P. & W. 207.

the record proper, for consideration.<sup>1</sup> The right to review the record thus is not taken away by a provision that the judgment of the lower court shall be final.<sup>2</sup> But *certiorari* will not lie to interlocutory orders;<sup>3</sup> nor to election contests as to state senators, which are vested in the legislature;<sup>4</sup> nor where the Common Pleas has final appellate jurisdiction;<sup>5</sup> or final jurisdiction of an election dispute.<sup>6</sup> *Certiorari* will lie in lunacy proceedings;<sup>7</sup> revocation of a license to sell liquor;<sup>8</sup> desertion case, act of April 13, 1867, P. L. 78;<sup>9</sup> attachment under act of 1869;<sup>10</sup> parol contract for sale of land;<sup>11</sup> landlord and tenant proceedings;<sup>12</sup> annexation of lands to school district under act of April 17, 1876, P. L. 38;<sup>13</sup> overseer's sale of husband's property for support of wife;<sup>14</sup> incorporation of borough;<sup>15</sup> to bring up missing records;<sup>16</sup> to remove a criminal proceeding;<sup>17</sup> order suspending erection of jail.<sup>18</sup>

### 12. Quashing of writ.

A writ of *certiorari* was quashed, where there was only an opinion;<sup>19</sup> or where there was not sufficient cause shown;<sup>20</sup> or where it did not specify the particular matter of complaint.<sup>21</sup> The motion to quash should not be delayed beyond the second term.<sup>22</sup>

### 13. Effect of writ of certiorari.

The effect of the writ was to bring up the record only for review, and if the judgment below was affirmed, it took effect from its date and not the date of affirmance.<sup>23</sup> A *certiorari* to the Orphans' court required the original record.<sup>24</sup> When the record is brought up, the appellate court will not inquire into the merits, but the

<sup>1</sup> *Kimber v. Schuylkill Co.*, 20 Pa. 366; *Chase v. Miller*, 41 Pa. 403.

<sup>2</sup> *Sunbury v. Dauphin*, 1 Am. L. J. 77; *Mauch Chunk v. Nescopeck*, 21 Pa. 46.

<sup>3</sup> *Wallace v. Jameson*, 179 Pa. 94.

<sup>4</sup> *McNeill's Contest*, 111 Pa. 235.

<sup>5</sup> *Silvergood v. Storricks*, 1 Watts, 532; *Virden's Ap.*, 37 Leg. Int. 325; *Mahonoy City v. Wadlinger*, 142 Pa. 308.

<sup>6</sup> *Carpenter's Case*, 14 Pa. 486; *Yonkin's Ap.*, 12 Cent. 371.

<sup>7</sup> *Gest's Case*, 9 S. & R. 317; *Comth. v. Beaumont*, 4 Rawle, 366.

<sup>8</sup> *Dolan's Ap.*, 108 Pa. 564.

<sup>9</sup> *Barne's Ap.*, 2 Penny. 508.

<sup>10</sup> *Wetherald v. Shupe*, 109 Pa. 389; *Parks v. Watts*, 112 Pa. 4.

<sup>11</sup> *Hagerty's Case*, 4 Watts, 305.

<sup>12</sup> *Fahnestock v. Faustenauer*, 5 S. & R. 174.

<sup>13</sup> *Elks Twp. School Dist.*, 146 Pa. 1.

<sup>14</sup> *Overseers v. Smith*, 2 S. & R. 363.

<sup>15</sup> *Quakertown Boro'*, 3 Grant, 203.

<sup>16</sup> *Walker's Ap.*, 2 Dallas, 190; *Gravensteine v. Feger*, 4 Atl. 917.

<sup>17</sup> *Comth. v. Simpson*, 2 Grant, 438.

<sup>18</sup> *Northampton County Comrs.' Ap.*, 57 Pa. 452.

<sup>19</sup> *Germantown Ave.*, 99 Pa. 479.

<sup>20</sup> *Ewing v. Filley*, 43 Pa. 384.

<sup>21</sup> *Nantmill Twp. Road*, 4 Yeates, 433.

<sup>22</sup> *Cooke v. Reinhart*, 1 Rawle, 317.

<sup>23</sup> *Luzerne County v. Trimmer*, 9 W. N. C. 376.

<sup>24</sup> *Torr's Ap.*, 1 Rawle, 76.

jurisdiction and regularity of the proceedings.<sup>25</sup> This means the record proper and not the opinion of the court<sup>26</sup> nor the evidence in the cause.<sup>27</sup> Unless apparent on the face of the record, otherwise, the court below will be presumed to have had jurisdiction<sup>28</sup> and to have proceeded regularly.<sup>29</sup> The court will not inquire *aliunde*, for irregularities.<sup>30</sup>

On an indictment, where the court below quashed after a verdict of guilty the commonwealth could have the order reviewed by *certiorari* and the supreme court refused to quash.<sup>31</sup>

#### 14. Change by Act of 1889.

It seems the act of 1889 has rather changed the form than the substance, as the adjudications go, and *certiorari* holds its function though under an *alias*.<sup>32</sup> This applies to liquor licenses<sup>33</sup> and to the review of road cases,<sup>34</sup> and township and borough questions<sup>35</sup> and proceedings under the poor laws;<sup>36</sup> or an order striking off the entry of satisfaction of a judgment;<sup>37</sup> or quashing a warrant of arrest under the act of 1842;<sup>38</sup> allowance of an appeal from a magistrate *nunc pro tunc*;<sup>39</sup> setting aside a sheriff's sale.<sup>40</sup> In construing the effect of the act of 1889 on the nature of an appeal where a writ of error would have been proper under the old procedure the supreme court said that the first provision of that act merely procures that dissimilar proceedings be called by the same name; the second refers only to appeals from the Orphans' court, appeals in equity and appeals from the distribution of money.<sup>41</sup>

#### 15. Appeals do not generally lie from interlocutory orders.

Unless an act of assembly authorizes it, an appeal will not lie

<sup>25</sup> Comth. v. Gillespie, 146 Pa. 546; Sadsbury Twp. Roads, 147 Pa. 471; Hamilton Street, 148 Pa. 640; Benzenhoefer's Ap., 154 Pa. 547; Comth. v. Ramsay, 166 Pa. 642; P. & L. Dig., vol. 1, cols. 755-6-7-8-9, 60.

<sup>26</sup> Darby v. Sharon, 112 Pa. 66; Plunketts Creek Twp. v. Fairfield Twp., 58 Pa. 209; P. & L. Dig., vol. 1, cols. 761-2.

<sup>27</sup> McCandless Twp. Road, 110 Pa. 605; P. & L. Dig., vol. 1, cols. 762-3.

<sup>28</sup> Allentown Road, 5 Wharton, 442.

<sup>29</sup> Windsor Twp. Case, 9 Watts, 248.

<sup>30</sup> Spring Garden St., 4 Rawle, 192; P. & L. Dig., vol. 1, col. 764.

<sup>31</sup> Comth. v. Wallace, 114 Pa. 405.

<sup>32</sup> Comth. v. Bird, 144 Pa. 194; Christy's Lunacy, 2 Supr. C. 259.

<sup>33</sup> Berg's Pet., 139 Pa. 354; Beck's Ap., 164 Pa. 427; Fowler's License, 2 Supr. C. 63.

<sup>34</sup> Roaring Brook Twp. Road, 140 Pa. 632; Jefferson Twp. Road, 3 Supr. C. 467; Ross Twp. Road, 5 Supr. C. 85; Glenfield Boro' Road, 5 Supr. C. 222.

<sup>35</sup> Camp Hill Boro', 142 Pa. 151; Valley Twp., 146 Pa. 111; Darby Boro' School Dist.'s Ap., 160 Pa. 79; Aliquippa School Director's Pet., 172 Pa. 81.

<sup>36</sup> Comth. v. James, 142 Pa. 32; Edenburg Poor Dist. v. Strattanville Poor Dist., 5 Supr. C. 516; P. & L. Dig., vol. 1, col. 769.

<sup>37</sup> Rand v. King, 134 Pa. 641.

<sup>38</sup> Grieb v. Kuttner, 135 Pa. 281.

<sup>39</sup> Comth. v. Reiser, 147 Pa. 342.

<sup>40</sup> Laird's Ap., 2 Supr. C. 300.

<sup>41</sup> Christner v. John, 171 Pa. 527.

from any judgment, order or decree, except it be final. Hence no appeal lies from the refusal of the court to set aside service;<sup>42</sup> judgment on a *sci. fa.* bringing in a new party to a suit;<sup>43</sup> approval of a bond in eminent domain;<sup>44</sup> an order to produce papers;<sup>45</sup> an order as to costs pending a suit in equity;<sup>46</sup> refusal to strike off a mechanic's claim;<sup>47</sup> or a municipal claim;<sup>48</sup> refusal to dismiss a bill in equity;<sup>49</sup> refusal to strike off an appeal from a justice of the peace;<sup>50</sup> special allowance of an appeal from a justice<sup>51</sup> *nunc pro tunc*; or its reinstatement after having been stricken off;<sup>52</sup> the refusal to strike off an appeal from an award<sup>53</sup> or its reinstatement;<sup>54</sup> interlocutory orders, such as making a rule absolute to bring ejectionment under acts of March 8, 1889, P. L. 10 and May 25, 1893, P. L. 131;<sup>55</sup> over-ruling demurrer to libel in divorce and granting leave to amend;<sup>56</sup> over-ruling demurrer to a bill in equity and requiring defendant to answer;<sup>57</sup> discharging a rule to show cause why service of a bill on a foreign corporation should not be set aside;<sup>58</sup> judgment for want of appearance where no damages have been assessed;<sup>59</sup> sale of real estate of a dissolved corporation;<sup>60</sup> discharging a rule to show cause why the bond of appellants, trustees of a religious society should not be approved and approving same;<sup>61</sup> dissolving or refusing to dissolve an attachment under act of 1869, and refusing to approve defendant's bond;<sup>62</sup> refusal to quash a writ of foreign attachment;<sup>63</sup> discharging a rule to show cause why a suit should not be dismissed be-

<sup>42</sup> *Comth. v. Reinsel*, 34 Supr. C. 265; *Lycoming, Etc., Co. v. Storrs*, 97 Pa. 354; *P. & R. R. Co. v. Snowden*, 161 Pa. 201; *Delaware County, Etc., Co. v. Lee*, 24 Supr. C. 74.

<sup>43</sup> *Bossler v. Johns*, 2 P. & W. 331.

<sup>44</sup> *Slocum's Ap.*, 12 W. N. C. 84; *Pittsburg, Etc., R. Co. v. Gamble*, 204 Pa. 198.

<sup>45</sup> *Logan v. Penna. R. Co.*, 132 Pa. 403.

<sup>46</sup> *Fidelity Trust Co.'s Ap.*, 11 W. N. C. 104.

<sup>47</sup> *Keemer v. Kerr*, 2 Penny. 175; *Carter v. Caldwell*, 147 Pa. 370; *Warren v. Johnston*, 33 Supr. C. 617; *Breitweiser Co. v. Scott*, 33 Supr. C. 627.

<sup>48</sup> *Phila. v. Christman*, 6 Supr. C. 29.

<sup>49</sup> *Palethorp v. Palethorp*, 168 Pa. 102.

<sup>50</sup> *Gardner v. Lefevre*, 1 P. & W. 73; *Barclay v. Colwell*, 4 W. N. C. 440; *Anderson v. McMichael*, 6 Supr. C. 114.

<sup>51</sup> *Yost v. Davison*, 5 Supr. C. 469.

<sup>52</sup> *Wooden Ware Co. v. Howe*, 164 Pa. 85.

<sup>53</sup> *Kendrick v. Overstreet*, 3 S. & R. 357; *Schultz v. Bear Creek Co.*, 174 Pa. 287; *Drum v. Uplinger*, 9 Supr. C. 404.

<sup>54</sup> *Straub v. Smith*, 2 S. & R. 382.

<sup>55</sup> *Gabler v. Black*, 210 Pa. 541.

<sup>56</sup> *Richardson v. Richardson*, 193 Pa. 279.

<sup>57</sup> *Arnold v. Russell, Etc., Co.*, 212 Pa. 303.

<sup>58</sup> *Platt v. Belsena, Etc., Co.*, 191 Pa. 215.

<sup>59</sup> *Snyder v. Flanigan*, 6 Leg. & Ins. R. 11.

<sup>60</sup> *Titusville Oil Exchange's Dissolution*, 10 Supr. C. 496.

<sup>61</sup> *Nolde's Ap.*, 2 Mona. 179.

<sup>62</sup> *Moss v. Mitchell*, 174 Pa. 517; *Lafferty v. Corcoran*, 175 Pa. 5; *Hoppes v. Houtz*, 133 Pa. 34; *Slingluff v. Sisler*, 193 Pa. 264; *Potter v. Graham*, 8 Supr. C. 199.

<sup>63</sup> *Bellah v. Poole*, 202 Pa. 71; *Dempsey v. Petersburg, Etc., Co.*, 26 Supr. C. 633.

cause the same cause of action was pleaded in set-off in another suit between the same parties;<sup>64</sup> directing a decree in equity to be drawn in accordance with the judge's findings of fact and conclusions of law;<sup>65</sup> discharging a rule to strike off an appeal from the report of county auditors;<sup>66</sup> continuing a case for the reason that plaintiff on the trial refused to file a replication to a plea in abatement;<sup>67</sup> discharging a rule to strike off an issue on an appeal from the report of county auditors;<sup>68</sup> sustaining a part of an auditor's report and referring the remainder back to him for further report;<sup>69</sup> appointing commissioners to divide a city into election districts and refusing to quash;<sup>70</sup> refusal to appoint an auditor in assignment proceedings where the objecting creditor has been secured by payment into court;<sup>71</sup> refusal to order the district attorney to file a bill of particulars in a criminal case;<sup>72</sup> discharging a rule to show cause why plaintiff should not have leave to file an amended statement and why the defendant should not file a new affidavit of defense;<sup>73</sup> sustaining a demurrer to a statement in part, with leave to plaintiff to amend in that respect and overruling it as to the rest;<sup>74</sup> overruling a demurrer to a statement;<sup>75</sup> directing retaxation of costs on appeal from taxation;<sup>76</sup> making absolute a rule on defendant to produce papers, before plaintiff has taken judgment by default under act of Feb'y 27, 1798, 3 Sm. L. 303;<sup>77</sup> directing judgment *non obstante veredicto* in favor of the garnishee in attachment;<sup>78</sup> postponing attachment against a witness to afford him opportunity to testify before a notary or come into court and show cause against it;<sup>79</sup> in sheriff's interpleader, revoking a previous order to proceed with the execution;<sup>80</sup> discharging a rule to show cause why service of subpoena in divorce should not be set aside;<sup>81</sup> according either party the right to apply for the appointment of viewers, under act of May 24, 1878, P. L. 129, if they cannot agree upon such viewers;<sup>82</sup> allowing a *sci. fa.* on a judgment confessed on a tax collector's bond.<sup>83</sup>

<sup>64</sup> Price v. Davis, Etc., Co., 208 Pa. 395.

<sup>65</sup> Watkins v. Hughes, 206 Pa. 526.

<sup>66</sup> Moore's Ap., 203 Pa. 376.

<sup>67</sup> Dailey v. Iselin, 200 Pa. 200.

<sup>68</sup> Huntingdon County v. Mason, 21 Supr. C. 148.

<sup>69</sup> Moore v. Lincoln, Etc., Co., 196 Pa. 519.

<sup>70</sup> Division of Wards in Pittsburgh, 7 Supr. C. 478.

<sup>71</sup> Hopper's Est., 192 P. 287.

<sup>72</sup> Comth. v. Shivers, 15 Supr. C. 579.

<sup>73</sup> Comth. v. Magee, 33 Supr. C. 257.

<sup>74</sup> Cherry Township v. Sullivan County, 30 Supr. C. 502.

<sup>75</sup> Leedom v. Phila., Etc., R. Co., 217 Pa. 278.

<sup>76</sup> Klugh v. Penna. R. Co., 29 Supr. C. 583.

<sup>77</sup> Quinn v. Penna. R. Co., 219 Pa. 24.

<sup>78</sup> Keystone Brewing Co. v. Canavan, 218 Pa. 161.

<sup>79</sup> Intl., Etc., Co. v. Penna. R. Co. (No. 2), 214 Pa. 474.

<sup>80</sup> Wruble v. Day, 34 Supr. C. 100.

<sup>81</sup> Tobin v. Tobin, 32 Supr. C. 186.

<sup>82</sup> Washington Street, 30 Supr. C. 542.

<sup>83</sup> Comth. v. Maxwell (No. 2), 34 Supr. C. 636.



### 16. Appeals, when not encouraged.

It is a rule that a cause should be reviewed in its entirety and not by installments.<sup>1</sup> It was questioned whether an appeal would lie from a judgment on a feigned issue under the sheriff's interpleader act, before an order of final distribution of the fund.<sup>2</sup> Appeals in equity only lie from such matters as were excepted to and upon which the court passed a final decree.<sup>3</sup> Where a petition is allowed and the court directs that an order be drawn, but this is not done, no appeal lies.<sup>4</sup> An appeal will be quashed, from an order sustaining demurrer in equity, without dismissing the bill.<sup>5</sup> So, too, the sustaining of exceptions to the findings of the judge, with directions to draw a decree, cannot be appealed from when no decree was made and entered.<sup>6</sup> The appeal must be taken from the final decree and not the dismissal of exceptions.<sup>7</sup> So any order or motion, looking to further action by the court or parties before the end of the proceeding, is non-appealable, except where the statute provides for an appeal.<sup>8</sup> Under equity rule 68, the dismissal of the bill has the effect of a nonsuit and no appeal lies until exceptions are taken and disposed of *in banc*, by the court.<sup>9</sup> Under the act of April 13, 1867, P. L. 78, requiring a parent to support his minor child, the refusal of an issue for a jury to determine whether it is his child or not, is not a final order.<sup>10</sup> Under the act of April 16, 1845, P. L. 543, no appeals from interlocutory orders or decrees were allowed,<sup>11</sup> nor from refusal to grant a preliminary injunction;<sup>12</sup> nor from its dissolution;<sup>13</sup> but under acts of Feb'y 14, 1866, P. L. 28, and June 12, 1879, P. L. 177, an appeal was given from the appointment of a receiver for a railroad company, without an injunctive affidavit;<sup>14</sup> but no appeal lies from a preliminary injunction as to a partnership;<sup>15</sup> and after long delay none will be entertained from a preliminary injunction notwithstanding the acts above cited.<sup>16</sup> On an appeal from refusal of a preliminary injunction, all the evidence being fully before the appellate court, a final order may be entered, on agreement of the parties;<sup>17</sup> but if the affidavits and testimony are not furnished, otherwise.<sup>18</sup> An appeal cannot be taken pending a rule

<sup>1</sup> Breitweiser Co. v. Scott, 33 Supr. C. 627.

<sup>2</sup> Kimmel v. Johnson, 18 Supr. C. 429.

<sup>3</sup> Canavan v. Page, 34 Supr. C. 91.

<sup>4</sup> Chew v. Phila., 35 Supr. C. 66.

<sup>5</sup> Armstrong v. Espy, 220 Pa. 48.

<sup>6</sup> Kenworthy v. Equitable Trust Co., 218 Pa. 286.

<sup>7</sup> Clymer v. Roberts, 220 Pa. 162.

<sup>8</sup> Caffisch v. Logue, 216 Pa. 146.

<sup>9</sup> Thomas v. Borden, 222 Pa. 184.

<sup>10</sup> Comth. v. Nagle, 31 Supr. C. 175.

<sup>11</sup> Holden's Admr. v. M'Makin, 1 Parsons, 270.

<sup>12</sup> Hilbish v. Catherman, 60 Pa. 444.

<sup>13</sup> Barrett's Ap., 21 W. N. C. 139.

<sup>14</sup> New Castle, Etc., Ap., 3 Walker, 281.

<sup>15</sup> Lacy's Ap., 30 Pitts. L. J. 275.

<sup>16</sup> Sheaffer's Ap., 100 Pa. 379.

<sup>17</sup> Market Co. v. P. & R. R. Co., 142 Pa. 580.

<sup>18</sup> Schlecht's Ap., 60 Pa. 172.

to take depositions,<sup>19</sup> or pending an appeal to the Common Pleas from a railroad view;<sup>20</sup> or to an order referring a report of viewers of a bridge to county commissioners;<sup>21</sup> and an order made subject to further action by the court is non-appealable.<sup>22</sup> No appeal lies from an order dismissing exceptions to report of auditors under the act of April 16, 1850, P. L. 477;<sup>23</sup> or setting aside an award and rule of reference.<sup>24</sup>

Or to a refusal to appoint an auditor, when not definitive;<sup>25</sup> or sustaining a demurrer as to parties "with leave to amend;"<sup>26</sup> or striking off a plea as to the proper plaintiff;<sup>27</sup> or overruling dilatory pleas;<sup>28</sup> or where under the court trial act of April 22, 1874, the judge had not filed his findings, etc.,<sup>29</sup> or pending distribution of a fund from an official sale;<sup>30</sup> or where the judgment of the court does not entirely dispose of the controversy;<sup>31</sup> or in trespass *vi et armis*, where judgment on demurrer was for plaintiff, but there was no assessment of the damages,<sup>32</sup> or after judgment *quod partitio fiat*, for assignment of only one purpart.<sup>33</sup> As a general rule an appeal will not lie from an order or decree directing an account;<sup>34</sup> but the act of June 24, 1895, P. L. 243, authorizing appeals in equity cases of account (*supra*), applies where the defendant requests the account.<sup>35</sup> An appeal will not lie to interlocutory orders in road cases,<sup>36</sup> or the appointment of a master in equity;<sup>37</sup> or an order appointing a master to hold a meeting of stockholders;<sup>38</sup> or an alternative writ of mandamus.<sup>39</sup> The appeal when taken must be to the order or decree of the court itself.<sup>40</sup>

#### 17. Appeal from interlocutory judgment.

The act of April 18, 1874, P. L. 64, provides as follows:

Section 1. That in all actions now pending or which may hereafter be brought, wherein, by act of assembly or rule of court, the

<sup>19</sup> Bowers v. Leeds, 7 Pa. L. J. 288.

<sup>20</sup> Hall's Ap., 56 Pa. 238; Macrum v. Jones, 11 Atl. 317; Penna. Steel Co.'s Ap., 161 Pa. 571.

<sup>21</sup> Youghiogheny Bridge Co., 168 Pa. 454.

<sup>22</sup> Hope Hose Co.'s Ap., 2 W. N. C. 451; Comth. v. Blatt, 165 Pa. 213.

<sup>23</sup> Ruby's Ap., 3 W. N. C. 349.

<sup>24</sup> Erie Bank v. Brawley, 8 Watts, 530.

<sup>25</sup> Woolley's Est., 6 Pa. 351.

<sup>26</sup> Bishop v. Culver, 1 W. N. C. 272.

<sup>27</sup> Reading v. Bentley, 2 Mona. 721.

<sup>28</sup> Wallace v. Jameson, 179 Pa. 94.

<sup>29</sup> Comth. v. Mitchell, 80 Pa. 57.

<sup>30</sup> Knebel v. Baumgarden, 1 Leg. Rec. R. 137.

<sup>31</sup> McGlue v. Phila., 105 Pa. 236; P. & L. Dig., vol. 1, col. 780.

<sup>32</sup> Logan v. Jennings, 4 Rawle, 355.

<sup>33</sup> Hawke v. Jones, 24 Pa. 127.

<sup>34</sup> Lauer v. Lauer Brewing Co., 180 Pa. 593; Offerle v. Reynold's Lumber Co., 170 Pa. 29; Worrlow's Ap., 1 Del. Co. 409.

<sup>35</sup> Lafferty v. Lafferty, 174 Pa. 536.

<sup>36</sup> McManus' Ap., 5 Supr. C. 65.

<sup>37</sup> Robinson's Ap., 1 W. N. C. 239.

<sup>38</sup> National Transit Co. v. U. S. Pipe Line Co., 180 Pa. 224.

<sup>39</sup> Saucon Twp. v. Broadhead, 9 Atl. 63.

<sup>40</sup> Wilson v. Colwell, 3 Watts, 212; Chew's Ap., 3 Grant, 294.

plaintiff is entitled to ask for judgment for want of a sufficient affidavit of defense and the court shall decide against his right to such judgment, plaintiff may except to such decision and take a writ of error to the supreme court.

Section 2. If, in the opinion of the supreme court, the decision of the court below is correct, the writ of error shall be dismissed at the costs of the plaintiff, but without prejudice to his right to trial by jury and a second writ of error after final judgment; but if the affidavit of defense should be deemed by the supreme court insufficient to prevent judgment, then said court shall remit the record to the court below, with directions to enter judgment against the defendant or defendants for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court below why such judgment should not be so entered."

Appeals under this act are not encouraged by the appellate courts,<sup>1</sup> and if there is a question of fact for a jury a refusal of judgment will be affirmed on appeal;<sup>2</sup> and if a judgment be entered and there is variance between the statement and the assessment of damages, it will be reversed.<sup>3</sup> The purpose of the act was only to reach clear errors of law and save the delay and expense of a trial,<sup>4</sup> and the appeal must be taken before the trial.<sup>5</sup> The discharge of a rule for judgment will be reversed rarely and only in a case free from doubt.<sup>6</sup> The same rule would apply to appeals under the act of July 15, 1897, P. L. 276, for refusal of judgment for part of plaintiff's claim,<sup>7</sup> but this act does not provide for an appeal.

In order to appeal under the act of 1874 exceptions must be taken by plaintiff and a bill sealed.<sup>8</sup>

But if the rule be made absolute, no exceptions are required,<sup>9</sup> by defendant.

On appeal only the statement and affidavit of defense will be considered.<sup>10</sup> Affidavits appearing of record will be presumed to be there regularly.<sup>11</sup> Deficiencies in the papers cannot be supplied before the appellate court by a "history of the case," or statements of counsel.<sup>12</sup>

Upon such appeal defects in the statement will be scrutinized

<sup>1</sup> Chase v. Trust Co., 207 Pa. 24.

<sup>2</sup> Griffith v. Sitgreaves, 2 W. N. C. 707; Radcliff v. Herbst, 135 Pa. 568; Ensign v. Kindred, 163 Pa. 638; Hazle Twp. v. Markle, 175 Pa. 405.

<sup>3</sup> Edison, Etc., Co. v. Thackara Mfg Co., 167 Pa. 530.

<sup>4</sup> Holland v. Sunbury Iron Works, 9 Supr. C. 261; Walsh v. Bourse, 15 Supr. C. 219; Arnold v. Stoner, 18 Supr. C. 537; Loeper v. Haas, 24 Supr. C. 184.

<sup>5</sup> Kessler v. Perrong, 22 Supr. C. 578.

<sup>6</sup> Kidder, Etc., Co. v. Muckle, 198 Pa. 388; Ferree v. Young, 6 Supr. C. 307; Aetna Ins. Co. v. Confer, 158 Pa. 598.

<sup>7</sup> Shea v. Wells, 8 Supr. C. 511.

<sup>8</sup> Titusville, Etc., Assn. v. McCombs, 92 Pa. 364; Comth. v. Cavett, 23 Supr. C. 57; Chambers v. McLean, 23 Supr. C. 551; Mehring v. Comth. B. & L. Assn., 17 W. N. C. 422.

<sup>9</sup> Brainerd v. Davis, 21 Supr. C. 599.

<sup>10</sup> Hutton v. McLaughlin, 1 Supr. C. 642.

<sup>11</sup> Wilkinson v. Brice, 148 Pa. 153.

<sup>12</sup> Johnston v. Mann, 9 Supr. C. 251; Loeper v. Haas, 24 Supr. C. 184.

although the affidavit does not point them out.<sup>13</sup> The plaintiff must not move for judgment if his statement is not self-sustaining.<sup>14</sup> But if defendant does not appeal from the judgment but moves to strike it off and appeals from the refusal to do so, he cannot introduce objections on such appeal.<sup>15</sup> If the affidavit of defense is insufficient judgment will be affirmed.<sup>16</sup> If the affidavit sets up a good defense or facts for a jury, an order refusing judgment will be affirmed.<sup>17</sup>

The surety on appeal is liable although the judgment was not liquidated until after *non pros.* in the supreme court.<sup>18</sup>

If the affidavit is adjudged insufficient by the supreme court and the record remitted directing conditional judgment the court below cannot sustain the affidavit on other grounds.<sup>19</sup>

But the court below may permit a supplementary affidavit to be filed where its order discharging a rule for judgment is affirmed.<sup>20</sup>

### 18. Rule as to finality.

Except, as above, where an act of assembly allows an appeal from an interlocutory order, the rule is that the determination must be definitive, that is, end the controversy between the parties.<sup>21</sup> Such judgments the following have been held to be: Where the sum is certain and requires no writ of inquiry to ascertain it;<sup>22</sup> setting aside a return of service of summons on a corporation;<sup>23</sup> judgment for defendant on demurrer to statement;<sup>24</sup> entry of final decree in equity, although one of the parties has objected;<sup>25</sup> order quashing an indictment;<sup>26</sup> an order directing a witness to answer is final as to him and he may appeal;<sup>27</sup> on discontinuance of a suit in divorce, an order to pay counsel fees and alimony;<sup>28</sup> an order confirming an award for defendant;<sup>29</sup> arresting judgment in ejectment;<sup>30</sup> subrogation in a suit on recognizance for stay of execution;<sup>31</sup> setting aside or refusing to set aside an execution;<sup>32</sup>

<sup>13</sup> Hutchinson v. Woodwell, 107 Pa. 509.

<sup>14</sup> Fritz v. Hathaway, 135 Pa. 274.

<sup>15</sup> Applegate v. Cohn, 1 Supr. C. 174.

<sup>16</sup> Heaton v. Horner, 35 Leg. Int. 146.

<sup>17</sup> Erie City v. Y. M. C. A. Assn., 151 Pa. 168; Kerr v. Culver, 209 Pa. 14. (See P. & L. Dig., vol. 1, col. 469.)

<sup>18</sup> Meehling v. Merchants', Etc., Bank, 34 Leg. Int. 313.

<sup>19</sup> Titusville Iron Works v. Keystone Oil Co., 130 Pa. 211.

<sup>20</sup> Kyler v. Christman, 25 Supr. C. 74.

<sup>21</sup> Wynn v. Bellas, 34 Pa. 160; Beale v. Penna. R. Co., 86 Pa. 509; Bradley v. Potts, 155 Pa. 418; P. & L. Dig., vol. 1, col. 784.

<sup>22</sup> Riott v. Blackstone, 10 Supr. C. 591.

<sup>23</sup> Ben Franklin Coal Co. v. Penna. Water Co., 25 Supr. C. 628; Ben-nethum v. Bowers, 133 Pa. 332.

<sup>24</sup> Bradley v. Potts, 155 Pa. 418.

<sup>25</sup> Green v. Prince, Etc., Co. (No. 1), 25 Supr. C. 415.

<sup>26</sup> Comth. v. Gouger, 21 Supr. C. 217.

<sup>27</sup> Int'l Coal Mining Co. v. P. R. Co. (No. 1), 214 Pa. 469.

<sup>28</sup> Borekman's Ap., 2 Walker, 285.

<sup>29</sup> Lewis v. England, 4 Binney, 5.

<sup>30</sup> Benjamin v. Armstrong, 2 S. & R. 392.

<sup>31</sup> Burns v. Huntingdon Bank, 1 P. & W. 395.

<sup>32</sup> Pontius v. Nesbit, 40 Pa. 309; Feagley v. Norbeck, 127 Pa. 238; Packer v. Owens, 164 Pa. 185.

setting aside a sheriff's sale;<sup>33</sup> quashing a warrant under act of July 12, 1842, P. L. 339.<sup>34</sup>

On an appeal from a judgment on a *sci. fa. sur* mechanic's lien the court will look into an order refusing to strike off the lien.<sup>35</sup>

Where the prothonotary enters judgment on a *sci. fa. sur* mortgage, or the bond, after a return of two *nihilis*, without an order of court no appeal lies. The remedy is to apply to the court below for relief.<sup>36</sup>

### 19. Time of taking appeal.

Under the act of May 19, 1897, P. L. 67, an appeal must be taken within six months from the final judgment or decree.<sup>37</sup> Under the act of 1874 it was held that the limitation did not apply to a *feme covert*.<sup>38</sup>

The court has no power to extend the time fixed by statute, but where the appeal is initiated within the time the court may extend the time to perfect it.<sup>39</sup> It must be taken within the statutory time.<sup>40</sup> An appeal from the distribution of funds arising from a sheriff's sale under acts of June 16, 1836, P. L. 755, and April 20, 1846, P. L. 411, must be taken in twenty days.<sup>41</sup> If an appeal is not taken within the time fixed by law it will be quashed.<sup>42</sup>

In computing the time, it has been held to begin to run from the date of a judgment by default for want of a plea;<sup>43</sup> or the entry of a decree, although made in vacation, when prompt notice was given;<sup>44</sup> and from its date, not the date of the court's refusal to open it.<sup>45</sup>

In case of motion to take off a nonsuit, the time will be computed from the term when the motion ought to have been made.<sup>46</sup> The day on which the judgment, order or decree is made is excluded; and if the last day falls on Sunday that day is also excluded.<sup>47</sup> In case of refusal to strike off or quash an order or decree void upon its face, the time runs from the date of this refusal.<sup>48</sup>

In equity, if the decree be not entered and exceptions are allowed

<sup>33</sup> Mackaness v. Long, 85 Pa. 158.

<sup>34</sup> Merch v. Raubitschek, 159 Pa. 559.

<sup>35</sup> Warren v. Johnston, 33 Supr. C. 617.

<sup>36</sup> Pettit v. Clever, 219 Pa. 428.

<sup>37</sup> Shelly v. Dampman, 174 Pa. 495; 1 Supr. C. 115.

<sup>38</sup> Fenn v. Early, 113 Pa. 264.

<sup>39</sup> Schrenkeisen v. Kishbaugh, 162 Pa. 45.

<sup>40</sup> Clarion, Etc., R. Co. v. Hamilton, 127 Pa. 1.

<sup>41</sup> Providence, Etc., Co. v. Chase, 108 Pa. 319.

<sup>42</sup> Pottsville Bank v. Cake, 12 Supr. C. 61; Farrel v. Scranton R. Co., 27 Supr. C. 127; Barlott v. Forney, 187 Pa. 301.

<sup>43</sup> Camp v. Wells, 11 Pa. 206.

<sup>44</sup> Dawson's Ap., 15 Pa. 480.

<sup>45</sup> Miller's Est., 159 Pa. 575; Merrian v. Nash, 3 W. N. C. 155.

<sup>46</sup> Black v. Pollock, 2 P. & W. 489.

<sup>47</sup> Goswiler's Est., 3 P. & W. 200; Act June 20, 1883, P. L. 136.

<sup>48</sup> Crescent Twp. Road, 18 Supr. C. 160.

*nunc pro tunc*, the time runs from the dismissal of the exceptions;<sup>40</sup> but a rule for a re-hearing does not suspend the statute.<sup>50</sup> It matters not that his opponent has appealed.<sup>51</sup> The appellate court may reverse and remit the record for judgment and the time will then begin to run.<sup>52</sup> From an order opening a confessed judgment an appeal will lie after final judgment is entered.<sup>53</sup>

The act of 1897, *supra*, which now regulates appeals to both the Supreme and Superior courts, does not expressly require that the *certiorari* shall be filed in the court from which the appeal is taken within the six months.<sup>54</sup>

## 20. Parties to an appeal.

In order that a party may appeal his name must appear in the record.<sup>1</sup> One who has no interest in the controversy cannot appeal;<sup>2</sup> nor one who has no standing in the lower court.<sup>3</sup> The appeal of one party will not inure to the benefit of another.<sup>4</sup>

After contestants of a will have been given leave to withdraw, on payment of costs, but fail to pay the costs, their appeal will be quashed.<sup>5</sup> Judgment on one writ of error does not bar a writ of error by the opposite party, when taken in time.<sup>6</sup> The record must show the relation of appellant to the suit.<sup>7</sup> The question of appellant's right is for the appellate court,<sup>8</sup> and where the party on the record appears to have an interest although it is averred he has conveyed, the appeal will not be dismissed.<sup>9</sup> Where mandamus is invoked against township supervisors the appeal will not be dismissed because the township is named and not the supervisors, in the appeal.<sup>10</sup> Where there was no service on the defendant, his rights cannot be reviewed.<sup>11</sup> A joint appeal is not the proper form where the parties make separate and distinct claims on a fund.<sup>12</sup>

<sup>40</sup> *Hinnershitz v. United Tr. Co.*, 206 Pa. 91.

<sup>50</sup> *Barlott v. Forney*, 187 Pa. 301; *Frazier's Est.*, 188 Pa. 415.

<sup>51</sup> *Pittsburg, Etc., Est.*, 204 Pa. 435.

<sup>52</sup> *Hughes v. Miller*, 192 Pa. 365.

<sup>53</sup> Act May 20, 1891, P. L. 101; *Schomaker v. Dean*, 201 Pa. 439.

<sup>54</sup> *Mehaffey v. Fink*, 13 Supr. C. 534. (See "Appeals," vol. 1; also *Rules of the Supreme Court and Superior Court*, vol. 1.)

<sup>1</sup> *Steel v. Bridenbach*, 7 W. & S. 150; *Gallagher v. Miller*, 2 W. N. C. 241.

<sup>2</sup> *Smith v. Reiff*, 20 Pa. 364; *McAllister's Ap.*, 59 Pa. 204; *Lawrence County's Ap.*, 67 Pa. 87; *Everman's Ap.*, 67 Pa. 335; *Pereyra's Ap.*, 126 Pa. 220; *P. & L. Dig.*, vol. 1, col. 802.

<sup>3</sup> *P. & L. Dig.*, vol. 1, col. 803; *Eby v. Guest*, 94 Pa. 160.

<sup>4</sup> *Cash's Ap.*, 1 Pa. 166; *Reamer's Ap.*, 18 Pa. 510.

<sup>5</sup> *Eichert's Est.*, 155 Pa. 59.

<sup>6</sup> *Ormsby v. Ihmsen*, 34 Pa. 462.

<sup>7</sup> *Spellman v. Scranton*, 17 Supr. C. 223; *Delaware, Etc., Co. v. Lee*, 24 Supr. C. 74.

<sup>8</sup> *Allen's Est.*, 16 Phila. 374.

<sup>9</sup> *Kreamer v. Fleming*, 191 Pa. 524.

<sup>10</sup> *Marcy v. Springville Twp.*, 24 Supr. C. 521.

<sup>11</sup> *Connor v. Schildt*, 16 Supr. C. 88.

<sup>12</sup> *Comth. v. Union, Etc., Co.*, 37 Supr. C. 167; *Welsh's Ap.*, 22 Supr. C. 392.

although depending on construction of the same instrument.<sup>13</sup> Where a husband and wife claim, one as creditor and the other as heir of an estate their appeal must be several not joint.<sup>14</sup> Cousins claiming several interests in an estate were held not to be entitled to a joint appeal.<sup>15</sup> Although a number of feigned issues are tried by the same jury, the several parties must take separate appeals.<sup>16</sup> One alone of two defendants having appealed the other cannot come in and ask for a modification of the judgment of reversal. He is bound by his acquiescence.<sup>17</sup> Independent proceedings cannot be joined in one appeal.<sup>18</sup>

Where more than one party appeals jointly and it appears that their rights are independent they may be required to elect which will prosecute the appeal and the same will be *non-prossed* as to the others.<sup>19</sup>

## 21. Parties as representatives.

Where an administrator or executor is merely a legal representative he cannot appeal from a decree of distribution,<sup>20</sup> but where he represents a claimant or interest as well, he may appeal.<sup>21</sup> The same rule applies to an assignee of an estate.<sup>22</sup> If a distributee the appeal will be considered as representing such interest;<sup>23</sup> so also, where the administrator *c. t. a.* is also testamentary trustee.<sup>24</sup> Remonstrants against granting a liquor license have an interest entitling them to appeal.<sup>25</sup> One who appeals for a municipality must show proper authority.<sup>26</sup>

## 22. Sureties, stake-holders and terre-tenants.

A surety on an administration bond may appeal from the decree of the orphans' court against the administrator;<sup>27</sup> but not in a matter wherein he has no liability.<sup>28</sup> A stake-holder cannot appeal as to the matter in his hands, as such.<sup>29</sup> A terre-tenant whose title is affected may appeal in his own name and right.<sup>30</sup>

<sup>13</sup> Samson's Est., 22 Supr. C. 93.

<sup>14</sup> Bitler's Est., 30 Supr. C. 84; Riemensberger's Est., 29 Supr. C. 596.

<sup>15</sup> May's Est., 22 Supr. C. 77.

<sup>16</sup> Kimmel v. Johnson, 18 Supr. C. 429.

<sup>17</sup> Donovan v. Driscoll, 12 W. N. C. 203.

<sup>18</sup> Stout v. Quinn, 9 Supr. C. 179.

<sup>19</sup> White's Ap., 15 W. N. C. 313; Reynolds v. Lumber Co., 175 Pa. 437; Fotteral v. Floyd, 6 S. & R. 315.

<sup>20</sup> Stineman's Ap., 34 Pa. 394; Sharp's Ap., 3 Grant, 260; Gallagher's Ap., 89 Pa. 29.

<sup>21</sup> Koch's Est., 4 Rawle, 268.

<sup>22</sup> Mellon's Ap., 32 Pa. 121; Singmaster's Ap., 86 Pa. 169; Graff, Etc., Estate, 146 Pa. 415; Jordan's Ap., 107 Pa. 75.

<sup>23</sup> Blaney's Est., 37 Supr. C. 76; King v. Savage Brick Co., 30 Supr. C. 582.

<sup>24</sup> Garman's Est., 32 Supr. C. 494.

<sup>25</sup> Wacker's License, 6 Supr. C. 323.

<sup>26</sup> Spellman v. Scranton, 17 Supr. C. 223.

<sup>27</sup> Garber v. Comth., 7 Pa. 265.

<sup>28</sup> Hise's Est., 5 Watts, 157.

<sup>29</sup> Craig's Ap., 38 Pa. 330; Crawford v. Shriver, 139 Pa. 239.

<sup>30</sup> Hessel v. Fritz, 124 Pa. 229; P. & L. Dig. vol. 1, col. 808; 1 C. R. A., col. 277.

### 23. Corporations and counties.

When the charter of a beneficial corporation is amended any member affected by it may appeal.<sup>31</sup> Where a borough is incorporated the appeal cannot be taken by less than three persons under act of May 9, 1889, P. L. 174.<sup>32</sup> By leave of court ten taxpayers may appeal from a judgment against a county.<sup>33</sup>

### 24. Effect of death of appellant.

Where the defendant in a criminal case dies pending an appeal the appeal is abated thereby.<sup>34</sup> Where the plaintiff in error dies after the issuance of the writ and before the assignments are filed the writ does not abate and his personal representatives may be substituted.<sup>35</sup> Nor will a *certiorari* be quashed because the defendant in error died before the writ issued.<sup>36</sup> On suggestion of the death of the defendant before judgment a writ of error *coram nobis* was allowed in the name of the administrator.<sup>37</sup>

### 25. Bill of exceptions.

In order to review the action of the court below, it is necessary that the record show a bill of exceptions as to the matter complained of;<sup>38</sup> otherwise only the record is presented for inspection<sup>39</sup> and the appellate court will not consider rulings on evidence;<sup>40</sup> errors in the charge of the judge;<sup>41</sup> or the conduct of the court and jury<sup>42</sup> or as to the facts of a reservation by the court,<sup>43</sup> or the form of a reservation of law.<sup>44</sup> The mere filing of exceptions in the prothonotary's office without a bill sealed is insufficient;<sup>45</sup> and rules of court concerning the time and manner must be observed.<sup>46</sup>

A mere objection is not enough, there must be an exception,<sup>47</sup> and bill sealed,<sup>48</sup> or the authentication of the stenographer's transcript of the record showing it, as required by the rules of the Supreme and Superior courts,<sup>49</sup> which see, Vol. I. Where there is

<sup>31</sup> Grand Lodge, A. O. U. W., 110 Pa. 613.

<sup>32</sup> Wilkesburg Boro', 131 Pa. 365.

<sup>33</sup> Act June 12, 1878, P. L. 208; Bell v. Allegheny County, 149 Pa. 381.

<sup>34</sup> Comth. v. Crowley, 28 Supr. C. 618.

<sup>35</sup> Ulshafer v. Stewart, 71 Pa. 170; Act April 13, 1787, 4 Sm. L. 476.

<sup>36</sup> Comth. v. McAllister, 1 Watts, 307.

<sup>37</sup> Devereux v. Roper, 1 Phila. 182.

<sup>38</sup> Sipea v. Mann, 39 Pa. 414; Augerstein v. Jones, 139 Pa. 183; Hill v. Egan, 160 Pa. 119; Green v. Thompson, 172 Pa. 609.

<sup>39</sup> Tasker v. Sheldon, 115 Pa. 107.

<sup>40</sup> Thomas v. Johnson, 175 Pa. 458; Crumley v. Lutz, 173 Pa. 211; P. & L. Dig., vol. 1, col. 812.

<sup>41</sup> Christner v. John, 2 Supr. C. 78.

<sup>42</sup> Earon v. Mackey, 106 Pa. 452.

<sup>43</sup> Smith v. Van Horne, 72 Pa. 207; Insurance Co., Etc., v. Phoenix Ins. Co., 71 Pa. 31.

<sup>44</sup> Blake v. Matzgar, 150 Pa. 291; P. & L. Dig., vol. 1, cols. 812, 813.

<sup>45</sup> Mehring v. Comth., Etc., Assn., 17 W. N. C. 422.

<sup>46</sup> Kirkpatrick v. Lex, 49 Pa. 122.

<sup>47</sup> Yeager v. Fuss, 9 W. N. C. 557.

<sup>48</sup> Comth. v. Dorman, 22 Supr. C. 20.

<sup>49</sup> Claysville, Etc., v. Donegal, Etc., 8 Supr. C. 232; Herlehy v. Shrader,



no bill of exceptions the facts stated in the charge of the judge will be assumed to be correct.<sup>50</sup>

#### 26. Exceptions to charge and record thereof.

Under the new rules of practice the record must show that exceptions were taken to the charge and a request made that the stenographer transcribe his notes and that all be made a part of the record.<sup>51</sup> It must appear that the filing was done by the judge himself or by his directions evidenced by his signature to the charge or the bill of exceptions;<sup>52</sup> and this must be done before the judge ceases to be a member of the court;<sup>53</sup> and the certificate of counsel cannot supply the judge's certificate as to any part of the record.<sup>54</sup> Where a carbon copy was sent up the appellate court permitted the original to be furnished so as to maintain the appeal.<sup>55</sup> The same rules apply to an appeal in equity.<sup>56</sup> In taking exceptions to the charge, the practice is to have them noted before verdict and request that the charge be reduced to writing from the stenographer's notes and filed of record, which request and direction must be made a part of the record. The assignments of error specifically may be made after verdict.<sup>57</sup> Without such request and record the appeal will be quashed.<sup>58</sup> The mere fact that the charge was filed by the judge's directions is not sufficient.<sup>59</sup> It must be brought on the record by a formal bill of exceptions signed by the trial judge.<sup>60</sup> This rule is technically enforced,<sup>61</sup> and the whole must be certified to the appellate court.<sup>62</sup> If points requested are declined by handing them back and stating that they were covered

20 Supr. C. 438; *Comth. v. Sober*, 22 Supr. C. 22; *O'Brien's Est.*, 22 Supr. C. 475; *Kershner v. Kemmerling*, 24 Supr. C. 181; *Harton v. Harton*, 28 Supr. C. 492.

<sup>50</sup> *McNair v. McLennan*, 24 Pa. 384.

<sup>51</sup> Act Mar. 24, 1877, P. L. 38; *Mathuschek Piano Mfg Co. v. Engberry*, 30 Supr. C. 543; *Sternberg v. Sklaroff*, 32 Supr. C. 116; *Patton v. Allegheny, Etc., Co.*, 36 Supr. C. 296.

<sup>52</sup> *Petri v. Carraccioli*, 33 Supr. C. 312; *Levy v. Singer Mfg Co.*, 32 Supr. C. 117; *Dietrich v. Farmer's, Etc., Co.*, 32 Supr. C. 234; *Thompson v. Petriello*, 33 Supr. C. 651; *American, Etc., Co. v. Altoona, Etc., R. Co.*, 218 Pa. 519; *Farley v. Altoona, Etc., R. Co.*, 32 Supr. C. 413.

<sup>53</sup> *Mitchell v. Edeburn*, 37 Supr. C. 223.

<sup>54</sup> *Crane Marks Co. v. Gordon*, 33 Supr. C. 315.

<sup>55</sup> *Ripka v. Mutual, Etc., Co.*, 36 Supr. C. 517.

<sup>56</sup> *Thomas v. Borden*, 222 Pa. 184.

<sup>57</sup> *Curtis v. Winston*, 186 Pa. 492. (For cases on former practice, see P. & L. Dig., vol. 1, cols. 815 to 820. See also Supreme Court and Superior Court rules, vol. 1. See vol. 1, C. R. A., col. 280.)

<sup>58</sup> *Rosenthal v. Ehrlicher*, 154 Pa. 402; *Smith v. Times Pub'g Co.*, 178 Pa. 497, explaining *Janney v. Howard*, 150 Pa. 339, and cases following "an inadvertent expression of opinion." *Scott v. Smaltz*, 10 Supr. C. 44; *Patterson v. Groetzinger*, 10 Supr. C. 327; *McConnell v. Penna. R. Co.*, 206 Pa. 370; *Comth. v. Pearl*, 29 Supr. C. 307; P. & L. Dig., vol. 1, C. R. A., col. 281.

<sup>59</sup> *Kinney v. Burnhorn*, 23 Supr. C. 583.

<sup>60</sup> *Edwards v. Gimbel*, 187 Pa. 78.

<sup>61</sup> *Leonard v. Leslie*, 23 Supr. C. 63.

<sup>62</sup> *Comth. v. Mock*, 23 Supr. C. 51; *Sibley v. Robertson*, 212 Pa. 24; *Wills v. Hardcastle*, 19 Supr. C. 525.

in the general charge, it is necessary to bring them on the record by exception.<sup>63</sup>

### 27. Stenographer's notes of exceptions.

It is necessary that the record shall show that the stenographer's notes of the trial have been transcribed, certified to by him as correct and that the trial judge has approved them as correct and ordered them filed. The judge should sign the bill of exceptions as at common law, the general certificate to the stenographer's transcript being loose practice;<sup>1</sup> but where the record was in all respects complete except as to the sealing of a bill under the statute of Westminster II, it was held to be sufficient.<sup>2</sup> A motion to supply the missing certificates, without an affidavit that the evidence printed in the paper book is what it purports to be will not be allowed.<sup>3</sup> The notes of the judge will be taken in preference to those of the stenographer where they conflict.<sup>4</sup>

In case of dispute the stenographer's notes made on the trial, approved and filed by direction of the judge are the best evidence.<sup>5</sup> This certificate by the judge is essential;<sup>6</sup> the stenographer's certificate not being enough;<sup>7</sup> and a certificate by the judge that the transcript is "substantially correct" is insufficient,<sup>8</sup> or if he merely writes "approved" upon a record only partially certified.<sup>9</sup>

The approval of the judge must be unqualified and comprehensive;<sup>10</sup> and his signature indisputable.<sup>11</sup> The right of the trial judge to correct the stenographer's notes of his charge has been sustained.<sup>12</sup> The record will not be considered unless certified to by the judge.<sup>13</sup>

### 28. Bill of exceptions — Statute of Westminster II.

Where the judge refuses to seal a bill of exceptions, it has been held he cannot be required to do so by mandamus;<sup>14</sup> but the remedy is under 13th Edward I (Westminster II) which see in Vol. I. The practice is for him to write his exception who alleges it and when refused to apply to the Supreme court by petition asking

<sup>63</sup> *Ensminger v. Hess*, 192 Pa. 432.

<sup>1</sup> *Connell v. O'Neil*, 154 Pa. 582; criticising *Chase v. Vandergrift*, 88 Pa. 217. (See *Hill v. Egan*, 160 Pa. 119; *Phila. v. West Phila. Institute*, 177 Pa. 37.)

<sup>2</sup> *Comth. v. Arnold*, 161 Pa. 320.

<sup>3</sup> *Woodward v. Heist*, 180 Pa. 161.

<sup>4</sup> *Comth. v. Fitzpatrick*, 1 Supr. C. 518.

<sup>5</sup> *Taylor v. Preston*, 79 Pa. 436.

<sup>6</sup> *Yost v. Beatty*, 12 Supr. C. 219.

<sup>7</sup> *O'Brien's Est.*, 22 Supr. C. 475.

<sup>8</sup> *Rothschild v. McLaughlin*, 12 Supr. C. 612.

<sup>9</sup> *Harris v. Phila. Tr. Co.*, 180 Pa. 184.

<sup>10</sup> *Kershner v. Kemmerling*, 24 Supr. C. 181; *Harton v. Harton*, 28 Supr. C. 492.

<sup>11</sup> *Yost v. Clark*, 25 Supr. C. 144.

<sup>12</sup> *Toddes v. Hafer*, 25 Supr. C. 78; *Comth. v. Van Horn*, 188 Pa. 143; *Comth. v. Morrison*, 193 Pa. 613.

<sup>13</sup> *Stout v. Quinn*, 9 Supr. C. 179.

<sup>14</sup> *Drexel v. Man*, 6 W. & S. 386.

for a citation to the judge to appear on a day certain, either to confess or deny the matters alleged, and, if he confess the same, to affix his seal thereto.<sup>16</sup> Where the judge has certified to the entire record as transcribed showing exceptions and bill sealed, he cannot be required to seal a bill specially when requested.<sup>16</sup>

The right under the statute does not embrace a ruling on evidence in a motion for summary relief,<sup>17</sup> or an inquiry upon damages executed at bar.<sup>18</sup> On the hearing the Supreme court will only inquire whether the exceptions were properly taken under the rules of court and not as to their quality.<sup>19</sup> A return by the judge that the bill presented was not true must point out in what respects; and if it does not a peremptory writ will be awarded.<sup>20</sup>

If the judge has already sealed a bill covering the exceptions, he need not seal another; <sup>21</sup> or where the court, in sealing a bill, declines to certify to the correctness of a statement of language alleged to have been used by the district attorney, his conduct will not be revised.<sup>22</sup>

### 29. Character and contents of bill.

A bill of exceptions as to evidence must show the offer, if refused, and the evidence if admitted;<sup>23</sup> and where it relates to a record or writing a copy must be given in the bill.<sup>24</sup>

If the offer was rejected, the bill must show the offer,<sup>25</sup> and must show its relevancy <sup>26</sup> or materiality;<sup>27</sup> and in case of a deposition, the objection to its admission.<sup>28</sup>

### 30. Time of exception and presentation.

An exception to the charge of the court must be taken before the verdict is rendered,<sup>29</sup> but has been allowed after by the court.<sup>30</sup>

In Allegheny County by rule of court, No. 60, exception must be taken immediately after the jury retires. In Philadelphia by rule a general exception to the entire charge is not allowed, but exceptions are taken before the jury retires.<sup>31</sup> If exceptions are

<sup>16</sup> Conrow v. Schloss, 55 Pa. 28.

<sup>18</sup> Comth. v. Arnold, 161 Pa. 320.

<sup>17</sup> Shortz v. Quigley, 1 Binney, 222; Murphy v. Flood, 2 Grant, 411.

<sup>18</sup> Bell v. Bell, 9 Watts, 47.

<sup>19</sup> Conrow v. Schloss, 55 Pa. 28.

<sup>20</sup> Reichenbach v. Ruddach, 121 Pa. 18.

<sup>21</sup> Shires v. O'Conner, 4 Supr. C. 465.

<sup>22</sup> Comth. v. Church, 17 Supr. C. 39.

<sup>23</sup> Snowden v. Warder, 3 Rawle, 101; Hamilton v. Moore, 4. W. & S. 570; Howard v. Murphy, 2 Pa. 173.

<sup>24</sup> Stafford v. Stafford, 27 Pa. 144; Lothrop v. Wightman, 41 Pa. 297; Kille v. Ege, 79 Pa. 15; Wilson v. Homer, 59 Pa. 155; Kiel v. Comth., 1 W. N. C. 347.

<sup>25</sup> Davenport v. Wright, 51 Pa. 292.

<sup>26</sup> Freeland v. Penna. R. Co., 66 Pa. 91.

<sup>27</sup> Phelin v. Kenderdine, 20 Pa. 354.

<sup>28</sup> Hill v. Hill, 42 Pa. 198.

<sup>29</sup> Morris v. Buckley, 8 S. & R. 211; Norris v. Ins. Co., Etc., 3 Yeates, 84; Jones v. Ins. Co., Etc., 4 Dallas, 249.

<sup>30</sup> Dock v. Hart, 7 W. & S. 172.

<sup>31</sup> Collins v. Leafy, 124 Pa. 203.

taken before verdict, specifications may be made later.<sup>32</sup> Exceptions to the entire charge without pointing out specific errors, are bad.<sup>33</sup> An exception to a part of a charge which the context explains will not justify a reversal.<sup>34</sup> An exception allowed several months after the trial is too late.<sup>35</sup> After nonsuit an exception cannot be allowed to a ruling on evidence.<sup>36</sup>

In Philadelphia, by section 1 of rule 12, exceptions must be tendered within ten days from the refusal to take off a compulsory nonsuit, which also applies to the application to sign the certificate of evidence.<sup>37</sup>

Under the old practice exceptions were simply noted as allowed during the progress of the trial and they could be drawn into form and sealed later,<sup>38</sup> and counsel were not held to so strict a compliance with a rule requiring forty-eight hours' notice.<sup>39</sup> But in this intensely technical epoch as to all things appellate, it is well to observe every rule to a nicety. Where the judge died before sealing a bill the Supreme court ordered the judge's notes to be filed and the bill was founded;<sup>40</sup> or the cause was continued and other members of the court sealed the bill.<sup>41</sup> Where an amended declaration was withdrawn a bill of exceptions to evidence under it fell.<sup>42</sup>

### 31. Affidavit as to delay.

The affidavit that the appeal is not intended for delay required by the act of assembly cannot be dispensed with, even by an administrator,<sup>43</sup> though an appellee was held to have waived his right to object after two years' delay.<sup>44</sup> Under the act of May 19, 1897, P. L. 67, the affidavit may be made by "the parties appellant or some one of them, or of one of their chief officers or of their agents or attorneys." "Such affidavit may be made before anyone authorized to administer oaths."

It was held in one case that the affidavit might be made before trial;<sup>45</sup> in another, that it must be made at the issuance of the writ and filed before the return,<sup>46</sup> and still another that the filing might be done after the return, if filed before a motion to dismiss the appeal.<sup>47</sup>

The act is found in Vol. I, p. 107.

<sup>32</sup> *Curtis v. Winston*, 186 Pa. 492.

<sup>33</sup> *Drenning v. Wesley*, 189 Pa. 160; *Fitzpatrick v. Tr. Co.*, 206 Pa. 335; *Kaufman v. R. Co.*, 210 Pa. 440.

<sup>34</sup> *Karl v. Co.*, 206 Pa. 633.

<sup>35</sup> *Comth. v. Van Horn*, 188 Pa. 143.

<sup>36</sup> *Guillon v. Redfield*, 205 Pa. 293.

<sup>37</sup> *Gartman v. Union Tr. Co.*, 13 D. R. 210.

<sup>38</sup> *Stewart v. Bank*, 11 S. & R. 267; *Comth. v. Arnold*, 161 Pa. 320; *McBeth v. Newlin*, 32 Pitts. L. J. 82.

<sup>39</sup> *Reichenbach v. Ruddach*, 121 Pa. 18.

<sup>40</sup> *Burk v. McMullen*, 4 Pa. 317.

<sup>41</sup> *McCandless v. McWha*, 20 Pa. 183.

<sup>42</sup> *Lyon v. Miller*, 24 Pa. 392.

<sup>43</sup> *Beale v. Patterson*, 6 S. & R. 89.

<sup>44</sup> *Heckert's Ap.*, 13 S. & R. 104.

<sup>45</sup> *Miles v. O'Hara*, 1 S. & R. 32.

<sup>46</sup> *Beale v. Patterson*, 6 S. & R. 89.

<sup>47</sup> *Brentlinger v. Brentlinger*, 4 Rawle, 241.

### 32. Recognizance on appeal.

Appeals, as to recognizance for costs and recognizance as to supersedeas are now regulated by the act of May 19, 1897, P. L. 67, which see, Vol. I.

Where security for costs is required on appeal a recognizance is required or the appeal will be quashed.<sup>1</sup> But where security is required for *supersedeas* of execution the effect of a failure to enter recognizance is not to annul the appeal, but there will be no stay of execution.<sup>2</sup>

Those acting as administrators, executors, guardians, etc., being representatives of fiduciary interests were by the act of June 16, 1836, P. L. 762, as well as are by the act of May 19, 1897, P. L. 67, authorized to appeal without giving security as supersedeas.<sup>3</sup> But this privilege is confined wholly to matters of a representative nature,<sup>4</sup> and not to his efforts to defend his infraction of duty in the trust.<sup>5</sup>

A minor was allowed to appeal, without recognizance, from an order confirming his guardian's account.<sup>6</sup>

### 33. Recognizance, amount and character.

Prior to the act of 1897 it was decided that a recognizance for costs only did not effect a supersedeas.<sup>7</sup> But on a *sci. fa. sur* mortgage it was sufficient where the question was one of restricting the lien.<sup>8</sup> If the parties agree upon the amount of a recognizance it will be a supersedeas.<sup>9</sup> The sureties are not required to own real estate nor to have their security in the county.<sup>10</sup>

The recognizance need not follow the language of the act strictly, if it substantially complies with it.<sup>11</sup> Since section 6 of the act of May 19, 1897, P. L. 67, requires the bond for appeal as a *supersedeas*, to be in double the amount of the judgment or decree and all costs accrued or likely to accrue, a bond in double the amount of the verdict is insufficient.<sup>12</sup>

Where the judgment on a *sci. fa. sur* mortgage is for the payment of money, it comes within section 6 of the act of 1897.<sup>13</sup>

<sup>1</sup> Brom v. Brom, 2 Wharton, 94; Moody's Ap., 1 Penny. 287; under Act 1881, repealed by Act May 21, 1885; P. L. 22; Roddy's Ap., 99 Pa. 9.

<sup>2</sup> Magill v. Kauffman, 4 S. & R. 317; Savings Institution v. Smith, 7 Pa. 291; Duvall's Est., 146 Pa. 176; P. & L. Dig., vol. 1, col. 835.

<sup>3</sup> Thomas' Est., 4 Kulp, 449; Maule v. Shaffer, 2 Pa. 404; Nixon's Est., 8 W. N. C. 390.

<sup>4</sup> Pugh v. Ottonkirk, 3 W. & S. 170; Gebler v. Culin, 6 Phila. 130.

<sup>5</sup> Revell's Est., 12 D. R. 138; Krodel's Est., 14 D. R. 417.

<sup>6</sup> Richard's Case, 6 S. & R. 462.

<sup>7</sup> Savage v. Kelly, 11 Phila. 525; Quick v. Miller, 103 Pa. 67; P. & L. Dig., vol. 1, col. 837.

<sup>8</sup> Hosie v. Gray, 73 Pa. 502.

<sup>9</sup> Haines v. Levin, 51 Pa. 412.

<sup>10</sup> Moodie v. Bank of Ashland, 1 W. N. C. 324.

<sup>11</sup> Witman v. Ely, 4 S. & R. 260; Serfass v. Dreisbach, 2 D. R. 56.

<sup>12</sup> Hoy v. Montgomery, Etc., Co., 21 Montg. Co., 77; Comth. v. Harvey, 51 Pitts. L. J. 380.

<sup>13</sup> Smead v. Stuart, 194 Pa. 578; Moyer v. Dodson, 9 Del. Co. 398; Comth. v. Cummings, 11 D. R. 355. (See Hosie v. Gray, *supra*, and

Prior to the surety company law of 1885, where two sureties were required, unless they were given the bail was held defective and the appellant was ruled to perfect his bail within a time fixed or have his appeal *non-prossed*, and the recognizance was held to be void, if not perfected.<sup>14</sup>

This rule still obtains where individuals are given as sureties.

The appellate court has full power, concurrently with the lower court, to take, amend or vacate recognizances,<sup>15</sup> and may determine the bail for a special *supersedeas*.<sup>16</sup>

If the record shows that the bond of a corporation appellant was objected to below and no new bond was given its appeal will be quashed.<sup>17</sup> But if not objected to below, an informality will not vitiate it.<sup>18</sup>

The receiver of a corporation must give the same kind of bond as the corporation if he does not intervene.<sup>19</sup> Under section 10 of the act of 1897, a bond in \$200, with the usual conditions was held to be insufficient as a *supersedeas* in ejectment.<sup>20</sup> The power of the court to revise the prothonotary's act in accepting bail under section 17 of the act of 1897, has been held to apply only to the responsibility of the sureties.<sup>21</sup>

Where a *certiorari* is filed in the court below within six months, the appeal will not be quashed because the bond was approved and filed later, the question of *supersedeas* not being raised.<sup>22</sup> Under the act of May 19, 1897, P. L. 67, section 4, it is provided that no appeal shall supersede an execution issued or distribution ordered, unless taken and perfected and bail entered within three weeks from such entry. It was held under the act of 1836 that, although an execution was issued, if nothing was done to execute it, an order of *supersedeas* would be made on bail perfected after three weeks.<sup>23</sup>

#### 34. *Supersedeas* — Form of petition for order.

A *supersedeas* stops proceedings in the court below,<sup>24</sup> except as to an execution issued and being executed.<sup>25</sup>

A *supersedeas* affects only the court below and the parties to the controversy.<sup>26</sup> Since the act of 1897, *supra*, bail must be perfected

Koecker v. Fidelity Co., 103 Pa. 331, which was for the payment of money.)

<sup>14</sup> Taggart v. Cooper, 3 Binney, 34; Tilden v. Worrell, 30 Pa. 272; P. & L. Dig., vol. 1, col. 840.

<sup>15</sup> Hosie v. Gray, 73 Pa. 502; P. & L. Dig., vol. 1, col. 841.

<sup>16</sup> Silliman v. Whitmer, 173 Pa. 401.

<sup>17</sup> Denlinger v. Conestoga, Etc., Co., 32 Supr. C. 418.

<sup>18</sup> Ripka v. Mutual, Etc., Co., 36 Supr. C. 517.

<sup>19</sup> Palmer v. Pittsburg, Etc., Co., 215 Pa. 518.

<sup>20</sup> Schock v. Solar, Etc., Co. (No. 2), 17 D. R. 561.

<sup>21</sup> Locher's Est., 16 D. R. 787.

<sup>22</sup> Hanhauser v. Penna., Etc., Co., No. 1, 222 Pa. 240.

<sup>23</sup> McDonald v. Gifford, 1 Brewster, 278.

<sup>24</sup> Hess' Ap., 1 Watts, 255; Cox' Admr. v. Henry, 36 Pa. 445; P. & L. Dig., vol. 1, col. 845.

<sup>25</sup> Krause v. Neidig, 3 Montg. 127; Supplee v. Reznor, 1 W. N. C. 20; Neider v. Scholken, 5 Kulp, 133; vol. 1, P. & L. Dig., col. 845.

<sup>26</sup> Comth. v. Kistler, 149 Pa. 345; Ewing v. Thompson, 43 Pa. 372.

in the court below within three weeks from the entry of judgment to operate as a *supersedeas*.<sup>27</sup> The rule is that a *supersedeas* suspends action in the case in the court below.<sup>28</sup> But if the record be not removed on an appeal in equity, and the subject matter of appeal is the character of the decree excepted to, argument may proceed on the exceptions in the court below.<sup>29</sup> Where a creditor appeals from the distribution of part of a fund, the balance being ample to protect his claim, his appeal will not stay the distribution.<sup>30</sup> If the rule of court as to the time of justifying bail is not complied with the appeal will not be a *supersedeas*.<sup>31</sup>

#### FORM OF PETITION FOR SUPERSEDEAS ON APPEAL TO SUPERIOR COURT IN SUMMARY CONVICTION.

Following is a form of petition for order of supersedeas in the court of Quarter Sessions, on appeal to the Superior court:

City of New Castle } In the court of Quarter Sessions of Lawrence  
v. } County, Pennsylvania,  
A. W. Treadwell. } No. 83, June sessions, 1907.

To the Honorable William E. Porter, President Judge of said court:

The petition of A. W. Treadwell, respectfully represents, That he has entered an appeal from the sentence of the said court in the above-stated case and removed the same to the Superior court of Pennsylvania. In order that said appeal may operate as a *supersedeas*, he respectfully prays your honor to make such order in the premises as to your honor may seem meet. And he will ever pray, etc.

H. R. Gregory,  
Attorney for Petitioner.

[Signed] A. W. T.

Lawrence County, ss.

A. W. Treadwell being duly sworn says that the facts set forth in the above petition are true.

Sworn to, etc.

*Order of Supersedeas.*

And now, September —, 1907, the above petition being presented in open court and the court being satisfied that there are questions involved in this case that ought to be determined by a higher court, directs that the defendant A. W. Treadwell, shall give bond in the sum of one hundred dollars, to be approved by this court, conditioned that the said defendant, appellant, will abide by and obey the order or decree of the appellate court, and pay all costs awarded by the appellate court or legally chargeable against him herein. And that upon the approval of said bond, the said appeal shall be

<sup>27</sup> Hoon v. Miller, 16 D. R. 703; Schock v. Solar, etc., Co., 17 D. R. 561; Margo v. Penna. R. Co., No. 2, 213 Pa. 468. (See P. & L. Dig., vol. 3, C. R. A., col. 102; vol. 1, C. R. A., col. 289.)

<sup>28</sup> Byrne v. Building Assn., 1 T. & H. Pr., section 844; Courtney v. Beck, 3 York, 170; Baxter v. Buchanan, 2 Leg. Gaz. 223.

<sup>29</sup> Green v. Prince, Etc., Co., No. 2, 25 Supr. C. 418.

<sup>30</sup> Comth. v. Order of Solon, 192 Pa. 495.

<sup>31</sup> McKeeby v. Webster, 170 Pa. 624.

a *supersedeas* to the sentence and decree of this court in the above stated case.

Per Cur.

W. E. Porter, P. J.

### 35. Action on the recognizance.

Suit may be brought against the sureties in the recognizance upon judgment of *non pros.*, or affirmance;<sup>32</sup> even where the *non pros.* was by agreement of all the parties.<sup>33</sup> If the judgment is reversed the sureties are not liable any further in the case.<sup>34</sup>

When the suit was for the price of land, it is not necessary to tender a deed before bringing suit on the recognizance.<sup>35</sup> But if the appellee treats the sureties as improper and rules them to justify, issuing execution against the principal, they are released.<sup>36</sup> The discontinuance of the appeal on suggestion of the court has the same effect, when judgment is opened.<sup>37</sup> The *sci. fa. sur* recognizance on appeal is ancillary to the suit in which given, and under the rules in Philadelphia must be commenced as of the same number and term and in the same court as the original suit.<sup>38</sup> Where the appeal is on a *sci. fa. sur* mortgage, the sureties are liable for any deficit as well as the costs, where the appeal is dismissed.<sup>39</sup> The surety on an appeal from an attachment against an administrator is liable only for the costs.<sup>40</sup> Whether or not the sureties can claim the benefit of the \$300 exemption has been held to depend on the original cause of action; if replevin, they were not entitled to it.<sup>41</sup> In the suit upon the recognizance the execution will be controlled until the original action is finally determined.<sup>42</sup> The surety is entitled to credit for the amount realized by the appellee on his execution against the principal.<sup>43</sup> The surety may take an assignment of the judgment, in tort, and have execution thereon.<sup>44</sup> He cannot plead the bankruptcy and discharge of his principal;<sup>45</sup> nor an attachment against appellant.<sup>46</sup> But he may plead that plaintiff treated the bail as a nullity and thereby released him.<sup>47</sup>

However, it is not a good defense that the recognizance was not certified to the Supreme court.<sup>48</sup> Where a sheriff appeals suit must

<sup>32</sup> *Davy v. Jackson*, 2 Yeates, 280; *Mechling v. Merchants' Etc., Bank*, 3 Walker, 466.

<sup>33</sup> *Share v. Hunt*, 9 S. & R. 404.

<sup>34</sup> *Bank v. Cowperthwaite*, 1 Wilcox, 273.

<sup>35</sup> *Comth. v. Harvey*, 51 Pitts. L. J. 380.

<sup>36</sup> *Tilden v. Worrell*, 14 Leg. Int. 132; *Geiselman v. Shomo*, 13 Supr. C. 1.

<sup>37</sup> *Comth. v. Krause*, 198 Pa. 391.

<sup>38</sup> *Wahl v. Wanamaker*, 8 W. N. C. 306; *Lukins v. Bryson*, 9 W. N. C. 540; *Given v. Johnston*, 16 W. N. C. 424.

<sup>39</sup> *Wahl v. Wanamaker*, 8 W. N. C. 306.

<sup>40</sup> *Comth. v. Luton*, 12 Luz. L. R. 63.

<sup>41</sup> *Ramsdell v. Seybert*, 14 D. R. 247.

<sup>42</sup> *Adams v. Mortland*, 13 W. N. C. 221.

<sup>43</sup> *Kessering v. Markley*, 1 Del. Co. 455; *Clayton v. Neff*, 1 W. N. C. 430 (also 247).

<sup>44</sup> *Farmers' Etc., Bank v. Harper*, 8 Pa. 249.

<sup>45</sup> *Adams v. Mortland*, 13 W. N. C. 221.

<sup>46</sup> *Noble v. Thompson Oil Co.*, 69 Pa. 409.

<sup>47</sup> *Allen v. Kellam*, 94 Pa. 253.

<sup>48</sup> *Beck v. Courtney*, 13 W. N. C. 302.



be brought on the recognizance of appeal and not his official bond.<sup>49</sup> An appeal bond in ejectment not conditioned as provided in section 10, act of 1897, does not cover waste or mesne profits and a *sci. fa.* on it will not lie and no affidavit of defense is required to prevent judgment by default.<sup>50</sup> An execution against a property which a surety fraudulently represented he owned, will be set aside and an order entered that the property shall not be affected with lien.<sup>51</sup>

### 36. Assignments of error.

Errors alleged in the court below must be assigned on appeal, according to the rules of court,<sup>1</sup> and must be printed in the paper book,<sup>2</sup> and be contained in the record,<sup>3</sup> and the facts on which the assignments are based must be set out;<sup>4</sup> error complained of which is not sustained by the record will not be considered by the appellate court.<sup>5</sup> But where the record shows a manifest error on its face although not assigned, as where a husband testified against his wife, the appellate court will take notice of it.<sup>6</sup> It will, however, not notice erroneous instructions of the court below which have not been assigned.<sup>7</sup> An appeal in equity will be quashed for failure to comply with the rules as to specification of errors.<sup>8</sup>

The brief statement required by equity rule 92 will not suffice for the specifications required by rule 11 of the Supreme court.<sup>9</sup> It is ground for quashing if assignments are not filed in the Superior court, on or before the first day of the week to which the case is assigned, as required by rule 13.<sup>10</sup> If no assignments are filed the appeal will be *non-prossed* or quashed.<sup>11</sup> This is true of a case stated<sup>12</sup> and the appellate court will not consider the whole case and enter judgment.<sup>13</sup>

When error is assigned only to refusal to take off a nonsuit the

<sup>49</sup> *Johnson v. Burkholder*, 10 Lanc. L. R. 393.

<sup>50</sup> *Lazarus v. Morris*, 17 D. R. 804.

<sup>51</sup> *Comth. v. Lacy*, 15 D. R. 199.

<sup>1</sup> *Landis v. Maher*, 1 W. N. C. 407; *Comth. v. Johnson*, 219 Pa. 174.

<sup>2</sup> *Speers v. Knarr*, 4 Supr. C. 80; *Jack v. Twyford*, 8 Supr. C. 231; *Manley v. Okell*, 19 Supr. C. 240; *Comth. v. Kreinbrook*, 23 Supr. 511.

<sup>3</sup> *Brisbane v. Van Lear*, 14 Pitts. L. J. 17; *Thirty-fourth Street*, 81 Pa. 27; *Jefferson Road*, 3 Supr. C. 467; *Littell v. Young*, 5 Supr. C. 205.

<sup>4</sup> *Gamble v. Woods*, 53 Pa. 158; *Harris v. Schuylkill, Etc., R. Co.*, 156 Pa. 252.

<sup>5</sup> *Girts v. Comth.*, 22 Pa. 351; *Hawk v. Jones*, 24 Pa. 127; *Hughes v. Peaslee*, 50 Pa. 257; *Thorne, Etc., Co. v. Warfflein*, 100 Pa. 527; *Comth. v. Smith*, 2 Supr. C. 474; *Land, Etc., Co. v. Fulmer (No. 2)*, 24 Supr. C. 260.

<sup>6</sup> *Canole v. Allen*, 222 Pa. 156; *Anderson v. Long*, 10 S. & R. 55; *Rodovinsky v. Roxford Knitting Co.*, 5 Supr. C. 636. (See *Uplinger v. Bryan*, 12 Pa. 219.)

<sup>7</sup> *Troxell v. Anderson Coal Mining Co.*, 213 Pa. 475.

<sup>8</sup> *Howard v. Swissvale Boro.*, 216 Pa. 388.

<sup>9</sup> *Jones v. Wier*, 217 Pa. 321; *Croasdale v. Von Boyneburgh*, 206 Pa. 15.

<sup>10</sup> *Comth. v. Owen*, 32 Supr. C. 420; *Natl., Etc., Co. v. Mehaffey*, 30 Supr. C. 544.

<sup>11</sup> *Arthurs v. Smathers*, 38 Pa. 40; *Halahan v. Cassidy*, 12 Supr. C. 227.

<sup>12</sup> *Warwick, Etc., Co. v. McKeag*, 205 Pa. 490.

<sup>13</sup> *Forney v. Huntingdon County*, 6 Supr. C. 397.

appellate court will not consider rulings on offers of evidence,<sup>14</sup> although exceptions had been noted at the trial.<sup>15</sup> Hence assignments become highly essential under the new rules.<sup>16</sup> They are a necessary part of the pleadings and should be so complete that it becomes unnecessary to sift them from other parts of the record.<sup>17</sup> The only part of the record retained in the appellate court after the remittitur takes it back, are usually the præcipe, assignments of error and the pleas thereto and these should be complete.<sup>18</sup> If the assignments are based on the facts, the evidence must be brought on the record by bill of exceptions.<sup>19</sup> No assignment can impeach the record;<sup>20</sup> on the other hand, it must be supported by the record.<sup>21</sup> If the assignment is the erroneous admission of a book of original entries it must set forth evidence on the character of the book.<sup>22</sup> If it be as to injunctive orders it must quote them;<sup>23</sup> and so also as to rulings upon a request for a bill of particulars in a criminal case;<sup>24</sup> or the legality of a sentence when no exception was taken.<sup>25</sup> The presumption of regularity as to the answering of points will countervail the mere assertion of appellant's counsel, where the record supports the former.<sup>26</sup>

### 37. Particularity of assignments.

An assignment of error must set forth the matter with particularity.<sup>27</sup> It must not be divided into clauses or points.<sup>28</sup> Under rules 29 of the Supreme court and 14 of the Superior court each assignment shall present but a single point.<sup>29</sup> Each error must be assigned by itself, which is called a specification of error,<sup>30</sup> and an assignment with two points is a waiver of both.<sup>31</sup> So an assignment with two or more distinct extracts from a charge relating to dis-

<sup>14</sup> *Forrest v. Buchanan*, 203 Pa. 454.

<sup>15</sup> *Scranton Traction Co. v. Schlichter*, 202 Pa. 6.

<sup>16</sup> See Rules of Supreme Court and Superior Court, vol. 1; *McCarthy v. Phila., Etc., R. Co.*, 211 Pa. 193.

<sup>17</sup> *Cessna's Est.*, 192 Pa. 14.

<sup>18</sup> *Wabash Ave.*, 26 Supr. C. 305; *Comth. v. Mackey*, 34 Supr. C. 1; *Intl., Etc., Co. v. Kleber*, 29 Supr. C. 200.

<sup>19</sup> *Comth. v. Mock*, 23 Supr. C. 51.

<sup>20</sup> *Doylestown, Etc., License*, 9 Supr. C. 96; *Quinn's License*, 11 Supr. C. 554.

<sup>21</sup> *Kinney v. Burnhorn*, 23 Supr. C. 583.

<sup>22</sup> *Coverdill v. Heath*, 12 Supr. C. 15.

<sup>23</sup> *Arnold v. Russell, Etc., Co.*, 212 Pa. 303.

<sup>24</sup> *Comth. v. Powell*, 23 Supr. C. 370.

<sup>25</sup> *Comth. v. Beale*, 19 Supr. C. 434.

<sup>26</sup> *Krug v. Peale*, 35 Supr. C. 1.

<sup>27</sup> *Scott's Est.*, 176 Pa. 49; *Comth. v. Zappe*, 153 Pa. 498; *Voskamp v. Connor*, 173 Pa. 109; *Gallagher v. Davis*, 179 Pa. 504; *P. & L. Dig.*, vol. 1, col. 865.

<sup>28</sup> *Kemmerer v. Tool*, 81 Pa. 467.

<sup>29</sup> *Hennessy v. Anstock*, 19 Supr. C. 644; *Brown v. Forest Water Co.*, 213 Pa. 440; *Jones v. Wier*, 217 Pa. 321; *Comth. v. Campbell*, 31 Supr. C. 9.

<sup>30</sup> *Haag v. Good*, 7 Supr. C. 425; *Erie v. Grant*, 24 Supr. C. 109; *P. & L. Dig.*, C. R. A., vol. 1, col. 300.

<sup>31</sup> *Armstrong's Ap.*, 63 Pa. 312; *Thompson v. McConnell*, 1 Grant, 396; *P. & L. Dig.*, vol. 1, cols. 867, 868.

tingent subjects is a violation of the rules;<sup>32</sup> also two or more answers to points;<sup>33</sup> or embracing several matters, some erroneous and some not.<sup>34</sup> Error in fact and error in law must be assigned separately.<sup>35</sup>

The appellate court will not consider a general assignment of error in the confirmation of a report;<sup>36</sup> or in over-ruling or sustaining exceptions to a report.<sup>37</sup> A specification of one error, assigning four reasons, does not violate the rule.<sup>38</sup> The general rule stated above has been held to be violated when the specification embraced admission of evidence and refusal of a new trial;<sup>39</sup> rulings on different requests for findings of fact in equity,<sup>40</sup> or rulings on law and facts;<sup>41</sup> or over-ruling exceptions in the Orphans' court;<sup>42</sup> or to reports;<sup>43</sup> refusal to affirm several separate and distinct points requested for charge;<sup>44</sup> refusal of a point and to call additional jurors;<sup>45</sup> entry of judgment for plaintiff and reservation of a question of law;<sup>46</sup> sustaining several exceptions in equity;<sup>47</sup> dismissal of several exceptions to an auditor's report;<sup>48</sup> the entry of two separate decrees;<sup>49</sup> and averring errors with a large number of specifications for each.<sup>50</sup>

### 38. Assignment must set forth the ruling complained of.

When a ruling of the court is alleged for error it must be set forth in the language used and not in general terms.<sup>1</sup> So general statements will be disregarded to the effect that the court erred in holding, etc., without saying the particular thing it held;<sup>2</sup> or in allowing certain claims;<sup>3</sup> or dismissal of exceptions,<sup>4</sup> or making

<sup>32</sup> *Harshman v. Dunbar Twp.*, 11 Supr. C. 638; *George v. Conneaut Twp.*, 18 Supr. C. 47.

<sup>33</sup> *Davidson v. Schuylkill Tr. Co.*, 4 Supr. C. 86; *Loeweke v. Lumberman's, Etc., Assn.*, 21 Supr. C. 389.

<sup>34</sup> *McGeary v. Raymond*, 17 Supr. C. 308.

<sup>35</sup> *McMurray v. Erie City*, 59 Pa. 223.

<sup>36</sup> *Bull's Ap.*, 24 Pa. 286; *Trullinger v. Charles*, 129 Pa. 289; *Maurer's Ap.*, 148 Pa. 272; vol. 1, P. & L. Dig., col. 860.

<sup>37</sup> *Holton v. R. Co.*, 138 Pa. 111; *Women's, Etc., Soc. v. Receiver of Taxes*, 173 Pa. 456; P. & L. Dig., vol. 1, col. 867.

<sup>38</sup> *Mix v. North American Co.*, 209 Pa. 636.

<sup>39</sup> *Ruddy v. Repp*, 19 Supr. C. 437.

<sup>40</sup> *Sloan v. James*, 13 Supr. C. 399.

<sup>41</sup> *Kase v. Burnham*, 206 Pa. 330.

<sup>42</sup> *Godshalk's Est.*, 24 Supr. C. 410.

<sup>43</sup> *Moore v. Bischoff*, 25 Supr. C. 1; *Wabash Ave.*, 26 Supr. C. 305; *Barr Twp. Road*, 29 Supr. C. 203.

<sup>44</sup> *Reading Co. v. Seip*, 30 Supr. C. 330; *Comth. v. Volquarts*, 36 Supr. C. 199.

<sup>45</sup> *Dotterer v. Scott*, 29 Supr. C. 553.

<sup>46</sup> *Ripka v. Mutual Fire Ins. Co., Etc.*, 36 Supr. C. 517.

<sup>47</sup> *Kenworthy v. Equitable Trust Co.*, 218 Pa. 286.

<sup>48</sup> *Graybill v. Deitrich*, 32 Supr. C. 482.

<sup>49</sup> *McConahy v. Western, Etc., R. Co.*, 31 Supr. C. 215.

<sup>50</sup> *Comth. v. Yocum*, 37 Supr. C. 237.

<sup>1</sup> *Cessna's Est.*, 192 Pa. 14; *Oakland Boro' v. Boyden*, 22 Supr. C. 278.

<sup>2</sup> *Wymard v. Deeds*, 21 Supr. C. 332; *Berk's County, Etc., v. Schuylkill County, Etc.*, 21 Supr. C. 627.

<sup>3</sup> *Ramchasel's Est.*, 21 Supr. C. 497.

<sup>4</sup> *O'Donnell v. Clements*, 23 Supr. C. 447.

a rule absolute for judgment for want of an affidavit of defense;<sup>5</sup> or over-ruling a motion to quash an indictment,<sup>6</sup> without setting forth the ruling. When the over-ruling of a demurrer to an indictment is assigned it should state on what the demurrer was based;<sup>7</sup> if remarks of counsel are assigned they must be quoted;<sup>8</sup> if a decree, it must be set out *totidem verbis*;<sup>9</sup> assigning error in not affirming requests should show what the requests were, and what the court did.<sup>10</sup>

The rulings of the court and the decree made are essential to assignments.<sup>11</sup> A general assignment of error in entry of judgment upon the verdict is insufficient.<sup>12</sup>

### 39. Assignments as to charge of court and answers to points.

Where error is alleged in the charge of the judge the part assigned must be given in the exact words.<sup>13</sup> The rules say *totidem verbis*. If the whole charge is assigned for error it must be given complete.<sup>14</sup> Before the era of intense technicality it was held sufficient if the whole charge were contained in the bill of exceptions and parts assigned specifically.<sup>15</sup> Excerpts from a charge must not be so set out as if continuous unless they are asterisked.<sup>16</sup> Where error is assigned to answers to points both points and answers must be set out.<sup>17</sup> Such assignments not sustained by the evidence will not be considered;<sup>18</sup> and it is bad to include argument with the evidence.<sup>19</sup> An assignment as error that the court did not charge in a certain way is a nullity unless it shows that the charge was requested so to charge.<sup>20</sup> An assignment which misquotes the charge will be held a violation of the rule;<sup>21</sup> also one which specifies that the judge submitted the case "in contradiction to the plaintiff's theory";<sup>22</sup> so, when it alleges that the whole

<sup>5</sup> *Interl., Etc., Co. v. Kleber*, 29 Supr. C. 200.

<sup>6</sup> *Comth. v. Stambaugh*, 22 Supr. C. 386.

<sup>7</sup> *Comth. v. Shoener*, 25 Supr. C. 528.

<sup>8</sup> *Comth. v. Dorman*, No. 2, 22 Supr. C. 20.

<sup>9</sup> See Rules of Supreme and Superior Courts; *Jones v. Wier*, 217 Pa. 321; *19 York*, 109; *McConahy v. Western, Etc., R. Co.*, 31 Supr. C. 215.

<sup>10</sup> *Shrewsbury, Etc., v. Penn., Etc.*, 33 Supr. C. 378.

<sup>11</sup> *Prudential Trust Co. v. Hildebrand* (No. 1), 34 Supr. C. 249.

<sup>12</sup> *Wills v. Hardcastle*, 19 Supr. C. 525.

<sup>13</sup> *Walton v. Hinnau*, 146 Pa. 396; *McNulty v. Penna. R. Co.*, 182 Pa. 479; *P. & L. Dig.*, vol. 1, cols. 869, 870; *Murtland v. English*, 214 Pa. 325;

*Pitton v. Allegheny, Etc., Co.*, 36 Supr. C. 296.

<sup>14</sup> *Gilmore v. Pittsburg, Etc., R. Co.*, 104 Pa. 275; *Comth. v. Orr*, 138 Pa. 276; *Udderzook v. Harris*, 140 Pa. 236.

<sup>15</sup> *Collins v. Leafy*, 23 W. N. C. 264.

<sup>16</sup> *Comth. v. Eckerd*, 174 Pa. 137; *Comth. v. Zappe*, 153 Pa. 498.

<sup>17</sup> *Readdy v. Shamokin Boro'*, 137 Pa. 92; *Irvin v. Kutruff*, 152 Pa. 609; *P. & L. Dig.*, vol. 1, cols. 871-2.

<sup>18</sup> *Clarkson v. Thom*, 2 Penny. 491.

<sup>19</sup> *Duquesne Natl. Bank v. Williams*, 155 Pa. 48.

<sup>20</sup> *Fox v. Fox*, 96 Pa. 60.

<sup>21</sup> *Shannon v. Cohlhepp*, 37 Supr. C. 241.

<sup>22</sup> *Ludwig Piano Co. v. Browne*, 33 Supr. C. 81.

charge was inadequate and misleading,<sup>23</sup> without quoting it; or assigns specially portions in brackets but giving the entire charge.<sup>24</sup> The Superior court is satisfied with the following form of assignment: "The charge of the court was inadequate in failing to define to the jury the nature and character of the crime charged in the indictment and the proof required to sustain the same."<sup>25</sup> But an assignment that the court erred in instructing the jury to find a verdict in favor of the plaintiff is held a violation of the rule.<sup>26</sup> And in the Supreme court, it is a violation of the rule to assign as error the failure to affirm a point asking binding instructions for the defendant, when the point or answer is not set out *totidem verbis*.<sup>27</sup>

#### 40. Assignments as to evidence and in equity.

An assignment of error as to the admission or rejection of evidence must quote the full substance of the bill of exceptions or give a copy of it with the specification<sup>28</sup> and must set forth the evidence to which the specification relates.<sup>29</sup>

It must also give the offer of the testimony, the objection and the ruling of the court.<sup>30</sup> That the evidence appears in the bill of exceptions is not sufficient,<sup>31</sup> nor that it is printed in the paper book.<sup>32</sup> The rules of the appellate courts are similar and construed alike.<sup>33</sup> The assignments must set forth the offers, rulings and the testimony, if admitted, and refer to the page of the paper book where it is found in order.<sup>34</sup>

It must show that a bill was sealed;<sup>35</sup> quote its full substance<sup>36</sup>

<sup>23</sup> Mitchell v. Edeburn, 37 Supr. C. 223.

<sup>24</sup> Wirsing v. Smith, 222 Pa. 8.

<sup>25</sup> Comth. v. Volquarts, 36 Supr. C. 199.

<sup>26</sup> Reading Co. v. Seip, 30 Supr. C. 330.

<sup>27</sup> Boyce v. Union, Etc., Assn., 218 Pa. 494. (However see Sheridan v. Gray's Ferry, Etc., Co., 214 Pa. 115. As to *tot. verb.*, see Dotterer v. Scott, 29 Supr. C. 553, and cases cited above.

<sup>28</sup> Kent, Etc., Co. v. Worbeck, 150 Pa. 359; P. & L. Dig., vol. 1, cols. 873-4; Comth. v. Heidler, 191 Pa. 375; Perkiomen, Etc., Co. v. Berks County, 196 Pa. 21; Ewing v. Cottman, 9 Supr. C. 444; P. & L. Dig. C. R. A., vol. 1, col. 307.

<sup>29</sup> Beck v. Penna. R. Co., 148 Pa. 271; Van Horne v. Dick, 151 Pa. 341; Raymond v. Schoonover, 181 Pa. 352; Sopherstein v. Bertels, 178 Pa. 401; Neely v. Bair, 157 Pa. 417; P. & L. Dig., vol. 1, cols. 874-5; vol. 1, C. R. A. 305; vol. 3, C. R. A., 109, 110.

<sup>30</sup> Sayers v. Hoskinson, 110 Pa. 473; Patterson v. Marine Natl. Bank, 130 Pa. 419; Norbeck v. Davis, 157 Pa. 399; Malone v. P. & R. R. Co., 157 Pa. 430; Gish v. Brown, 171 Pa. 479; 1 C. R. A., cols. 307-8.

<sup>31</sup> Smith v. Tome, 68 Pa. 158; Bidwell v. Evans, 156 Pa. 30; Fritz v. Lebanon, Etc., Co., 154 Pa. 384.

<sup>32</sup> Dietrich v. Adams, 9 W. N. C. 492. (See rules of Supreme and Superior Courts, vol. 1.)

<sup>33</sup> DeRoy v. Richards, 8 Supr. C. 119.

<sup>34</sup> Fitzgerald v. Edison, Etc., Co., 207 Pa. 118; Berk's County, Etc., v. Schuylkill County, Etc., 21 Supr. C. 627; Comth. v. Powell, 23 Supr. C. 370; Gerwig v. Johnston Co., 207 Pa. 585; Brown v. Forest Water Co., 213 Pa. 440; Hallock v. Lebanon, 215 Pa. 1; Cameron v. Citizen's Tr. Co., 216 Pa. 191; Brouse v. Oliger, 36 Supr. C. 399; Winnett v. Carnegie, Etc., Co., 37 Supr. C. 204; 3 C. R. A., col. 110.

<sup>35</sup> Readdy v. Shamokin Boro', No. 2, 137 Pa. 98.

and give the name of the witness.<sup>37</sup> A mere reference to a page of the paper book is insufficient.<sup>38</sup> In one case an amendment of defective assignments was allowed.<sup>39</sup>

Assignments as to offers of writings or records must have copies thereof printed.<sup>40</sup> The same applies to ordinances and resolutions,<sup>41</sup> or a rule of court requiring construction,<sup>42</sup> or any writing the subject of an exception.<sup>43</sup>

Where the assignment is to the refusal of the court to strike out a portion of testimony, all of the related testimony should be set forth.<sup>44</sup> Assignments having covered matters alleged for error in detail, additional technical specifications will not be considered.<sup>45</sup> Where error is assigned to the report of an auditor or master it must show that objection was taken in the court below.<sup>46</sup> An assignment that the court sustained objection to a question on cross-examination, without quoting the context of record,<sup>47</sup> is bad.

When the assignments are very numerous the trivial or frivolous ones weaken those which might have some weight.<sup>48</sup>

In equity matters, the supreme court rules have the force of law and appeals are subject to those rules.<sup>49</sup> This is true of the rule (92) requiring a statement of the errors to be filed in the court below,<sup>50</sup> without which the appeal may be *non-prossed* or quashed,<sup>51</sup> if the appellate court does not see fit to allow it to be filed *nunc*

<sup>36</sup> *Perkiomen, Etc., Co. v. Berk's County*, 196 Pa. 21; *P. & L. Dig.*, vol. 1, C. R. A., col. 307.

<sup>37</sup> *De Roy v. Richards*, 8 Supr. C. 119; *Gerwig v. Johnston Co.*, 207 Pa. 585; *Hawes v. O'Reilly*, 126 Pa. 440.

<sup>38</sup> *Vanderslice v. Donner*, 26 Supr. C. 319.

<sup>39</sup> *Swope v. Donnelly*, 190 Pa. 417.

<sup>40</sup> *McGeary v. Raymond*, 17 Supr. C. 308; *McKnight v. Newell*, 207 Pa. 562; *Comth. v. Pearl*, 29 Supr. C. 307; *Kaufman v. Pittsburg, Etc., R. Co.*, 210 Pa. 440; *Bailey v. Pittsburg*, 207 Pa. 553; *Nolt v. Crow*, 22 Supr. C. 113; *P. & L. Dig.*, vol. 1, C. R. A. 308.

<sup>41</sup> *Grier v. Homestead Boro'*, 6 Supr. C. 542; *Allentown v. Ackerman*, 37 Supr. C. 363.

<sup>42</sup> *Haines v. Young*, 13 Supr. C. 303.

<sup>43</sup> *Hallock v. Lebanon*, 215 Pa. 1; *Am., Etc., Co. v. Altoona, Etc., R. Co.*, 218 Pa. 519; *Gratz v. Gratz*, 4 Rawle, 410; *Kreiner v. Rochester, Etc., R. Co.*, 135 Pa. 184; *Reynolds v. Cridge*, 131 Pa. 189; *Cochran v. Sanderson*, 151 Pa. 591; *Bower v. Walker*, 220 Pa. 294; *Kalin v. Wehrle*, 36 Supr. C. 305.

<sup>44</sup> *Miller v. Windsor Water Co.*, 148 Pa. 429; *Walker v. Straub*, 88 Pa. 32; *Comth. v. Werntz*, 161 Pa. 591; *McElheny v. McKeesport, Etc., Co.*, 153 Pa. 108.

<sup>45</sup> *Shink v. Mingle*, 13 S. & R. 29; *Galbraith v. Green*, 13 S. & R. 85.

<sup>46</sup> *Comth. v. Porter*, 21 Pa. 385; *Ross Twp. Road*, 5 Supr. C. 85; *Warner v. McMullin*, 131 Pa. 370.

<sup>47</sup> *Creachen v. Bromley, Etc., Co.*, 214 Pa. 96.

<sup>48</sup> *Slater v. Slater*, 209 Pa. 194; *Hanna v. Clark*, 189 Pa. 321; *Seifred v. Penna. R. Co.*, 206 Pa. 399; *Saving Inst. v. Bank*, 2 Leg. Gaz. 170.

<sup>49</sup> *Barlott v. Forney*, 187 Pa. 301.

<sup>50</sup> *Wilson v. Keller*, 195 Pa. 98.

<sup>51</sup> *North v. Pantall*, 197 Pa. 303; *Croasdale v. Von Boyneburgk*, 206 Pa. 15;; *Howard v. Swissvale Boro'*, 216 Pa. 388; *Mason v. Linn*, 218 Pa. 161.

*pro tunc*,<sup>52</sup> which leave will only be given in cases of exceptional hardship.<sup>53</sup>

#### 41. Paper books.

The rules of the superior and supreme courts, which are given in Vol. I, are so complete and specific on this subject that reference is made thereto.

The salient points are given here.

The appellant's paper book must contain a true copy of the docket entries of the court below, a willful misstatement or garbling of them being punishable with disbarment.<sup>1</sup> The pleadings and statement of claim are essential where the court refused to take off a compulsory nonsuit,<sup>2</sup> although a verdict was sustained without the pleadings.<sup>3</sup> An appeal in ejectment was quashed for failure to print in the paper book the *præcipe*, writ or declaration;<sup>4</sup> or the statement in any case, when material to determine what the suit is about;<sup>5</sup> also the claim in a case on a mechanic's lien;<sup>6</sup> or the auditor's report where error is alleged in the decree upon it,<sup>7</sup> or the petition in an election contest.<sup>8</sup> Where the assignment is for refusal of judgment for want of a sufficient affidavit of defense, only this and the statement are required — no history of the case.<sup>9</sup> On a *sci. fa. sur* judgment, the paper book should contain the affidavit of defense and the opinion of the court discharging the rule to open.<sup>10</sup> On demurrer, error for over-ruling it, the demurrer must be printed.<sup>11</sup> On an order of court, the order must be printed.<sup>12</sup> On error as to an execution for costs the whole related record should be set forth.<sup>13</sup> On a case stated the docket entries, the agreement and judgment must be given.<sup>14</sup> If the docket entries in any case are not given, the appeal will not be quashed if they are supplied from other sources.<sup>15</sup> They must be printed in

<sup>52</sup> *Swoope v. Wakefield*, 10 Supr. C. 342; *Wilson v. Keller*, 195 Pa. 98; *Barlott v. Forney*, 187 Pa. 301.

<sup>53</sup> *McMellen v. Williamson*, 32 Supr. C. 263; *Groff v. City, Etc., Co.*, 32 Supr. C. 416.

<sup>1</sup> *Bristol v. Tasker*, 135 Pa. 110.

<sup>2</sup> *Finch v. Conrade*, 154 Pa. 326; *Comth. v. Burns*, 14 Supr. C. 248; *Carson v. West Branch, Etc., Co.*, 15 Supr. C. 476.

<sup>3</sup> *Shamburg v. Abbott*, 121 Pa. 443.

<sup>4</sup> *Updegraff v. Snyder*, 36 Supr. C. 30.

<sup>5</sup> *Morris v. Phila., Etc., Co.*, 215 Pa. 317; *Murdock v. Martin*, 147 Pa. 203; *Quigley v. Traders', Etc., Co.*, 35 Supr. C. 51; *P. & L. Dig.*, vol. 1, col. 882.

<sup>6</sup> *National Lumber Co. v. Mehaffey*, 30 Supr. C. 544.

<sup>7</sup> *Fair's Est.*, 34 Supr. C. 263.

<sup>8</sup> *Hayes' Election*, 33 Supr. C. 310.

<sup>9</sup> *Hutton v. McLaughlin*, 1 Supr. C. 642.

<sup>10</sup> *Ahl v. Goodhart*, 161 Pa. 455.

<sup>11</sup> *Bartlett v. Kingan*, 19 Pa. 341.

<sup>12</sup> *Benzinger Twp. Road Case*, 135 Pa. 176.

<sup>13</sup> *Irwin v. Hanthorn*, 6 Supr. C. 165.

<sup>14</sup> *Dougherty v. Cumberland County*, 22 Supr. C. 591; *Warwick, Etc., Co. v. McKeag*, 205 Pa. 490.

<sup>15</sup> *Comth. v. Pilnik* (No. 1), 29 Supr. 285.

the order and manner as they appear on the record.<sup>16</sup> Where the appeal is from an auditor's report in partition, the names of the parties, the proceedings and an abstract of the petition must be printed.<sup>17</sup> On appeal from an order of the Quarter Sessions the paper book must furnish an abstract of the petition and answer.<sup>18</sup> Where the pleadings are necessary to a decision of the case, it will be fatal to the appeal if they are not furnished.<sup>19</sup> An assignment on the allowance of an amendment to the declaration cannot be considered when the paper book contains neither the original nor the amended declaration.<sup>20</sup> On appeal from an order discharging a rule all the pertinent portions of the record must be printed.<sup>21</sup> Where a defendant in a *ca. sa.* claims the right to be discharged under the insolvent laws the whole record must be printed.<sup>22</sup> Rule 26 of the Superior court requires the record in full in all cases appealed from the Common Pleas not founded on a verdict or a case stated.<sup>23</sup> On appeal from refusal of the court to set aside an award the paper book must contain the exceptions below.<sup>24</sup> Rule 27 of the Superior court must be followed on appeals from auditor's reports.<sup>25</sup> Rule 20 of the Supreme court requires an appendix containing the record in full, on appeal from the Quarter Sessions.<sup>26</sup> On a plea of *res adjudicata* the record of the case claimed to have been adjudicated must be printed.<sup>27</sup> If the charge of the court is essential it must be printed.<sup>28</sup> Rule 9 of the Supreme court requires "any opinion of the court below filed in the case."<sup>29</sup>

The assignments of error must be printed in every case.<sup>30</sup>

The latest rules of the Supreme and Superior courts require the filing with the prothonotary of each court eighteen copies of the paper book in the eastern and middle districts and nineteen in the western district.

#### 42. Statement of question involved—brief of argument.

Under rules of the Supreme court and Superior court, which see, every paper book must have a succinct statement of the questions involved even to a limitation of space. The attorney who fails to obey these rules, even in a murder case, is liable to have his appeal *non-prossed*, his paper book suppressed and his client exe-

<sup>16</sup> *Trescott v. Co-Operative, Etc.*, 212 Pa. 47.

<sup>17</sup> *O'Donnell v. Clements*, 23 Supr. C. 447.

<sup>18</sup> *Welsh's Ap.*, 22 Supr. C. 392.

<sup>19</sup> *Nulton v. Campbell*, 15 Supr. C. 151; *Sailor v. Reamer*, 20 Supr. C. 597; *Whetstone v. Bowser*, 29 Pa. 59.

<sup>20</sup> *Thorne v. Warfflein*, 100 Pa. 519.

<sup>21</sup> *Talcott v. Oppenheimer*, 159 Pa. 506.

<sup>22</sup> *Harris' Pet.*, 15 Supr. C. 471.

<sup>23</sup> *Cunningham v. Everett*, 24 Supr. C. 469.

<sup>24</sup> *Manley v. Okell*, 19 Supr. C. 240.

<sup>25</sup> *Moore v. Bischoff*, 25 Supr. C. 1. (See *Saxton's Est.*, 195 Pa. 459; *Mauk's Est.*, 195 Pa. 483, as to the Supreme Court rule.)

<sup>26</sup> *La Plume Borough*, 18 W. N. C. 82.

<sup>27</sup> *Goodhart v. Bishop*, 142 Pa. 416.

<sup>28</sup> *Fritzius v. Brennan*, 28 Supr. C. 365.

<sup>29</sup> *Sanker v. Penna. R. Co.*, 205 Pa. 609.

<sup>30</sup> *Jack v. Twyford*, 8 Supr. C. 231; *Manley v. Okell*, 19 Supr. C. 240; *Comth. v. Kreinbrook*, 23 Supr. C. 511.



cuted, if he fails before the Board of Pardons or does not know how to get a writ from the U. S. Supreme Court.<sup>31</sup> "It is in the highest degree mandatory."<sup>32</sup> If it extends over a half a page, the Supreme court may quash the appeal, if it doesn't digest it.<sup>33</sup> Same in the Superior court.<sup>34</sup> The appellate court may refuse to consider a point not embraced in the statement aforesaid.<sup>35</sup> But if the infraction of the rule be so modest that the appellate court will deem it within the maxim: "*de minimis non curat lex*," there will be saving grace.<sup>36</sup> The purpose of the statement of the questions involved is to save the time and trouble for the learned court in examining the pleadings and the entire cause.<sup>37</sup> But if too concise as "sufficiency of the affidavit of defense";<sup>38</sup> or "the correctness of answers to certain of defendant's points, portions of charge especially assigned as error,"<sup>39</sup> it will not come up to the critical nicety intended by the eminently mandatory rules of both appellate courts. *Verbum sap. suf.* If this highly imperative mandate has been violated but not noticed until after the argument when the court first awoke to the fact, the cause will be decided on the law, nathless, and if obligatory, the same reversed.<sup>40</sup>

The paper book may also be suppressed for scandalous language, or an excision be directed.<sup>41</sup>

The rule of the Supreme Court requires a brief of the argument in appellant's paper book,<sup>42</sup> which must be divided so as to cover each specification separately.<sup>43</sup>

#### 43. Evidence, assignment as to.

Under rule 25 of the Supreme court where the assignment of error is to the findings of fact of a master or auditor the printed argument must contain a synopsis of all the evidence bearing upon such dispute and references to the page or pages of the paper book where the evidence is contained at length.<sup>44</sup> Under the rules of the appellate courts the evidence in the cause must be printed in the appendix, with the stenographer's and the judge's certificate.<sup>45</sup>

By agreement of counsel signed portions of testimony which they

<sup>31</sup> Comth. v. Johnson, 219 Pa. 174; H. v. T., 208 Pa. 233; Fifth, Etc., Assn. v. Boylan, 198 Pa. 250; Comth. v. Strail, 220 P. 483.

<sup>32</sup> Robinowitz v. Kenah, 31 Supr. C. 334; P. & L. Dig. C. R. A., vol. 1, col. 316; vol. 3, C. R. A., col. 113.

<sup>33</sup> Creachen v. Bromley, Etc., Co., 214 Pa. 15.

<sup>34</sup> McMellen v. Williamson, 32 Supr. C. 263.

<sup>35</sup> Bousquet's Est., 206 Pa. 534.

<sup>36</sup> Ripka v. Mutual, Etc., Co., 36 Supr. C. 517.

<sup>37</sup> Intl., Etc., Co. v. Kleber, 29 Supr. C. 200; Swisher v. Sipps, 19 Supr. C. 43.

<sup>38</sup> Devers v. Sollenberger, 25 Supr. C. 64.

<sup>39</sup> Jones v. Matheis, 17 Supr. C. 220.

<sup>40</sup> Van Sciver Co. v. McPherson, 199 Pa. 331. (Pertinent to these rules, see note of a homicide case in vol. 1, where the attorney was not afraid of a *non pros*.)

<sup>41</sup> Williams v. Phila., 208 Pa. 282; Matthews' Ap., 104 Pa. 444.

<sup>42</sup> Stockdale v. Maginn, 131 Pa. 507.

<sup>43</sup> Edenburg, Etc., v. Strattonville, Etc., 5 Supr. C. 516.

<sup>44</sup> Silliman v. Kuhn, 142 Pa. 461.

<sup>45</sup> See P. & L. Dig., vol. 1, cols. 886, 7-8-9-90 for the old cases.

may deem immaterial or irrelevant need not be printed.<sup>46</sup> But the safe guide is to follow the rules of court, which require all the evidence on the matter which they must decide.<sup>47</sup> The evidence cannot be supplied from the opinion of the judge.<sup>48</sup>

As to errors assigned to findings of fact by an auditor or referee, the paper book must contain the evidence.<sup>49</sup> For not printing the required and necessary evidence the appeal will be dismissed and the judgment affirmed.<sup>50</sup> Where the stenographer delays making the transcript of the evidence, the appellant may expedite his duties by an order from the court.<sup>51</sup>

Rule 24 of the Superior Court requiring the evidence to be printed will be strictly enforced wherever the evidence is necessary to the determination of the question.<sup>52</sup> In the absence of the evidence the disposition of the facts by the judge below will be accepted as correct.<sup>53</sup> Where necessary papers are wanting the appeal will be quashed.<sup>54</sup>

On a question of perjury the alleged perjured testimony, and the record and pleadings of the case should be printed.<sup>55</sup> A synopsis of the evidence will not supply the stenographic notes.<sup>56</sup>

In the citation of authorities counsel should give Pennsylvania cases the preference<sup>57</sup> and exercise care as to the names, volume and page of the report.<sup>58</sup>

A paper book containing more than twenty pages, must have a complete index, according to rule 32 of the Supreme court, or it may be suppressed.<sup>59</sup>

#### 44. Consideration of the cause — where no exceptions were taken below.

Where appellant failed to object or raise his question in due time and form below, he will have no standing on appeal, because the appellate court sits to revise the errors of the court below and not those of the party complaining. Such appeals will be dismissed.<sup>1</sup>

<sup>46</sup> *Wilson v. Keller*, 195 Pa. 98.

<sup>47</sup> *Wills v. Hardcastle*, 19 Supr. C. 525; *Fritzius v. Brennan*, 28 Supr. C. 365.

<sup>48</sup> *Hoff v. Hamilton*, 28 Supr. C. 76.

<sup>49</sup> *Hess' Est.*, 27 Supr. C. 498; *Penn-Gaskell's Est.*, No. 2, 208 Pa. 346; *P. & L. Dig.*, vol. 1, C. R. A., cols. 319, 320.

<sup>50</sup> *Comth. v. Hasse*, 21 Supr. C. 291; *Miller v. Doyle*, 211 Pa. 59; *P. & L. Dig.*, vol. 1, C. R. A., col. 320.

<sup>51</sup> *Comth. v. Ezell*, 212 Pa. 293.

<sup>52</sup> *Crane Marks Co. v. Gordon*, 33 Supr. C. 315; *Comth. v. Sunderlin*, 31 Supr. C. 349; *Comth. v. Joy*, 29 Supr. C. 445.

<sup>53</sup> *Comth. v. Miller*, No. 2, 31 Supr. C. 317.

<sup>54</sup> *Quigley v. Traders' Etc., Co.*, 35 Supr. C. 51.

<sup>55</sup> *Comth. v. DeCost*, 35 Supr. C. 88.

<sup>56</sup> *Thompson v. Petriello*, 33 Supr. C. 651.

<sup>57</sup> *Duggan v. B. & O. R. Co.*, 159 Pa. 248.

<sup>58</sup> *Tanney v. Tanney*, 159 Pa. 277; *Farquhar v. McAlevy*, 142 Pa. 233.

<sup>59</sup> *Hessel v. Bradstreet Co.*, 141 Pa. 501; *Wilson v. Scranton*, 141 Pa. 621; *Sailor v. Reamer*, 20 Supr. C. 597.

<sup>1</sup> *Ross Twp. Road*, 5 Supr. C. 85; *Messmore v. Robinson*, 172 P. 300; *Bartholomew v. Lehig Co.*, 148 Pa. 82. (See *P. & L. Dig.*, vol. 1, cols. 895-900.)

And exceptions must be taken.<sup>2</sup> If no exceptions were taken the appeal will be dismissed,<sup>3</sup> especially where the defendant was not prejudiced by the ruling.<sup>4</sup> To be available the objection must be made and the exception taken in time,<sup>5</sup> as where it is fixed by law or rule of court,<sup>6</sup> and in case of testimony, it must be excepted to at the time of the offer and ruling.<sup>7</sup>

The court will take notice of a plain error on the face of the record although no exception was taken.<sup>8</sup> The exceptions taken below must appear on the record,<sup>9</sup> and must be clear, not subject to surmises.<sup>10</sup>

The appellate court will not consider trifling exceptions, such as are directed at clerical errors;<sup>11</sup> formal or technical irregularities which might have been amended below;<sup>12</sup> such as defects in the form of action;<sup>13</sup> or parties;<sup>14</sup> or other matters which might have been cured on timely application to the lower court.<sup>15</sup> But where a case is tried while counsel is absent from the state, the defendant offering no evidence, the appellate court will search the record critically.<sup>16</sup> Without submission of a point or exception to the charge, an appeal will not be considered.<sup>17</sup>

An exception is required, where the court answers an inquiry by a juror after the jury had retired;<sup>18</sup> refusal to grant a new trial;<sup>19</sup>

<sup>2</sup> Swanson Street, 163 Pa. 323; Mixel v. Betz, 168 Pa. 328; Galbraith v. Phila. Co., 2 Supr. C. 359; P. & L. Dig., vol. 1, cols. 901-906.

<sup>3</sup> Davis v. Penna. R. Co., 215 Pa. 581; Comth. v. Wilkinsburg Boro', 37 Supr. C. 160; Comth. v. Magee, 33 Supr. C. 257; Kenworthy v. Equitable, Etc., Co., 218 Pa. 286.

<sup>4</sup> Comth. v. Bell, 166 Pa. 405.

<sup>5</sup> Lyon v. Phillips, 106 Pa. 57; Comth. v. Mudgett, 174 Pa. 211.

<sup>6</sup> Crosby v. Massey, 1 P. & W. 229; O. & P. R. Co. v. Vicary, 1 Am. L. R. 121; Wolf v. Ferguson, 129 Pa. 272.

<sup>7</sup> Robinson v. Snyder, 25 Pa. 203; McMeen v. Comth., 114 Pa. 300; Gilmore v. Pittsburg, Etc., R. Co., 104 Pa. 275; P. & L. Dig., vol. 1, cols. 906-908; Comth. v. McGowan, 189 Pa. 641; Comth. v. Wilson, 186 Pa. 1; Yeager v. Cassidy, 12 Supr. C. 232; Schondorf v. Griffith, 13 Supr. C. 580; Zugamith v. Rosenblatt, 15 Supr. C. 296; Simpson v. Meyers, 197 Pa. 522; Coyle v. Pittsburg, Etc., R. Co., 18 Supr. C. 235; Swope v. Snyder, 209 Pa. 352; Cutler v. Pierson, 26 Supr. C. 10; Levison v. Davis, 212 Pa. 148.

<sup>8</sup> Bean's Road, 35 Pa. 280; Canole v. Allen, 222 Pa. 156.

<sup>9</sup> Harding v. Lloyd, 3 Supr. C. 293; Finch v. Conrade's Exr., 154 Pa. 326; Rosenthal v. Ehrlicher, 154 Pa. 396; P. & L. Dig., vol. 1, cols. 909-10.

<sup>10</sup> Hobson v. Craft, 49 Pa. 363.

<sup>11</sup> Pennsylvania Hall, 5 Pa. 204; Mohr v. Warg, 26 Pa. 106; P. & L. Dig., vol. 1, cols. 911-12.

<sup>12</sup> Melchoir v. Ralston, 2 Yeates, 154; Readdy v. Shamokin Boro', 137 Pa. 98.

<sup>13</sup> Bierly v. Strohecker, 2 W. N. C. 37; Bennett v. Bullock, 35 Pa. 364; P. & L. Dig., vol. 1, col. 916.

<sup>14</sup> Kelley v. Kelley, 182 Pa. 131.

<sup>15</sup> Passenger, Etc., Co. v. Birnbaum, 116 Pa. 565; P. & L. Dig., vol. 1, cols. 917-8.

<sup>16</sup> Ensly v. Wright, 3 Pa. 501.

<sup>17</sup> Scott v. Smaltz, 10 Supr. C. 44; Wills v. Hardcastle, 19 Supr. C. 525.

<sup>18</sup> Cutter v. Pierson, 26 Supr. C. 10.

<sup>19</sup> Comth. v. Spencer, 6 Supr. C. 256.

the opinion or decree in equity;<sup>20</sup> or the findings and orders on an injunction;<sup>21</sup> or the rulings or findings of an auditor, master or referee.<sup>22</sup>

#### 45. Consideration of grounds not excepted to below.

In the appellate court a party will not be heard on grounds different from those he urged in the court below.<sup>23</sup> He cannot by his appeal introduce new matter.<sup>24</sup> For example, in an appeal from the Orphans' Court the statute of limitations must be pleaded in the court below.<sup>25</sup> He cannot raise a new defense on the evidence on appeal,<sup>26</sup> especially one which was not set up in the affidavit of defense.<sup>27</sup> The parties will be bound by their agreement as to the status of the case below.<sup>28</sup> A claim upon a fund on new grounds will not be considered in the appellate court.<sup>29</sup> A defense of which appellant might have availed himself below cannot be made above.<sup>30</sup> The appeal rests upon the facts as they were when the appeal was taken and will not be controlled by facts subsequently occurring.<sup>31</sup> A fact conceded below will be taken as conceded above.<sup>32</sup>

Errors alleged to have been committed on the trial of the case must be called to the attention of the court below,<sup>33</sup> for a cause will not be reversed for error pointed out in the appellate court for the first time, unless it is of grave import.<sup>34</sup> Estoppel in replevin cannot be raised for the first time in the appellate court.<sup>35</sup>

#### 46. General objections.

Where the objections below are in general terms, as a rule, the appellant can not assign specific errors in the appellate court,<sup>36</sup> but an exception to this rule is where a statute is plainly violated.<sup>37</sup> The court below will be reversed where it over-rules an objection to evidence, which is in part incompetent.<sup>38</sup> Where the appellant

<sup>20</sup> *Beatty v. Harris*, 205 Pa. 377.

<sup>21</sup> *Phila., Etc., Co. v. Neshaminy, Etc., Co.*, 206 Pa. 343.

<sup>22</sup> *Fidelity, Etc., Co. v. Bell*, 188 Pa. 637; *Swoope v. Wakefield*, 10 Supr. C. 342; *Black v. Black*, 216 Pa. 116; *Johnson's Est.*, 29 Supr. C. 255.

<sup>23</sup> *Danley v. Danley*, 179 Pa. 170; *Merriman v. McManus*, 102 Pa. 102; *P. & L. Dig.*, vol. 1, cols. 919-20.

<sup>24</sup> *Troubat Ave.*, 10 Supr. C. 27; *MacKellar v. Seeds*, 10 Supr. C. 167; *Comth. v. Price*, 15 Supr. C. 342.

<sup>25</sup> *Payne's Est.*, 204 Pa. 535.

<sup>26</sup> *Henry v. Zurfleeh*, 203 Pa. 440.

<sup>27</sup> *McGraw v. Metropolitan, Etc., Co.*, 5 Supr. C. 488.

<sup>28</sup> *Hart's Est.* (No. 3), 203 Pa. 492.

<sup>29</sup> *Bousquet's Est.*, 206 Pa. 534.

<sup>30</sup> *Lauer Brewing Co. v. Chmielewski*, 206 Pa. 90.

<sup>31</sup> *Stone's Ap.*, 1 Mona. 710.

<sup>32</sup> *Beaver Boro' v. Beaver, Etc., R. Co.*, 217 Pa. 280; *Morris v. Phila., Etc., Co.*, 215 Pa. 317.

<sup>33</sup> *Kuntz v. N. Y., Etc., R. Co.*, 206 Pa. 162.

<sup>34</sup> *Provident, Etc., Co. v. Phila.*, 202 Pa. 78.

<sup>35</sup> *Martin v. Strong*, 35 Supr. C. 635.

<sup>36</sup> *Elderton Overseers v. Plum, Etc.*, 2 Supr. C. 397; *P. & L. Dig.*, vol. 1, cols. 921-2.

<sup>37</sup> *Penn, Etc., Soc. v. Corley*, 39 Leg. Int. 139.

<sup>38</sup> *Laubach v. Laubach*, 73 Pa. 387; *P. & L. Dig.*, vol. 1, col. 923.

has not asked for the particular relief he was entitled to below he cannot complain on appeal.<sup>39</sup> But this does not affect one under disability when the judgment was entered.<sup>40</sup> On a *sci. fa. sur* judgment, estoppel cannot be raised for the first time on appeal.<sup>41</sup>

#### 47. New theory of action.

The appellate court will not adopt a new theory of the action,<sup>42</sup> so as to change the ground on which the plaintiff sought to recover;<sup>43</sup> nor to change the ground on which the cause was tried,<sup>44</sup> and submitted to the jury by the parties without dissent;<sup>45</sup> or where in the Orphans' court the claim on a mortgage was based on the theory that it was a loan;<sup>46</sup> or where recovery of damages was based on a certain item to which there was no objection.<sup>47</sup>

#### 48. Rulings as to evidence.

An appeal will not be heard from an order refusing to strike out or rule out testimony which was received without objection;<sup>48</sup> and without a motion to strike out promptly made and an exception the objection will be waived.<sup>49</sup>

As to evidence competent when admitted, but which subsequently became incompetent, a request must be made for instructions to the jury to disregard it, or it is no ground for appeal.<sup>50</sup> As to a series of modified objections, a bill sealed as to the last is sufficient to cover all.<sup>51</sup> Objection to sending out a statement to the jury is too late if not taken at the time.<sup>52</sup>

#### 49. Jurisdiction.

The question of jurisdiction can be raised at any time and in any manner. It cannot be waived.<sup>1</sup> If the court had no jurisdiction of the cause of action it cannot be conferred by an act of the legislature even, though it may affect the procedure.<sup>2</sup> Where the parties submit their cause to equity instead of law jurisdiction the court of appeals will not oust the jurisdiction unless the want of it is so apparent that they must do it on their own motion.<sup>3</sup> For a jurisdictional defect apparent on the face of the record the

<sup>39</sup> McLean v. Bindley, 114 Pa. 559; Bearmer's Ap., 126 Pa. 77.

<sup>40</sup> Silver v. Shelback, 1 Dallas, 178.

<sup>41</sup> Maus v. Maus, 6 Watts, 275.

<sup>42</sup> Taylor v. Sattler, 6 Supr. C. 229.

<sup>43</sup> Moore v. Adams, 29 Supr. C. 239.

<sup>44</sup> Turner v. Whitaker, 9 Supr. C. 83; Welch v. Miller, 210 Pa. 204.

<sup>45</sup> Carpenter v. Lancaster, 212 Pa. 581.

<sup>46</sup> Harrison's Est., 31 Supr. C. 485.

<sup>47</sup> McMillin Printing Co. v. Pittsburg, Etc., R. Co., 216 Pa. 504; Shipley v. Pittsburg, Etc., R. Co., 216 Pa. 512.

<sup>48</sup> Robinson v. Snyder, 25 Pa. 203; Lowrey v. Robinson, 141 Pa. 189; Pizzi v. Nardello, 23 Supr. C. 535.

<sup>49</sup> Huling v. Henderson, 161 Pa. 553.

<sup>50</sup> Aitkin v. Young, 12 Pa. 15.

<sup>51</sup> Ellmaker v. Franklin Ins. Co., 5 Pa. 183.

<sup>52</sup> Welliver v. Penna. Canal Co., 23 Supr. C. 79.

<sup>1</sup> Little Meadows Borough, 28 Pa. 256; Musselman's Ap., 101 Pa. 165.

<sup>2</sup> Lane v. Nelson, 79 Pa. 410.

<sup>3</sup> Edgett v. Douglass, 144 Pa. 95.

court will reverse at any stage of the proceedings.<sup>4</sup> Though, as between law and equity, where the domain is not always clear, the objection must be taken early, if not by demurrer, then by continued objection to the end.<sup>5</sup> The appellate court will not reverse in a doubtful case, on this point.<sup>6</sup>

The appellate court may reverse on a point raised on appeal for the first time, which appears to be fundamental and apparent,<sup>7</sup> as where the record shows the plaintiff had no cause of action;<sup>8</sup> or where both parties treat the question as properly raised;<sup>9</sup> or where the constitutionality of a law is the question;<sup>10</sup> or where it is a question as to the right of the party to maintain an action.<sup>11</sup> The Orphans' court being of equitable jurisdiction, appeals therefrom will be considered on their merits, but decrees will not be reversed, without exception, below, unless injustice has clearly been done.<sup>12</sup>

#### 50. Matters held waived.

A party who voluntarily accepted a decree, order or finding, will be held to have waived his right to appeal therefrom;<sup>13</sup> so also where counsel agree to waive exceptions,<sup>14</sup> although it must now be in writing to bind. Irregularities as to the summons are waived by appearance and the appellate court will not consider them.<sup>15</sup> So also of a judgment appealed from a justice and the judgment thereon for want of appearance.<sup>16</sup>

Where a party fails on the trial to accept the offer of the judge to correct an error, he will be held to have waived it on appeal;<sup>17</sup> also where the step was taken at his instance.<sup>18</sup> But where the motion of the appellant is refused and he goes to trial, he does not thereby lose his right.<sup>19</sup> Irregularities on a *sci. fa. sur.* judgment will not be considered where the court and parties went to trial, without exception, on the pleadings.<sup>20</sup> On a petition for subrogation, where the answer denies the petition and neither the commissioner nor the court took notice of the answer, though exceptions were filed, the appellate court will.<sup>21</sup> Unless there be manifest error the appellate court will not pass upon questions of fact, or matters of evidence which the court below considered fully;<sup>22</sup> but

<sup>4</sup> Middletown Road, 15 Supr. C. 167.

<sup>5</sup> North, Etc., R. Co. v. Penna. Co., 193 Pa. 641.

<sup>6</sup> Williams v. Concord Cong. Church, 193 Pa. 120.

<sup>7</sup> Frankstown Twp. Road, 26 Pa. 472; Grasser v. Eckert, 1 Binney, 575.

<sup>8</sup> Hoffer v. Wightman, 5 Watts, 205.

<sup>9</sup> Summerson v. Hicks, 142 Pa. 344.

<sup>10</sup> Hoffa v. Person, 1 Supr. C. 357.

<sup>11</sup> Kelly v. Pittsburg, Etc., Co., 204 Pa. 623.

<sup>12</sup> Hart's Est., No. 3, 203 Pa. 492.

<sup>13</sup> Gibson's Ap., 108 Pa. 244; Scranton B. Assn. v. Rauck, 13 Atl. 840.

<sup>14</sup> Baring v. Shippen, 2 Binney, 154.

<sup>15</sup> Smith v. Hewson, 1 Am. L. R. 441.

<sup>16</sup> Elkinton v. Fennimore, 13 Pa. 173.

<sup>17</sup> D'Homergue v. Morgan, 3 Wharton, 26.

<sup>18</sup> Wills v. Kane, 2 Grant, 60.

<sup>19</sup> Post v. Wallace, 110 Pa. 121.

<sup>20</sup> Ramsey v. Ramsey, 15 Supr. C. 214.

<sup>21</sup> Musgrove v. Dickson, 172 Pa. 629.

<sup>22</sup> Light v. Harrisburg, Etc., R. Co., 4 Supr. C. 427; Paine v. Kindred,

where the error is evident it will reverse.<sup>23</sup> Where a judgment is entered on a writ of error *coram nobis* on a *testatum vend. ex.* it may be reviewed.<sup>24</sup> The findings of the court below will not be considered where the evidence is not brought up.<sup>25</sup> Great weight will be given to the rulings of the trial court, as for example on the challenge of jurors,<sup>26</sup> or on a question of fact in the Quarter Sessions.<sup>27</sup>

The appellate court will not reverse a finding of fact on a rule to open judgment, based on sufficient evidence;<sup>28</sup> nor in equity,<sup>29</sup> nor in the Orphans' court.<sup>30</sup>

Exceptions as to new matters not raised on the trial will not avail in the appellate court.<sup>31</sup>

### 51. Reports of masters, referees, auditors, etc.

The appellate courts will not review the report of a master, made on evidence sufficient for a jury, except for manifest error.<sup>32</sup>

Also the report of a referee.<sup>33</sup> The same rule applies to arbitrators.<sup>34</sup> A master's report not supported by evidence will be reversed.<sup>35</sup> Where a referee does not find the facts the appellate court will.<sup>36</sup>

The conclusiveness of a referee's report under the act of 1874 is the same as to that of the court or the verdict of a jury, as regards the facts.<sup>37</sup> The same rule applies to an auditor's report approved by the court below.<sup>38</sup> It will be reversed only for plain error of fact.<sup>39</sup> On appeal from road viewers' reports, the facts will not be reviewed.<sup>40</sup> The findings of fact by a court in a case submitted to it by agreement have the same force as the verdict of a jury,

163 Pa. 638; *Stockett v. Ryan*, 176 Pa. 71; P. & L. Dig., vol. 1, cols. 936-7-8-9.

<sup>23</sup> *Beale v. Kline*, 183 Pa. 149; *Kramer v. Boggs*, 5 Supr. C. 394.

<sup>24</sup> *Wood's Ex. v. Colwell*, 34 Pa. 92.

<sup>25</sup> *Borda v. P. & R. R. Co.*, 141 Pa. 484; *Owen's Pet.*, 140 Pa. 565; P. & L. Dig., vol. 1, cols. 941-2.

<sup>26</sup> *Comth. v. Craig*, 19 Supr. C. 81; *Comth. v. Church*, 17 Supr. C. 39.

<sup>27</sup> *Morrellville, Boro' Annexation*, 7 Supr. C. 532; *Bittenbender v. Kemmerer*, 185 Pa. 135.

<sup>28</sup> *Parrish v. Felts*, 215 Pa. 654.

<sup>29</sup> *Jones v. Wier*, 217 Pa. 321.

<sup>30</sup> *McMichan's Est.*, 220 Pa. 187.

<sup>31</sup> *Lewis v. Penna. R. Co.*, 220 Pa. 317; *Hentzler v. Weniger*, 32 Supr. C. 164.

<sup>32</sup> *Logue's Ap.*, 104 Pa. 136; *Bugbee's Ap.*, 110 Pa. 331; *Cake's Ap.*, 110 Pa. 65; *Martinsburg Bank v. Central, Etc., Co.*, 150 Pa. 36; *Krumbhaar v. Griffith*, 151 Pa. 223; *Warner v. Hare*, 154 Pa. 548.

<sup>33</sup> *Ellison v. Hosie*, 147 Pa. 336; *Bulkley v. Wood & Co.*, 4 Supr. C. 391; *Trustees v. Guthrie*, 19 Pa. 418; *Leonard v. Smith*, 162 Pa. 284; P. & L. Dig., vol. 1, col. 944.

<sup>34</sup> *Sheets v. Rudebaugh*, 2 Rawle, 149.

<sup>35</sup> *Worrall's Ap.*, 110 Pa. 349.

<sup>36</sup> *Leonard v. Smith*, 162 Pa. 284.

<sup>37</sup> *Southern Maryland R. Co. v. Moyer*, 125 Pa. 506; *Bradlee v. Whitney*, 108 Pa. 362; P. & L. Dig., vol. 1, col. 945.

<sup>38</sup> *Ake's Ap.*, 21 Pa. 320; *Roddy's Ap.*, 99 Pa. 9; *Lowry's Est.*, 6 Supr. C. 143; *Baird v. Ford*, 152 Pa. 637; P. & L. Dig., vol. 1, cols. 947-8-9.

<sup>39</sup> *Jacob's Ap.*, 107 Pa. 137.

<sup>40</sup> *Bell's Ap.*, 26 Pitts. L. J. 66; *Keller's Private Road*, 154 Pa. 547.

and error can be assigned only to rulings on the law and evidence.<sup>41</sup>  
 Exceptions must be argued in the court below before appeal.<sup>42</sup>  
 The same rule applies to the Orphans' court.<sup>43</sup>

### 52. Review of verdict.

The verdict of a jury based on legal evidence<sup>44</sup> submitted under proper instructions will not be reversed.<sup>45</sup>

If appellant desires a review on the sufficiency of the evidence he should ask for binding instructions and if refused, take an exception.<sup>46</sup> On a motion for a new trial, the court below will consider the weight or sufficiency of the evidence,<sup>47</sup> reservations on admissibility,<sup>48</sup> or the excessiveness or inadequacy of the verdict.<sup>49</sup> The jury will not be reviewed on the credibility of the witnesses.<sup>50</sup> Where there is no evidence the judgment will be reversed.<sup>51</sup> But where the verdict on an issue from the Orphans' Court sustains the auditor's report, it will stand.<sup>52</sup> Also in case of divorce and finding for respondent.<sup>53</sup> An appeal may be had upon an issue where *nul tiel* record is the plea.<sup>54</sup> On a rule for judgment for an insufficient affidavit of defense, when the appeal raises questions of law and fact the questions of law will not be passed upon, if the case is one for the jury.<sup>55</sup>

### 53. Review of the record.

Upon appeal the record will be inspected and if no error is apparent on its face,<sup>56</sup> or the record does not disclose whether or not there is any error,<sup>57</sup> or the grounds of error are not shown,<sup>58</sup> every-

<sup>41</sup> Brown v. Susquehanna Boom Co., 109 Pa. 57; Gouser v. Smith, 115 Pa. 452; Comth. v. Westinghouse, Etc., Co., 151 Pa. 265; P. & L. Dig., vol. 1, cols. 951-2.

<sup>42</sup> Comth. v. Mitchell, 80 Pa. 57.

<sup>43</sup> Gibson's Ap., 25 Pa. 191.

<sup>44</sup> Christner v. John, 2 Supr. C. 78; Bartlett v. Kingan, 19 Pa. 341; P. & L. Dig., vol. 1, cols. 953-4.

<sup>45</sup> Repsher v. Wattson, 17 Pa. 365; vol. 1, C. R. A., col. 330; Lazzari v. Penna. R. Co., 28 Supr. C. 175; Winslow Bros.' Co. v. Du Puy, 208 Pa. 98; Williams v. Williams, 206 Pa. 644.

<sup>46</sup> Comth. v. Hanley, 15 Supr. C. 271.

<sup>47</sup> Sergeant v. Ingersoll, 15 Pa. 343.

<sup>48</sup> Kitchen v. Smith, 101 Pa. 452.

<sup>49</sup> Phila., Etc., R. Co. v. Gesner, 20 Pa. 240; Penna. R. Co. v. Spicker, 105 Pa. 142; Charles v. Bishoff, 1 Atl. 572.

<sup>50</sup> Waters v. Burgess, 14 Atl. 398.

<sup>51</sup> Cauffman v. Long, 82 Pa. 72.

<sup>52</sup> Harding's Est., 24 Pa. 189.

<sup>53</sup> Cattison v. Cattison, 22 Pa. 275.

<sup>54</sup> Crutcher v. Comth., 6 Wharton, 340.

<sup>55</sup> Phila. v. P. & R. R. Co., 3 W. N. C. 492.

<sup>56</sup> Melchoir v. Ralston, 2 Yeates, 154; Sondheimer v. Hoover, 144 Pa. 221; Mulholland's Case, 217 Pa. 631; Independence Party Nomination, 208 Pa. 108; Krickbaum's Election, 221 Pa. 521; P. & L. Dig., vol. 1, cols. 957-8-9, 960.

<sup>57</sup> Gram's Ap., 4 Watts, 43; Weaver v. Comth., 29 Pa. 445; P. & L. Dig., vol. 1, cols. 961-2.

<sup>58</sup> Horbach v. Huey, 7 Watts, 532; Weaver v. Comth., 29 Pa. 445; P. & L. Dig., vol. 1, cols. 961-2.



thing will be presumed to have been rightly done and the lower court will be affirmed. The appellate court will consider only the record proper on appeal in the nature of a writ of error.<sup>59</sup>

Facts outside the record will not be considered,<sup>60</sup> even though imported by the opinion of the judge.<sup>61</sup> Merely collateral or subsidiary matters which are not made a part of the record for review will not be considered.<sup>62</sup> The opinion of the court below is not reviewable;<sup>63</sup> particularly when no exceptions were filed below.<sup>64</sup> Remarks of counsel are *dehors* the record<sup>65</sup> and will not be reviewed where the court instructed the jury to disregard them.<sup>66</sup> If counsel is misstating the evidence or making improper remarks the proper practice is to have the objectionable remarks taken down and if not withdrawn or corrected by the trial judge they must be made part of the record by exception. If the court does not withdraw a juror or later grant a new trial, there is a record to be reviewed.<sup>67</sup>

As already shown evidence not a part of the record proper cannot be considered. In order to have the facts reviewed and the rulings of the court thereon, they must be brought upon the record and exceptions taken.<sup>68</sup> The evidence must be duly certified and sent up for review.<sup>69</sup> The opinion of the court reviewing the evidence will not help the appellant;<sup>70</sup> although the opinion will be looked into to sustain the record.<sup>71</sup> So, in every case, the appellant should not "overlook his baggage."<sup>72</sup>

The presumption of regularity will clothe the record, where the court had jurisdiction of the parties and the matter at issue.<sup>73</sup>

Notwithstanding this the appellate court will take cognizance of apparent error of law or jurisdiction on the face of the record, with or without an assignment.<sup>74</sup> When notice is jurisdictional

<sup>59</sup> *Drexel v. Man*, 6 W. & S. 343; *Read v. Husulton*, 27 Leg. Int. 198; *Comth. v. Craig*, 19 Supr. C. 81; *Fritzius v. Brennan*, 28 Supr. C. 365.

<sup>60</sup> *Stephens v. Addis*, 19 Supr. C. 185; *Hires v. Norton*, 6 Supr. C. 457.

<sup>61</sup> *Independence Party Nomination*, 208 Pa. 108.

<sup>62</sup> *Pool v. White*, 171 Pa. 500; *Evans' Est.*, 150 Pa. 212; *Pittsburg v. Maxwell*, 179 Pa. 553; *P. & L. Dig.*, vol. 1, cols. 963-4-5.

<sup>63</sup> *Comth. v. Church*, 1 Pa. 105; *Fullerton's Estate*, 146 Pa. 61.

<sup>64</sup> *Owen's Pet.*, 140 Pa. 565; *Cathcart v. Comth.*, 37 Pa. 108; *Scanlon v. Suter*, 158 Pa. 275.

<sup>65</sup> *Fulmer v. Comth.*, 97 Pa. 503.

<sup>66</sup> *Comth. v. Nicely*, 130 Pa. 261; *McCloskey v. Bell's Gap R. Co.*, 165 Pa. 254.

<sup>67</sup> *Littell v. Young*, 5 Supr. C. 205; *Moore v. Neubert*, 21 Supr. C. 144; *Brewing Co. v. Weiss*, 23 Supr. C. 519; *Holden v. R. Co.*, 169 Pa. 1; *Guckaven v. Traction Co.*, 203 Pa. 521. (See *Bierly on Juries and Jury Trials*, p. 211 and 279.)

<sup>68</sup> *Fowler's License*, 2 Supr. C. 63; *Scott's Assigned Est.*, 176 Pa. 49; *P. & L. Dig.*, vol. 1, cols. 967 to 978.

<sup>69</sup> *Long v. Shull*, 7 Supr. C. 476; *Seagrave v. Lacy*, 28 Supr. C. 586; *P. & L. Dig.*, vol. 1, C. R. A., col. 333.

<sup>70</sup> *Madison Twp., Etc., v. Brady's Bend, Etc.*, 7 Atl. 204.

<sup>71</sup> *Comth. v. Horner*, 34 Pa. 440; *Dowing v. Baldwin*, 1 S. & R. 298.

<sup>72</sup> *Comth. v. Hazlett*, 14 Supr. C. 352; *Fieser's Est.*, 15 Supr. C. 447.

<sup>73</sup> *Miller's Appl.*, 8 Supr. C. 223; *Quinn's License*, 11 Supr. C. 554; *Ross Twp. Road*, 5 Supr. C. 85.

<sup>74</sup> *Hastings v. Ritchie*, 2 Yeates, 433; *Brown v. Barnett*, 2 Binney, 33;

the lack of it in the record is sufficient to reverse.<sup>75</sup> The appellate court will take notice of the time of commencement of the suit,<sup>76</sup> and, in ascertaining this, will consider the *præcipe* a part of the record,<sup>77</sup> though the issuance of process is the commencement of the action. A document attached to the record not excepted to may be treated as a part of it.<sup>78</sup> But the memorandum of the agreement of the jury is not.<sup>79</sup> Where a judgment is erroneously entered by the prothonotary it will be stricken off, on appeal.<sup>80</sup> For the want of the stenographer's certificate the record has been remitted for completion.<sup>81</sup> So also for the substitution of an executor *nunc pro tunc*.<sup>82</sup> In equity, where the finding of facts is not clear, the same.<sup>83</sup> It is not competent for the appellant to contradict the record;<sup>84</sup> neither by the judge's or the stenographer's certificate.<sup>85</sup> But on a suggestion of diminution of the record will grant a *certiorari* and remit the record to have it completed.<sup>86</sup> If the return of the judge is *tiel* record, the only remedy of the party is an action for a false return.<sup>87</sup> Where the depositions were not sent up with the record, on notice of a motion to quash, the appellant should suggest diminution promptly,<sup>88</sup> in the appellate court.<sup>89</sup> The return of the judge below is conclusive upon the appellate court.<sup>90</sup> A record admitted in the court below for a certain purpose will be restricted thereto in the court of error.<sup>91</sup>

#### 54. Rules of court and rulings below.

As a general proposition the lower court is the best interpreter of its own rules.<sup>1</sup> But it cannot disregard its own rules;<sup>2</sup> nor yet disregard the construction put upon similar rules of general import by the Supreme court.<sup>3</sup> Rulings upon evidence which are clearly

*Maheer v. Ashmead*, 30 Pa. 344; *Delaware Div. Canal v. McKeen*, 52 Pa. 117; *Gearing v. Lacher*, 146 Pa. 397. See *supra*.

<sup>75</sup> *Norwegian Twp.*, 20 Pa. 324.

<sup>76</sup> *Withers v. Gillespy*, 7 S. & R. 10.

<sup>77</sup> *Fitzsimons v. Salomon*, 2 Binney, 436.

<sup>78</sup> *Frey v. Wells*, 4 Yeates, 497.

<sup>79</sup> *Girts v. Comth.*, 22 Pa. 351.

<sup>80</sup> *Guthrie v. Reid*, 107 Pa. 251.

<sup>81</sup> *Waln v. Beaver*, 161 Pa. 605.

<sup>82</sup> *Darlington v. Speakman*, 9 W. & S. 182.

<sup>83</sup> *Fitzsimmons v. Robb*, 173 Pa. 645.

<sup>84</sup> *Taylor v. Comth.*, 44 Pa. 133; P. & L. Dig., vol. 1, col. 986.

<sup>85</sup> *Comth. v. Walter*, 86 Pa. 15; *Beringer v. Lutz*, 179 Pa. 1.

<sup>86</sup> *Bassler v. Niesly*, 1 S. & R. 472.

<sup>87</sup> *Flagg v. Searle*, 31 Leg. Int. 101.

<sup>88</sup> *Seagrave v. Lacy*, 28 Supr. C. 586.

<sup>89</sup> *Newbold v. Newbold*, 1 W. N. C. 134.

<sup>90</sup> *Comth. v. Hutton*, 32 Supr. C. 68.

<sup>91</sup> *Paul v. Oliphant*, 14 Pa. 342.

<sup>1</sup> *Gilmore v. Pittsburg, Etc.*, R. Co., 104 Pa. 275; *Bair v. Hubartt*, 139 Pa. 96; P. & L. Dig., vol. 1, cols. 989, 990, 991, 992.

<sup>2</sup> *Brennan's Est.*, 65 Pa. 16; *Gannon v. Fritz*, 79 Pa. 303; *Schrimpton v. Bertolet*, 155 Pa. 638; *McLane v. Hoffman*, 164 Pa. 491.

<sup>3</sup> *Morrison v. Nevin*, 130 Pa. 344; *Lancaster County Natl. Bank v. Henning*, 171 Pa. 399.

in the discretion of the court below will not be reversed.<sup>4</sup> So is the refusal of a motion to strike out evidence,<sup>5</sup> and the admission or refusal of expert testimony.<sup>6</sup> The refusal of an exception is not a ground for error.<sup>7</sup>

Allowance or refusal of amendments, is reviewable.<sup>8</sup> It is within the discretion of the lower court to grant or refuse leave to withdraw a plea;<sup>9</sup> to direct the order of trial as to placing a cause at the head of the list;<sup>10</sup> staying or refusing to stay proceedings;<sup>11</sup> setting aside a proceeding before a justice of the peace on *certiorari*;<sup>12</sup> granting a continuance;<sup>13</sup> or refusing it;<sup>14</sup> refusing a discontinuance,<sup>15</sup> unless agreed upon by a rule of court;<sup>16</sup> the granting or refusal of a nonsuit;<sup>17</sup> but the refusal to take off a compulsory nonsuit is reviewable.<sup>18</sup> The order of addressing the jury or arguing a cause is not reviewable.<sup>19</sup> But if there is a rule it ought to be enforced.<sup>20</sup>

An order referring a report back to an auditor with instructions is not reviewable;<sup>21</sup> or the resubmission of a cause to the jury, on the finding of a fact;<sup>22</sup> or refusal to reinstate a rule to show cause why certain orders should not be vacated<sup>23</sup> or to grant a re-hearing of an application for license to sell liquor;<sup>24</sup> the granting or refusal of a motion for a new trial;<sup>25</sup> even in a murder case;<sup>26</sup> granting or refusing motions for orders *nunc pro tunc*.<sup>27</sup>

<sup>4</sup> *Covanhovan v. Hart*, 21 Pa. 495; P. & L. Dig., vol. 1, cols. 993-4-5; *Dosch v. Diem*, 176 Pa. 603.

<sup>5</sup> *U. S. Tel. Co. v. Wenger*, 55 Pa. 262.

<sup>6</sup> *Allen's Ap.*, 99 Pa. 196; *Sorg v. First German Congn.*, 63 Pa. 156.

<sup>7</sup> *Patterson v. Roberts*, 109 Pa. 42; *Floyd v. Hotchkiss*, 5 Supr. C. 216.

<sup>8</sup> *Society of the Cincinnati's Ap.*, 154 Pa. 621. (See P. & L. Dig., vol. 1, cols. 999, 1000.)

<sup>9</sup> *Rush v. Cavanaugh*, 2 Pa. 187; *Breden v. Gilliland*, 67 Pa. 34.

<sup>10</sup> *Pringle v. Pringle*, 59 Pa. 281.

<sup>11</sup> *Brubacker v. Meek*, 6 S. & R. 542; *Withers v. Haines*, 2 Pa. 435.

<sup>12</sup> *Jacobs v. Ellis*, 156 Pa. 253.

<sup>13</sup> *Porter v. Lee*, 16 Pa. 412; P. & L. Dig., vol. 1, col. 1002.

<sup>14</sup> *De Grote v. De Grote*, 175 Pa. 50.

<sup>15</sup> *Evans v. Clover*, 1 Grant, 164; *Hall v. Vanderpool*, 156 Pa. 152; *Bach v. Burke*, 141 Pa. 649.

<sup>16</sup> *Schrimpton v. Bertolet*, 155 Pa. 638.

<sup>17</sup> *Girard v. Gettig*, 2 Binney, 234; *Crawford v. McKinney*, 165 Pa. 605. (For numerous cases collated, see P. & L. Dig., vol. 1, cols. 1003-4-5.)

<sup>18</sup> *Haverly v. Mercur*, 78 Pa. 257; P. & L. Dig., vol. 1, cols. 1004-5.

<sup>19</sup> *Robeson v. Whitesides*, 16 S. & R. 520; *Patterson v. Marine Natl. Bank*, 130 Pa. 419; P. & L. Dig., vol. 1, cols. 1005-6.

<sup>20</sup> *Smith v. Frazier*, 53 Pa. 226; *Strong, J.*

<sup>21</sup> *Kimmel's Ap.*, 2 W. N. C. 138.

<sup>22</sup> *Moser v. Mayberry*, 7 Watts, 12.

<sup>23</sup> *Lowenstein v. North, Etc., Co.*, 132 Pa. 410.

<sup>24</sup> *Lauck's Ap.*, 2 Supr. C. 53.

<sup>25</sup> *Burd v. Dansdale's Lessee*, 2 Binney, 80; *Shanahan v. Agl. Ins. Co.*, 6 Supr. C. 65; *Comth. v. Del., Etc., R. Co.*, 165 Pa. 44.

<sup>26</sup> *Cathcart v. Comth.*, 37 Pa. 108; *Gray v. Comth.*, 101 Pa. 380; *Alexander v. Comth.*, 105 Pa. 1; P. & L. Dig., vol. 1, cols. 1007-8-9.

<sup>27</sup> *Ley v. Union Canal*, 5 Watts, 104; *Weidner v. Matthews*, 11 Pa. 336; *Lawshe v. Bonnell*, 105 Pa. 46.

### 55. Rules and orders concerning judgments, etc.

The act of April 4, 1877, P. L. 53, gave the right to appeal from an order opening or refusing to open a judgment entered by confession on a warrant of attorney in a note. This has been held strictly to such judgments.<sup>28</sup> This act did not affect the right of the appellate court to review the legal discretion of the lower court in other cases, by implication.<sup>29</sup> It is only for an abuse of discretion that an appeal will be considered on an order opening, or refusing to open, or set aside a judgment;<sup>30</sup> or imposing terms when a judgment is opened.<sup>31</sup>

The rule of discretion applies to judgments by default;<sup>32</sup> and on *scire facias* to revive;<sup>33</sup> decrees in equity,<sup>34</sup> Orphans' court orders<sup>35</sup> and the Quarter Sessions.<sup>36</sup> The act of May 20, 1891, P. L. 101, enlarges the right of appeal to embrace amicable confessions of judgment.<sup>37</sup> The striking off judgments comes under the same rule as above.<sup>38</sup>

So also refusal to revoke, rescind or modify a decree, or vacate an order.<sup>39</sup> No appeal lies from taxation of costs.<sup>40</sup> But if an execution has issued without taxation, an appeal will lie on exception.<sup>41</sup> In fixing fees and compensation, the discretion of the lower court will not be reviewed;<sup>42</sup> nor in allowing alimony in divorce;<sup>43</sup> or setting off one judgment against another, or removal<sup>44</sup> or the credit of the proceeds of an execution upon the judgment at a retrial;<sup>45</sup> an interlocutory order for payment of money to or by a re-

<sup>28</sup> Perth Amboy, Etc., Co.'s Ap., 124 Pa. 367; Maneval v. Jackson Twp., 141 Pa. 426; Jones' Ap., 38 Leg. Int. 430; Citizens', Etc., Assn. v. Hoagland, 87 Pa. 326.

<sup>29</sup> Early's Ap., 90 Pa. 321; Hickernell's Ap., 90 Pa. 328; Kneedler's Ap., 92 Pa. 428.

<sup>30</sup> Catlin v. Robinson, 2 Watts, 373; Griffiths' Ap., 16 W. N. C. 249; P. & L. Dig., vol. 1, cols. 1013, 1014, 1015.

<sup>31</sup> Dubois v. Glaub, 52 Pa. 238; Huston, Etc., Ins. Co. v. Beale, 110 Pa. 321; Kelber v. Pitts., Etc., Co., 146 Pa. 485.

<sup>32</sup> Pennock v. Kennedy, 153 Pa. 579; Abeles v. Powell, 6 Supr. C. 123; Phila. v. Kates, 150 Pa. 30; Phila. v. Unknown Owner, 148 Pa. 536; Horner v. Horner, 145 Pa. 258.

<sup>33</sup> Gibson v. Simmons, 134 Pa. 189; P. & L. Dig., vol. 1, col. 1016.

<sup>34</sup> Acuff's Ap., 9 Atl. 319.

<sup>35</sup> Williams' Est., 140 Pa. 187.

<sup>36</sup> Mercer School Dist. v. Cummins, 1 Mona. 111; Brown v. Ind. School Dist., 16 Atl. 32.

<sup>37</sup> Kelber v. Pitts. Plow Co., 146 Pa. 485; Renwick v. Richardson, 5 Supr. C. 202; Hunter v. Mahoney, 148 Pa. 232; Walter v. Fees, 155 Pa. 55; Phila. v. Weaver, 155 Pa. 74.

<sup>38</sup> Clarion, Etc., Co. v. Hamilton, 127 Pa. 1; Knox v. Flack, 22 Pa. 337.

<sup>39</sup> Fullerton v. Peabody, 2 Supr. C. 145; Lowenstein v. North, Etc., Co., 132 Pa. 410.

<sup>40</sup> McCauley's Ap., 86 Pa. 187; Orbison's Ap., 22 W. N. C. 116.

<sup>41</sup> Harger v. Comrs., Etc., 12 Pa. 251; Barnet v. Thrie, 1 Rawle, 44; Johnson v. Perkins, 1 P. & W. 23.

<sup>42</sup> Totten's Ap., 40 Pa. 385; Litz v. Kauffman, 4 C. C. 329; Morris' Ap., 42 Leg. Int. 395.

<sup>43</sup> Waldron v. Waldron, 55 Pa. 231; Fernald v. Fernald, 5 Supr. C. 629.

<sup>44</sup> Wellock v. Cowan, 16 S. & R. 318; Burns v. Thornburgh, 3 Watts, 78.

<sup>45</sup> Harris v. Harris, 35 Leg. Int. 324.

ceiver;<sup>46</sup> an order distributing funds realized on a forfeited recognizance;<sup>47</sup> fixing amount and approval of bail;<sup>48</sup> refusal to remit or moderate forfeited recognizance in the court of Quarter Sessions,<sup>49</sup> though in the Common Pleas an appeal lies under act of Dec. 9, 1783, 2 Sm. L. 84; staying and setting aside executions in legal discretion;<sup>50</sup> quashing or dissolving foreign attachment, or fraudulent debtor's attachment;<sup>51</sup> granting or refusing a feigned issue in equity;<sup>52</sup> or to the manner of molding it and constituting its parties;<sup>53</sup> confirmation or refusal to set aside a sheriff's sale unless there is patent error and injustice.<sup>54</sup>

### 56. Reference, views, reports, etc.

The discretion of the lower court will not be reviewed for setting aside an agreement to refer on the ground that it is inoperative;<sup>1</sup> or the confirmation of a report<sup>2</sup> or refusal to set aside an award,<sup>3</sup> or decree on settlement of a lunacy committee's account;<sup>4</sup> or confirming or setting aside the report of viewers of roads, etc.;<sup>5</sup> or appointing reviewers;<sup>6</sup> or the finding as to the necessity of the bridge or road;<sup>7</sup> refusal to appoint a guardian;<sup>8</sup> removal or refusal to remove a committee of a lunatic,<sup>9</sup> or the appointment of a receiver for a lunatic's estate, *pendente lite*;<sup>10</sup> non-approval of a charter;<sup>11</sup> but for an abuse of discretion in amending a lodge charter an appeal will lie;<sup>12</sup> and for legal defects a review can be had by *certiorari*.<sup>13</sup> The orders of the Quarter Sessions in incorporation, etc., of a borough under the act of April 3, 1851, P. L. 320, will not be reviewed;<sup>14</sup> granting or refusing liquor licenses;<sup>15</sup> refusal to grant a

<sup>46</sup> Sykes v. Thornton, 152 Pa. 94.

<sup>47</sup> Comth. v. Justice, 34 Pa. 165.

<sup>48</sup> Market Co. v. P. & R. R. Co., 142 Pa. 580; P. & L. Dig., col. 1025.

<sup>49</sup> Bross v. Comth., 71 Pa. 262; Comth. v. Oblender, 135 Pa. 536; Comth. v. Fogelman, 3 Supr. C. 566.

<sup>50</sup> Newhart v. Wolfe, 2 Penny, 295; P. & L. Dig., vol. 1, col. 1027.

<sup>51</sup> Johnston v. Menagh, 4 Supr. C. 154; Wetherald v. Shupe, 109 Pa. 389; First Natl. Bank v. Crosby, 179 Pa. 63.

<sup>52</sup> Scheetz' Ap., 35 Pa. 88; Thompson's Ap., 103 Pa. 603; Knowles v. Jacobs, 4 Supr. C. 268.

<sup>53</sup> Neff v. Barr, 14 S. & R. 166; Palmer's Est., 132 Pa. 297.

<sup>54</sup> Sloan's Case, 8 Watts, 194; Laird's Ap., 2 Supr. C. 300; Southwest Gas Co. v. Fayette Fuel Gas Co., 145 Pa. 13; P. & L. Dig., vol. 1, cols. 1031-2.

<sup>1</sup> Fulweiler v. Baugher, 15 S. & R. 45.

<sup>2</sup> Kline v. Guthart, 2 P. & W. 490.

<sup>3</sup> Bemus v. Clark, 29 Pa. 251.

<sup>4</sup> Fuch's Case, 6 Wharton, 191.

<sup>5</sup> Fretz' Ap., 15 Pa. 397; P. & L. Dig., vol. 1, col. 1033.

<sup>6</sup> Moore Twp. Road, 17 Pa. 116; Allegheny, Etc., Road, 1 Pitts. 67.

<sup>7</sup> Public Road, 5 Pa. 101; Youghiogheny River Bridge, 2 Supr. C. 265.

<sup>8</sup> Gray's Ap., 10 W. N. C. 248; Pote's Ap., 106 Pa. 574.

<sup>9</sup> Black's Case, 18 Pa. 434; Dean's Ap., 90 Pa. 106.

<sup>10</sup> Misselwitz' Case, 177 Pa. 359.

<sup>11</sup> Vaux' Ap., 109 Pa. 497.

<sup>12</sup> Grand Lodge A. O. W., 110 Pa. 613.

<sup>13</sup> Vaux' Ap., 109 Pa. 497.

<sup>14</sup> Osborne Boro's Case, 101 Pa. 284; P. & L. Dig., vol. 1, col. 1036.

<sup>15</sup> Reed's Ap., 114 Pa. 452; P. & L. Dig., vol. 1, cols. 1036-7.

writ of *quo warranto*;<sup>16</sup> proceedings on habeas corpus discharging the prisoner<sup>17</sup> or delivering the custody of the child to its parent;<sup>18</sup> but an order discharging a prisoner in the hands of the sheriff for contempt was reversed.<sup>19</sup> In mandamus the act of June 8, 1893, P. L. 345 (section 29), provides for an appeal within twenty days after refusal of the writ or after final decree or order when the writ is granted. The appellate court has declined to reverse orders refusing to withdraw a juror;<sup>20</sup> to quash a petition in an election contest;<sup>21</sup> change of venue;<sup>22</sup> to discharge a defendant arrested on a *capias* while attending court;<sup>23</sup> permitting plaintiff's account books in court to be taken to the office of defendant's attorney;<sup>24</sup> refusal to require an executor to apply for a second order to sell;<sup>25</sup> dismissing exceptions to a false return on a *lev. fa.*;<sup>26</sup> refusing to certify a trespass as willful and malicious under statute 8 and 9, William III, C. 11, to enable plaintiff to recover full costs;<sup>27</sup> refusal to direct a special verdict;<sup>28</sup> making an order for acknowledgment of a sheriff's deed;<sup>29</sup> refusal to answer a point of law without a request to find the facts upon which it rests;<sup>30</sup> refusal to revoke letters granted by the register when not improvidently granted;<sup>31</sup> dismissal by Quarter Sessions of a petition for removal of bodies from a burial ground under act of May 12, 1887, P. L. 96.<sup>32</sup> But where a court granted a severance on the trial where it had no discretion, it was reversed.<sup>33</sup>

#### 57. Harmless error.

There is a class of error called "harmless" for which an appellate court will not reverse on appeal. Examples of such immaterial error are these:

Admission of incompetent testimony, which was favorable to appellant;<sup>1</sup> or, at least, not prejudicial to his cause,<sup>2</sup> though it be technically wrong to admit it;<sup>3</sup> if it was disregarded by the court;<sup>4</sup> or

<sup>16</sup> Comth. v. McCarter, 98 Pa. 607; Comth. v. Davis, 109 Pa. 128.

<sup>17</sup> Russell v. Comth., 1 P. & W. 82.

<sup>18</sup> Comth. v. Kryder, 1 Penny. 143.

<sup>19</sup> Doyle v. Comth., 107 Pa. 20.

<sup>20</sup> Thompson v. Stevens, 71 Pa. 161.

<sup>21</sup> Moock v. Conrad, 155 Pa. 586.

<sup>22</sup> Felts v. Del., Etc., R. Co., 160 Pa. 503.

<sup>23</sup> Roberts v. Austin, 5 Wharton, 313.

<sup>24</sup> Beals v. See, 10 Pa. 56.

<sup>25</sup> Gamble v. Woods, 53 Pa. 158.

<sup>26</sup> O'Hara v. Baum, 1 Penny. 430.

<sup>27</sup> Winger v. Rife, 101 Pa. 152.

<sup>28</sup> B. & O. R. Co. v. Sulphur, Etc., Dist., 30 Pitts. L. J. 187.

<sup>29</sup> Smith v. Hutchinson, 3 Walker, 254.

<sup>30</sup> Warsaw Twp. v. Knox Twp., 107 Pa. 301.

<sup>31</sup> Wilkey's Ap., 108 Pa. 567.

<sup>32</sup> Zion's German Refd. Congn.'s Ap., 1 Mona. 635.

<sup>33</sup> Helfenstein v. Leonard, 50 Pa. 461.

<sup>1</sup> Miles v. Stevens, 3 Pa. 21.

<sup>2</sup> Whitmire v. Montgomery, 165 Pa. 253; Patterson v. People's, Etc., Co., 172 Pa. 554; P. & L. Dig., vol. 1, cols. 1043-4.

<sup>3</sup> Dunham v. McMichael, 214 Pa. 485.

<sup>4</sup> Llewellyn v. Cauffiel, 215 Pa. 23.

had no effect upon the decision of the cause;<sup>5</sup> or was afterwards excluded,<sup>6</sup> or withdrawn<sup>7</sup> or disregarded by the jury;<sup>8</sup> or after instructions to disregard it.<sup>9</sup> But the refusal to strike out incompetent evidence which is prejudicial is cause for reversal although the court instructs the jury to disregard it.<sup>10</sup> But the testimony must appear to have been prejudicial.<sup>11</sup>

This has been especially emphasized by the Supreme court, since the act of May 24, 1887, P. L. 199, authorizing exceptions to rulings, remarks of the trial judge in presence of the jury and orders, in order to discourage appeals for trifles.<sup>12</sup> If the judgment below is good it will not be reversed for that the judge gave the wrong reason for entering it;<sup>13</sup> nor for opinions subsequently expressed by the judge.<sup>14</sup>

Where the plaintiff could not recover, his assignments of error will not avail.<sup>15</sup> The exclusion of a question on cross-examination, where the party was not harmed by it, is no ground for reversal.<sup>16</sup> Where evidence is rejected the court will not be reversed, if the evidence could not have assisted appellant;<sup>17</sup> nor where the rejection was right but the judge gave the wrong reason for it.<sup>18</sup> An erroneous construction of a paper, if not injurious to appellant's cause, is not ground for reversal.<sup>19</sup> Clerical errors are not the subject of reversal;<sup>20</sup> nor defective pleadings which did no harm;<sup>21</sup> nor for errors on the trial which are non-prejudicial;<sup>22</sup> or improperly re-

<sup>5</sup> *Wills v. Hardcastle*, 19 Supr. C. 525; *Cox v. Wilson*, 25 Supr. C. 635; *Comth. v. Phila., Etc., Co.*, 23 Supr. C. 235; 1 C. R. A., P. & L. Dig., col. 335; *Pittsburg, Etc., Co. v. Caldwell*, 74 Pa. 421; P. & L. Dig., vol. 1, col. 1045.

<sup>6</sup> *Unangst v. Kraemer*, 8 W. & S. 391.

<sup>7</sup> *Rathgebe v. Penna. R. Co.*, 179 Pa. 31.

<sup>8</sup> *Cornish v. Hooker*, 141 Pa. 138; P. & L. Dig., vol. 1, cols. 1046-7.

<sup>9</sup> P. & L. Dig., vol. 1, cols. 1047-8.

<sup>10</sup> *Erie, Etc., R. Co. v. Smith*, 23 W. N. C. 511.

<sup>11</sup> *Breneman's Est.*, 65 Pa. 298.

<sup>12</sup> *Beardslee v. Columbia Twp.*, 188 Pa. 496.

<sup>13</sup> *Jeannette, Etc., Co. v. Greenawalt*, 11 Supr. C. 157; *Corgan v. Lee Coal Co.*, 218 Pa. 386; *Clegg v. Seaboard, Etc., Co.*, 34 Supr. C. 63.

<sup>14</sup> *Carpenter v. Lancaster*, 212 Pa. 581.

<sup>15</sup> *Tenan v. Cain*, 188 Pa. 242.

<sup>16</sup> *Creachen v. Bromley, Etc., Co.*, 214 Pa. 15.

<sup>17</sup> *Ziegler v. Handrick*, 106 Pa. 87; *Worrall v. Pyle*, 132 Pa. 529; *Collins v. Houston*, 138 Pa. 481; *Comth. Title Co. v. Gray*, 150 Pa. 255; *Powell v. Derickson*, 178 Pa. 612; P. & L. Dig., vol. 1, cols. 1051, 1052-3.

<sup>18</sup> *Thomas v. Mann*, 28 Pa. 520.

<sup>19</sup> *Franciscus v. Reigart*, 4 Watts, 98; *Monongahela Ins. Co. v. Chester*, 43 Pa. 491.

<sup>20</sup> *Comth. v. Gibbons, Etc.*, 3 Supr. C. 408; P. & L. Dig., vol. i, col. 1054.

<sup>21</sup> *Quick v. Miller*, 103 Pa. 67; *Scranton, Etc., v. Simpson*, 133 Pa. 202; P. & L. Dig., vol. 1, cols. 1055-6.

<sup>22</sup> *Murphy v. Chase*, 103 Pa. 260; *Pardee v. Orvis*, 103 Pa. 451; P. & L. Dig., vol. 1, cols. 1057-8-9.

<sup>23</sup> *Erie, Etc., v. Barber*, 106 Pa. 125; P. & L. Dig., vol. 1, col. 1060.

serving a point;<sup>23</sup> or entering judgment;<sup>24</sup> or if the error was induced or caused by the party appealing.<sup>25</sup>

### 58. Argument in appellate court.

Argument in the appellate courts is now governed by the respective rules, for which see Vol. I.<sup>26</sup> Where appellant petitions the Superior court, averring after-discovered evidence in a divorce suit and requests it to hear the evidence or direct the cause to be remitted, the petition will be refused, where it would be only cumulative.<sup>27</sup>

On motion for re-argument the appellate court will consider only the record properly before it.<sup>28</sup> A re-argument will be granted in the settlement of an estate on the petition of an interested one whose rights were not before the court on appeal.<sup>29</sup> Upon petition for re-argument, when additional facts are averred, the case may be referred to the court below to apply for opening of the judgment.<sup>30</sup> Where a case is affirmed by an equally divided court the appellate court may in its discretion grant a re-argument.<sup>31</sup>

### 59. Reversal of judgment.

A judgment will not be reversed on appeal except for clear, real and substantial error.<sup>32</sup> The weight of the evidence is not a criterion.<sup>33</sup> If it is alleged that the court below violated its rules, this must be clearly shown.<sup>34</sup> If part of the claim is not barred by the statute, the decree will not be reversed for the part that is barred.<sup>35</sup> But if the record discloses that there was no cause of action it will be reversed.<sup>36</sup> Where the court below opened a judgment, the remedy being by bill, the appellate court will not reverse.<sup>37</sup>

A record will be reversed where judgment was taken in an action of dower without a declaration first filed;<sup>38</sup> also, where the jury in an action of slander awarded \$5 damages and six cents costs, but the court allowed *ca. sa.* for full costs.<sup>39</sup> Where a case is sub-

<sup>23</sup> *Comth. v. Shirley*, 152 Pa. 170; *Susong's Ap.*, 2 Supr. C. 611; *P. & L. Dig.*, vol. 1, cols. 1061-2.

<sup>24</sup> *Am., Etc., Co. v. McAden*, 109 Pa. 399; *Pantall v. R. & P., Etc., Co.*, 204 Pa. 158; 18 Supr. C. 341; *Moore v. Adams*, 29 Supr. C. 239.

<sup>25</sup> For old cases, see *P. & L. Dig.*, vol. 1, cols. 1063-4.

<sup>26</sup> *Hartje v. Hartje*, 35 Supr. C. 14.

<sup>27</sup> *McMeen v. Comth.*, 10 Atl. 785.

<sup>28</sup> *Lefevre's Est.*, 193 Pa. 225.

<sup>29</sup> *Osterheldt v. Phila.*, 195 Pa. 362.

<sup>30</sup> *Harvey v. Vandegrift*, 2 W. N. C. 79; *Tennery v. Pettinger*, 12 Leg. Int. 14.

<sup>31</sup> *Kiser v. Vanleer*, 2 W. N. C. 561; *P. & L. Dig.*, vol. 1, col. 1065.

<sup>32</sup> *Moreland, Etc., v. Benton, Etc.*, 3 W. N. C. 20; *Steele's Ap.*, 72 Pa. 101.

<sup>33</sup> *Morrison v. Nevin*, 130 Pa. 344.

<sup>34</sup> *Robb's Ap.*, 1 Penny. 436.

<sup>35</sup> *Miller v. Ralston*, 1 S. & R. 309; *Clay v. Irvine*, 4 W. & S. 232; *Moyer v. Kirby*, 14 S. & R. 162.

<sup>36</sup> *Laughlin v. Conn.*, 191 Pa. 150.

<sup>37</sup> *Ritchie v. Hastings*, 2 Yeates, 433.

<sup>38</sup> *Gailey v. Beard*, 4 Yeates, 546; Act Mar. 27, 1713, section 4, 1 Sm. L. 76.



mitted to the court to decide the law upon the undisputed facts, it will be reversed for excluding proper evidence;<sup>40</sup> and for other substantial irregularities.<sup>41</sup> The affirmance of a cause does not in every case conclude and estop the parties, as *e. g.*, a preliminary injunction;<sup>42</sup> jurisdiction when not raised in the case before;<sup>43</sup> dismissal of a bill without prejudice.<sup>44</sup> The appellate court has power to remit a part of the judgment erroneously allowed and enter judgment for the correct amount;<sup>45</sup> or condition affirmance upon remission of the excess,<sup>46</sup> or a release of damages.<sup>47</sup>

#### 60. Moulding of judgment.

The act of June 16, 1836, P. L. 784, gave the Supreme court power to mould the judgment on appeal, so as to do exact justice, and the act of June 24, 1895, P. L. 212, conferred like power upon the Superior court. Under the construction of these acts the appellate courts will not reverse and remit, where they can modify and mould the judgment to do equal justice.<sup>1</sup>

In this manner the appellate court will remove a doubt;<sup>2</sup> correct a clerical error;<sup>3</sup> change the judgment as to costs;<sup>4</sup> in case of a special verdict, enter the proper one;<sup>5</sup> modify the judgment so that the defendant may have the benefit of his exceptions;<sup>6</sup> strike out the names of minor children wrongly joined;<sup>7</sup> affirm as to some and reverse as to others not served,<sup>8</sup> or improperly joined,<sup>9</sup> as partners and some not partners.<sup>10</sup> But where the error is inseparable the whole record must be reversed.<sup>11</sup>

#### 61. Venire facias de novo.

The appellate court in reversing may award a *venire facias de novo*,<sup>12</sup> within its discretion.<sup>13</sup> If the judgment or verdict were

<sup>40</sup> Hopkins v. Forsyth, 14 Pa. 34.

<sup>41</sup> P. & L. Dig., vol. 1, col. 1068.

<sup>42</sup> Paxson's Ap., 106 Pa. 429.

<sup>43</sup> Gordon's Ap., 93 Pa. 361.

<sup>44</sup> Bratzman's Ap., 119 Pa. 645.

<sup>45</sup> Emerson v. Schoonmaker, 135 Pa. 437; King v. McKinstry, 32 Supr. C. 34; Glasse v. Stewart, 32 Supr. C. 385; Cox v. Burdett, 23 Supr. C. 346; Act of June 24, 1895, P. L. 212; P. & L. Dig., vol. 1, cols. 1070-1.

<sup>46</sup> Ludwig Piano Co. v. Browne, 33 Supr. C. 81; McClain v. Lawrence County, 14 Supr. C. 273.

<sup>47</sup> Shuster v. Central, Etc., Co., 34 Supr. C. 513.

<sup>1</sup> Comth. v. Phila., 157 Pa. 531; Terry v. Wenderoth, 147 Pa. 519; P. & L. Dig., vol. 1, col. 1073.

<sup>2</sup> Thrall v. Wilson, 17 Supr. C. 376.

<sup>3</sup> Simpson v. Meyers, 197 Pa. 522.

<sup>4</sup> Rodgers v. Black, 15 Supr. C. 498.

<sup>5</sup> Comth. v. Haffey, 6 Pa. 348.

<sup>6</sup> Tryon v. Carlin, 5 Watts, 371.

<sup>7</sup> Robinson v. Buck, 71 Pa. 386.

Jamieson v. Pomeroy, 9 Pa. 230.

McCanna v. Johnston, 19 Pa. 434; Sopp v. Winpenny, 68 Pa. 78.

Walker v. Tupper, 152 Pa. 1.

<sup>11</sup> Swearingen v. Pendleton, 4 S. & R. 389; Whitehill v. Schwartz, 27 Supr. C. 526.

<sup>12</sup> Sterrett v. Bull, 1 Binney, 238.

<sup>13</sup> Fries v. Penna. R. Co., 98 Pa. 142.

for the defendant, on reversal, the court must award a *ven. fac. de novo*.<sup>14</sup> When the verdict was for the plaintiff but the court entered judgment for defendant *non obstante veredicto*, on reversal, the court may award a *ven. fac. de novo*,<sup>15</sup> and upon the new trial new questions may arise, on the pleadings which the court below controls and not the appellate court.<sup>16</sup>

The reversal of a judgment of nonsuit after verdict for the plaintiff carries with it a *venire facias de novo*.<sup>17</sup> If there is a good cause of action and judgment for plaintiff is reversed, a new trial will not be denied,<sup>18</sup> though it is not always done.<sup>19</sup> But if the plaintiff's declaration discloses no cause of action the order may be refused.<sup>20</sup> The appellate court must exercise a sound discretion herein.<sup>21</sup> But if there was no error, none will be awarded.<sup>22</sup> Or where the defense is purely technical;<sup>23</sup> or a new trial could not be had.<sup>24</sup>

## 62. Entry of final judgment — Act of 1891.

Upon an improper arrest of judgment below the appellate court may enter final judgment, when reversing;<sup>25</sup> also in reversing judgment *non obstante veredicto*.<sup>26</sup>

The act of May 20, 1891, P. L. 101, invested power in the Supreme court to affirm, reverse, amend, or modify a judgment appealed from.<sup>27</sup>

Section 1 of said act is as follows:

"That in all cases of application for the opening, vacating and striking off of judgments of any kind, whether entered by amicable confession, upon warrant of attorney or otherwise, any party aggrieved by the decision of the court opening, vacating or striking off, or the refusal to open, vacate or strike off such judgment, may appeal therefrom to the Supreme court of this commonwealth and such case shall thereupon be heard, reviewed and decided upon such appeal by the Supreme court, in like manner as appeals from final decrees to the said Supreme court."

"Section 2. The Supreme court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from, and to enter such judgment, order or decree in the case as the Supreme court may deem proper and just, without returning the record for amendment or modification, to the court be-

<sup>14</sup> Chatham Natl. Bank v. Gardner, 31 Supr. C. 135; Merchants', Etc., Bank v. Gardner, 31 Supr. C. 143; McCahan v. Wharton, 121 Pa. 424.

<sup>15</sup> Werneberg v. Pittsburg, 210 Pa. 267.

<sup>16</sup> Livingston v. South Middleton, Etc., 15 Supr. C. 358.

<sup>17</sup> Wharton v. Williamson, 13 Pa. 273.

<sup>18</sup> Little, Etc., Co. v. Norton, 24 Pa. 465.

<sup>19</sup> Penna. R. Co. v. Fries, 7 W. N. C. 433.

<sup>20</sup> Griffith v. Eshelman, 4 Watts, 51.

<sup>21</sup> Mixer v. Imp. Coal Co., 152 Pa. 395; Dick v. Williams, 130 Pa. 41; P. & L. Dig., vol. 1, cols. 1079-80-81-2.

<sup>22</sup> Miller v. Ralston, 1 S. & R. 309.

<sup>23</sup> Connellsville Boro' v. Hogg, 156 Pa. 526.

<sup>24</sup> Tozer v. Jackson, 164 Pa. 373.

<sup>25</sup> Wilson v. Gray, 8 Watts, 25.

<sup>26</sup> Chandler v. Commerce Ins. Co., 88 Pa. 223; Henry v. Heilman, 114 Pa. 499.

<sup>27</sup> Smith v. Pub'g Co., 178 Pa. 481.

low, and may order a verdict and judgment to be set aside and a new trial had."

"Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

### 63. *Procedendo*.

The order of the appellate court when it reverses proceedings which must be completed in the lower court is called a *procedendo*. But the lower court on the return of the record may proceed with the cause without it.<sup>28</sup> The party who accepts judgment in his favor loses no rights thereby.<sup>29</sup> The lower court will proceed in the natural order with the case.<sup>30</sup> A reversal with a direction to enter judgment below in accordance with the report of the referee, is in effect a *procedendo*.<sup>31</sup>

Where the matter in controversy is so uncertain that the appellate court is perplexed with it the case will be remitted.<sup>32</sup> When a judgment for defendant *non obstante veredicto* is reversed the record may be remitted so that judgment be there entered in accordance with the opinion of the appellate court as law and justice require.<sup>33</sup> If the verdict is excessive the court may require the plaintiff to remit the excess or grant a new trial.<sup>34</sup>

The Supreme court may modify its own order at a subsequent term, where not final in its nature.<sup>35</sup> It may change a judgment of reversal for defendant into a judgment for him;<sup>36</sup> and may revoke an order previously made.<sup>37</sup> It may amend a judgment of reversal so as to cover costs.<sup>38</sup>

### 64. Costs on appeal.

At the common law no costs were recoverable on a writ of error;<sup>1</sup> and if paid on a *fi. fa.* for them were ordered to be paid back.<sup>2</sup> In an early case,<sup>3</sup> it was held that all the costs must abide the event of the suit. Where the defendant in error, who won the appeal paid the costs and then sued for them it was held he could not recover because he had paid them voluntarily.<sup>4</sup> Where the successful party below is the loser on the appeal it was held he must pay all the

<sup>28</sup> Benzinger Twp. Road, 135 Pa. 176.

<sup>29</sup> Harper v. Keeley, 17 Pa. 234.

<sup>30</sup> Titusville Iron Works v. Keystone Oil Co., 130 Pa. 211.

<sup>31</sup> Leonard v. Smith, 4 D. R. 249.

<sup>32</sup> Gray v. Citizens' Gas Co., 206 Pa. 303; Horn, Etc., Co. v. Steelman, 24 Supr. C. 126; Thomas v. Borden, 222 Pa. 184.

<sup>33</sup> Hughes v. Miller, 192 Pa. 365; McGeehan v. Hughes, 217 Pa. 121.

<sup>34</sup> McGeehan v. Hughes, 17 D. R. 421.

<sup>35</sup> McCoy v. Porter, 17 S. & R. 59.

<sup>36</sup> Nugent v. Phila. Tr. Co., 183 Pa. 142.

<sup>37</sup> Dillman's Ap., 2 Mona. 733.

<sup>38</sup> Ellis v. Agl. Ins. Co., 9 Supr. C. 392.

<sup>1</sup> Cameron v. Paul, 11 Pa. 277; Beam v. Warfel, 9 Lanc. Bar, 185; Smith v. Sharp, 5 Watts, 292.

<sup>2</sup> Wright v. Small's Lessee, 5 Binney, 204.

<sup>3</sup> Work v. Maclay, 14 S. & R. 265.

<sup>4</sup> Richardson v. Cassily, 5 Watts, 449. (But see Hamilton v. Aslin, 3 Watts, 222.)

costs.<sup>5</sup> An order allowing the costs of this appeal does not cover all the costs.<sup>6</sup>

When the appellate court makes an order for the benefit of the litigant it may annex a condition as to costs;<sup>7</sup> and among such costs were those of a re-argument and the paper book.<sup>8</sup> Where an assigned estate was concerned the costs of an appeal to determine the right and status of the receiver were put upon the estate.<sup>9</sup>

Where creditors appealed from an order confirming the account of a receiver and succeeded in surcharging him the costs of their paper book and of counsel were ordered paid.<sup>10</sup> Where an appeal in equity is dismissed at the cost of the appellants it means all the costs above and below.<sup>11</sup> The prothonotary's fees in the appellate court are a part of the costs to be taxed.<sup>12</sup> Since the act of April 15, 1907 (P. L. 83), as amended by the act of April 27, 1909, P. L. 263, "the cost of printing the paper book of each party shall be taxed as costs collectible by the attorney of record of such party in such appeal."<sup>13</sup>

When the appellate court reverses and awards a *ven. fac. de novo*, it may impose terms as to costs, and if it does not, they abide the event of the suit,<sup>14</sup> and without such order there is no authority to issue execution for them before the final judgment.<sup>15</sup> Except where there is an act of assembly or the appellate court has power to impose conditions each party pays his own costs of appeal, and where one party is compelled to pay the fees to the prothonotary for the record he may recover them by suit from the opponent.<sup>16</sup> In equity the court has power over the costs independently of any statute, and may order accordingly.<sup>17</sup> If the appellee has been guilty of laches, the costs will not be put on the appellant.<sup>18</sup> In equity the costs may be put on the one in fault.<sup>19</sup> The appellate court may dismiss without costs an appeal on an issue to determine the right of a petitioner for an issue *devisavit vel non*.<sup>20</sup> Where a terretenant is obliged to appeal to preserve his rights as to a judgment, he is entitled to his actual outlay including counsel fees and paper books.<sup>21</sup>

<sup>5</sup> Krout v. Fox, 1 W. N. C. 401.

<sup>6</sup> Taylor's Ap., 21 W. N. C. 356.

<sup>7</sup> Brothers v. Mitchell, 157 Pa. 484.

<sup>8</sup> Heilman v. Lebanon, Etc., R. Co., 180 Pa. 627.

<sup>9</sup> Fraternal Guardian's Assigned Est., 159 Pa. 603.

<sup>10</sup> Schwartz v. Keystone Oil Co., 164 Pa. 415.

<sup>11</sup> Jones' Ap., 87 Pa. 428.

<sup>12</sup> Ballinger v. Gallagher, 18 C. C. 438.

<sup>13</sup> Held to be prospective only. Smith v. Illinois Cent. R. Co., 36 Supr. C. 584. (Lower court cases, see 3 C. R. A., col. 122.)

<sup>14</sup> Herr v. Keemer, 1 Lanc. L. R. 337.

<sup>15</sup> Ellis v. Agl. Ins. Co., 9 Supr. C. 392.

<sup>16</sup> Leonard v. Smith, 4 D. R. 249.

<sup>17</sup> Danville, Etc., R. Co. v. Kase, 41 W. N. C. 411.

<sup>18</sup> Palm's Est., 13 Supr. C. 296.

<sup>19</sup> Markle v. Wilbur (No. 2), 200 Pa. 473.

<sup>20</sup> Roger's Est., 154 Pa. 217.

<sup>21</sup> Stevenson v. Whitesell, 10 Supr. C. 306.

**65. Amendment in appellate court.**

Until the return day of the appeal the record is amendable by the court below.<sup>22</sup> After that it is with the appellate court and it may correct mere technical or clerical errors or irregularities,<sup>23</sup> unless it would be unjust to the appellant;<sup>24</sup> the appellate court may impose costs on such amendment.<sup>25</sup> This power of rectifying formal irregularities extends to the parties on the record;<sup>26</sup> and to declarations and statements so as to conform to the evidence.<sup>27</sup>

**66. Waiver of right of appeal.**

If parties have waived the right of appeal by agreement, their appeal will be quashed.<sup>28</sup> This waiver may be in a note<sup>29</sup> or in a lease;<sup>30</sup> an agreement to compromise before an auditor in the Orphans' court<sup>31</sup> or otherwise.<sup>32</sup> It may also be done by submission to arbitrators making their award final,<sup>33</sup> or by agreeing to submit the matter finally to the court.<sup>34</sup> The plaintiff who issues execution and realizes upon it will have his appeal quashed.<sup>35</sup> But the giving of bail for a stay by defendant is not a waiver.<sup>36</sup>

**67. Joining separate causes in one appeal.**

It is error to join separate and independent causes or proceedings in one appeal.<sup>37</sup> It is questioned, even, whether two distinct orders at separate stages of the same cause may be heard in one appeal,<sup>38</sup> though it would seem that the rule against splitting suits or controversies would favor a decision of all questions in the same cause on the same appeal. Where the court below does not consolidate the actions, separate appeals are necessary, although the causes were all tried at the same time by the same jury.<sup>39</sup> The same rule has been applied to indictments, where appellant does not elect on which he will stand.<sup>40</sup>

<sup>22</sup> *Gunn v. Bowers*, 126 Pa. 522; P. & L. Dig., vol. 1, col. 1099.

<sup>23</sup> *Campbell v. Floyd*, 153 Pa. 84; P. & L. Dig., vol. 1, cols. 1100, 1101.

<sup>24</sup> *Park v. Holmes*, 147 Pa. 497.

<sup>25</sup> *Brothers v. Mitchell*, 157 Pa. 484.

<sup>26</sup> *Fritz v. Heyl*, 93 Pa. 77; *Thornton v. Britton*, 144 Pa. 126.

<sup>27</sup> *Kroegher v. McConway, Etc., Co.*, 149 Pa. 444; vol. 1, P. & L. Dig., col. 1104.

<sup>28</sup> *Galbreath v. Colt*, 4 Yeates, 551; *Cuncle v. Dripps*, 3 P. & W. 291.

<sup>29</sup> *Pritchard v. Denton*, 8 Watts, 371.

<sup>30</sup> *Groll v. Gegenheimer*, 147 Pa. 162; *City v. Elvins*, 1 W. N. C. 7.

<sup>31</sup> *Hess' Est.*, 27 Supr. C. 498.

<sup>32</sup> P. & L. Dig., vol. 1, col. 1107.

<sup>33</sup> P. & L. Dig., vol. 1, cols. 1108-9.

<sup>34</sup> *Galbreath v. Colt*, 4 Yeates, 551.

<sup>35</sup> *Hall v. Lacy*, 37 Pa. 366; *Smith v. Jack*, 2 W. & S. 101; *Laughlin v. Peebles*, 1 P. & W. 114.

<sup>36</sup> *Ranck v. Becker*, 12 S. & R. 412.

<sup>37</sup> *Pottsville Bank v. Cake*, 12 Supr. C. 61.

<sup>38</sup> *Bunnell v. Kintner*, 27 Supr. C. 605. (See *Middletown Road*, 15 Supr. C. 167; *Cowan v. Penna., Etc., Co.*, 188 Pa. 542.)

<sup>39</sup> *Cauley v. P. C., Etc., R. Co.*, 95 Pa. 398; *McCosh v. Myers*, 25 Supr. C. 61; P. & L. Dig., vol. 1, col. 1111.

<sup>40</sup> *Comth. v. Schollenberger*, 17 Supr. C. 218; *Comth. v. Pilnik*, 29 Supr. C. 285.

It was held that after one writ of error was *non-prossed*, appellant might have another;<sup>41</sup> but a second writ, on the assessment of costs, was dismissed.<sup>42</sup> In equity all questions will be considered to have been settled on the first appeal.<sup>43</sup> Where no new questions appear a re-argument or another appeal will be refused.<sup>44</sup>

Where a judgment *non ob. ver.* is reversed and judgment directed to be entered on the verdict, the defendant may then have an appeal for error on the trial, notwithstanding the act of May 20, 1891, P. L. 101.<sup>45</sup>

### 68. Appeals for the purpose of delay.

Under the act of May 25, 1874, P. L. 227, when the Supreme court was of the opinion that the appeal was taken merely for delay, an order could be made taxing as costs, damages at the rate of six per centum per annum, an attorney's fee of twenty dollars and the cost of printing appellee's paper book. Section 21 of the act of May 19, 1897, P. L. 67, changed the attorney fee to twenty-five dollars and omitted mention of the paper book, but the acts of 1907 and 1909 put the cost of the paper book on the loser, in any event.

Under these acts it has been held that the question could not be raised on a motion to quash;<sup>46</sup> but on affirmance, and without a special rule, the Supreme court awarded the penalty.<sup>47</sup> Where the appellant neglects to file assignments or do aught else and his appeal is *non-prossed*, the penalty will be added.<sup>48</sup> The application for the penalty should be made within ten days after the decision of the court, before the record is remitted.<sup>49</sup> An order as to this is not an affirmance of the judgment, *per se*;<sup>50</sup> and the penalty will not be imposed where the matter is doubtful,<sup>51</sup> or the appellant honestly believed in his claim of right.<sup>52</sup> Where the appellant abandons his appeal and claim of right the penalty will be added,<sup>53</sup> especially where it is vexatious.<sup>54</sup>

<sup>41</sup> *Power v. Frick*, 2 Grant, 306.

<sup>42</sup> *Gibson v. Cummings*, 25 Pa. 231.

<sup>43</sup> *Rich v. Black*, 181 Pa. 290.

<sup>44</sup> *Creachen v. Bromley, Etc., Co.*, 214 Pa. 15; *McMahon's Est.*, 215 Pa. 10.

<sup>45</sup> *Gates v. Penna. R. Co.*, 154 Pa. 566.

<sup>46</sup> *Moodie v. Ashland Bank*, 1 W. N. C. 324.

<sup>47</sup> *Bachman v. Gross*, 150 Pa. 516.

<sup>48</sup> *Ebert v. Kaufmann*, 34 Supr. C. 487.

<sup>49</sup> *Thirteenth Ward, Etc., Assn. v. Coyle*, 19 Supr. C. 238.

<sup>50</sup> *Keating v. Union, Etc., R. Co.*, 5 W. N. C. 232.

<sup>51</sup> *Drummond's Ap.*, 2 Mona. 775; *Camden, Etc., Co. v. Monaghan*, 10 W. N. C. 48; *Wolf v. Phila. Tr. Co.*, 181 Pa. 399; *Bucknor's Ap.*, 2 Mona. 774; *Lodge's Ap.*, 2 Mona. 764.

<sup>52</sup> *Kline v. St. Mary, Etc., Church*, 33 Supr. C. 578.

<sup>53</sup> *Martin v. Rider*, 181 Pa. 265; P. & L. Dig., vol. 1, cols. 1114-5; vol. 1, C. R. A., cols. 352-3-4.

<sup>54</sup> *Smead v. Stuart*, 194 Pa. 578; *Radigan's Est.*, 13 Supr. C. 131; *McFadden v. McFadden*, 211 Pa. 599; *Twibill's Est.*, 29 Supr. C. 319; *Dietrich v. Loughran*, 29 Supr. C. 320.

### 69. Appeals on cases from justices of the peace.

Whilst the jurisdiction of the Common Pleas in cases of *certiorari* to justices of the peace, aldermen and magistrates, is final under the act of March 20, 1810, 5 Sm. L. 161;<sup>1</sup> it does not cover criminal proceedings<sup>2</sup> nor attachment execution<sup>3</sup> nor landlord and tenant proceedings;<sup>4</sup> nor where it is a matter of jurisdiction.<sup>5</sup> Only the record is brought up on *certiorari*.<sup>6</sup> The common law writ of *certiorari* may be invoked by the appellate court to revise the proceedings of inferior courts, where the ends of justice require it.<sup>7</sup>

### 70. Appeals to superior court.

The superior court has the same appellate jurisdiction as the supreme court formerly had, in cases enumerated in the acts of assembly.<sup>8</sup> The jurisdictional amount involved, when determined from the plaintiff's statement must be the amount claimed when the statement is filed.<sup>9</sup> In case of judgment *n. o. v.* it is the amount of the verdict and not the claim.<sup>10</sup> If the record does not show that it is within the jurisdiction the case will be certified to the supreme court.<sup>11</sup>

On a claim allowed in the Orphans' court jurisdiction depends on the amount awarded and not the amount of the interest.<sup>12</sup> On the consolidation of two actions the amount of the verdict controls.<sup>13</sup> The amount of the judgment or decree below is the criterion under the act of May 5, 1899, P. L. 248.<sup>14</sup>

This is also true of an action for tort.<sup>15</sup> In appeals from the Orphans' court the amount of the separate interests ascertained controls.<sup>16</sup> Claims cannot be joined to give the supreme court jurisdiction.<sup>17</sup> The supreme court will remit to the superior court claims within its jurisdiction.<sup>18</sup>

In ejectment, without the certificate of the trial judge that the

<sup>1</sup> Colwyn Boro' v. Tarbolton, 1 Supr. C. 179; Mahanoy City v. Wadlinger, 142 Pa. 308; P. & L. Dig., vol. 1, cols. 1118-9.

<sup>2</sup> Comth. v. Burkhardt, 23 Pa. 521; Comth. v. Betts, 76 Pa. 465.

<sup>3</sup> Strouse v. Lawrence, 160 Pa. 421.

<sup>4</sup> Clark v. Yeat, 4 Binney, 185; Clark v. Patterson, 6 Binney, 128.

<sup>5</sup> Hill v. Tionesta Twp., 129 Pa. 525.

<sup>6</sup> Oakland R. Co. v. Keenan, 56 Pa. 198.

<sup>7</sup> Burginhofen v. Martin, 3 Yeates, 479; Comth. v. Fourteen Hogs, 10 S. & R. 393, under the Estray law of 1705, 1 Sm. L. 70; Bauer v. Angeny, 100 Pa. 429.

<sup>8</sup> Boro' v. Tarbottom, 1 Supr. C. 179; Thompson v. Preston, 5 Supr. C. 154; Comth. v. Tragle, 4 Supr. C. 159; Comth. v. Kohnle, Etc., Co., 1 Supr. C. 627.

<sup>9</sup> Comth. v. Magee, 213 Pa. 443.

<sup>10</sup> Peters v. Carner, 183 Pa. 65.

<sup>11</sup> Sedlinger's Ap., 1 Supr. C. 221.

<sup>12</sup> May's Est., 218 Pa. 64; Makof v. Sherman, 17 D. R. 55.

<sup>13</sup> Spring, Etc., Co. v. Harry Martin Brick, Etc., Co., 221 Pa. 385.

<sup>14</sup> Prentice v. Hancock, 204 Pa. 128; Astwood v. Wanamaker, 209 Pa. 103; Hosack v. Crill, 197 Pa. 370.

<sup>15</sup> Weaver v. Cone, 189 Pa. 298.

<sup>16</sup> Staib's Est., 188 Pa. 238; Samson's Est., 201 Pa. 590.

<sup>17</sup> Jennings's Est., 195 Pa. 406.

<sup>18</sup> Eslen's Est., 211 Pa. 215.

value of the land exceeds \$1,500 the supreme court will not assume jurisdiction.<sup>19</sup> The superior court had jurisdiction of an appeal from an order suspending an attorney;<sup>20</sup> prior to the act of May 5, 1899, P. L. 248, which gives the supreme court exclusive jurisdiction. Section 7 of the same act gives the superior court jurisdiction of divorce appeals.

Appeals in *quo warranto*, no pecuniary interests being involved are to the supreme court.<sup>21</sup> In mandamus where no property right is in question the appeal is to the supreme court.<sup>22</sup> An order restraining parties from interfering with the official duties of prison warden requires an appeal to the supreme court;<sup>23</sup> so also an order under act of June 19, 1871, P. L. 1360, with reference to crossings at grade.<sup>24</sup> The superior court has cognizance of jurisdictional questions arising on appeal.<sup>25</sup> An order of the quarter sessions imposing costs in an election contest is appealable to the superior court.<sup>26</sup>

#### 71. Time and manner of appeal.

Under the act of May 19, 1897, P. L. 87, the appeal must be taken within six months from the day of final judgment. The manner of appealing is treated fully in Vol. I, "Superior Court." The equity rules of the supreme court govern the superior court.<sup>27</sup>

The superior court is given power to modify or amend a judgment without reversing it<sup>28</sup> or it may enter final judgment as justice shall require.<sup>29</sup>

#### 72. Appeal to supreme court from superior court.

The supreme court will be loth to grant an allocatur for an appeal from the superior court, unless the reasons are urgent.<sup>30</sup> The petition for allowance must clearly set forth the reasons for it.<sup>31</sup> The practice is to file a petition with the prothonotary of the district in which the county is situate who will present it to the court if in session or the most convenient justice in vacation, the date of application being as of the date of filing. The petition should in all cases be accompanied with a copy of the paper books, the opinion of the superior court, and a full statement of the grounds on which the allowance is asked. If the appeal is allowed, counsel will be immediately notified by the prothonotary and the præcipe for a certiorari must promptly issue and the appeal be perfected within a reasonable time, as required by law.<sup>32</sup> The assignments of error

<sup>19</sup> *Matthews v. Rising*, 194 Pa. 217.

<sup>20</sup> *Shoemaker's Ap.*, 175 Pa. 159.

<sup>21</sup> *Comth. v. O'Donnell*, 7 Supr. C. 49.

<sup>22</sup> *Neubert v. Armstrong Water Co.*, 26 Supr. C. 608.

<sup>23</sup> *Brower v. Kantner*, 9 Supr. C. 94.

<sup>24</sup> *Penna. R. Co. v. Warren, Etc., R. Co.*, 188 Pa. 74.

<sup>25</sup> *Middletown Road*, 15 Supr. C. 167.

<sup>26</sup> *Hayes' Election*, 214 Pa. 551.

<sup>27</sup> *Swoope v. Wakefield*, 10 Supr. C. 342.

<sup>28</sup> *Lyons v. Means*, 1 Supr. C. 608.

<sup>29</sup> *New Castle City v. New Castle E. R. Co.*, 2 Supr. C. 228.

<sup>30</sup> *Kremer v. Guarantee Co.*, 173 Pa. 416; *Melon Street*, 182 Pa. 397; *Phila. v. Penna., Etc.*, 214 Pa. 138.

<sup>31</sup> *Boyle's License*, 190 Pa. 577.

<sup>32</sup> *Platt-Barber Co. v. Groves*, 193 Pa. 475.



should be as specific as from the Common Pleas. It is suggested that the form be:

"The superior court erred in not sustaining (or in sustaining) the first assignment of error to the judgment of the Common Pleas, to-wit: [setting it out]. If there are any new matters they must be assigned separately.<sup>33</sup> If there are cross-appeals and but one side appeals, the other appeal will not be considered.<sup>34</sup> An application for appeal will not suspend execution below.<sup>35</sup>

If an appeal is erroneously taken to the superior court, it will be certified to the supreme court;<sup>36</sup> but it must be averred that it was erroneously taken through a mistake of law or fact.<sup>37</sup> After the supreme court has taken cognizance the duties of the superior court are at an end.<sup>38</sup>

The appellate court will order restitution after a reversal, wherein the court below the plaintiff had issued execution.<sup>39</sup>

In regard to hearing appeals the supreme court on May 24, 1910, adopted the following rule:

All appeals in civil and criminal cases from the superior court to this court shall be placed at the head of the list for the third argument week after the appeal has been allowed, and if the court is then sitting in another district, the prothonotary shall promptly certify it to that district.

### 73. Return of cause and remission of record.

When the appellate court has affirmed the court below and ordered a *remittitur*, the cause is out of it.<sup>40</sup> And when the court below proceeds, the record of the supreme court may be amended *nunc pro tunc* afterwards to comply, if there was no *remittitur*.<sup>41</sup> The judgment of the appellate court must be executed by the lower court,<sup>42</sup> and if remitted for further proceedings they must accord with the opinion of the appellate court.<sup>43</sup> After a *non pros.* a *certiorari* will be quashed which issued before a renewal of the appeal.<sup>44</sup> After affirmance it is too late to raise questions of irregularity on the execution.<sup>45</sup> In a case from the Orphans' court the appeal may be directed to be withdrawn and an irregularity obviated below.<sup>46</sup> A cause is pending as long as the record is in the supreme court, according to an old case;<sup>47</sup> but when ordered remitted the jurisdiction begins below.<sup>48</sup> When the plaintiff waits 25 years, he loses

<sup>33</sup> Mellick v. Penna. R. Co., 203 Pa. 457.

<sup>34</sup> Price v. Lancaster Co., 189 Pa. 95.

<sup>35</sup> Backenstoe v. O'Neil, 28 C. C. 156; Harris' Petition, 15 Supr. C. 471.

<sup>36</sup> Neubert v. Armstrong Water Co., 26 Supr. C. 608.

<sup>37</sup> Hogsett v. Columbia, Etc., Co., 15 Supr. C. 474.

<sup>38</sup> Melon Street, 192 Pa. 331.

<sup>39</sup> Brightly v. McAleer, 4 Supr. C. 563.

<sup>40</sup> McCall v. Crousillat, 3 S. & R. 7; Penna. R. Co. v. Comth., 39 Pa. 403.

<sup>41</sup> Albright v. McGinnis, 4 Yeates, 517.

<sup>42</sup> McMasters v. Blair, 31 Pa. 467; Nippes' Ap., 35 Leg. Int. 245.

<sup>43</sup> Savage v. Everman, 70 Pa. 315.

<sup>44</sup> Roddy's Ap., 99 Pa. 9.

<sup>45</sup> Church's Ap., 103 Pa. 263.

<sup>46</sup> Lindenmuth's Est., 5 Watts, 145.

<sup>47</sup> Star v. Bradford, 2 P. & W. 384.

<sup>48</sup> Penna. R. Co. v. Comth., 39 Pa. 403; Faucett v. Harris, 190 Pa. 98.

his rights by laches.<sup>49</sup> When the appellate court has declared a judgment void the lower court should strike it from the record.<sup>50</sup> If an order striking off a judgment below is reversed, the status of the cause remains liable to have the judgment opened under the rules of the lower court.<sup>51</sup> A decree in equity having been affirmed, the court below cannot open it on the ground of after-discovered evidence.<sup>52</sup> Nor can error be alleged if the lower court obeys the directions of the appellate court.<sup>53</sup>

#### 74. Order and writ of restitution.

Although the appellate court affirm the judgment it may reverse the execution and award restitution,<sup>1</sup> unless the money was voluntarily paid.<sup>2</sup> Being a matter of grace, it will not be awarded contrary to the agreement of the parties.<sup>3</sup> If the judgment was afterwards reversed, restitution will be ordered,<sup>4</sup> and it is the duty of the lower court to enforce it without delay.<sup>5</sup> In the Orphans' court where a decree of distribution has been reversed the distributees will be ordered to refund accordingly.<sup>6</sup> The Common Pleas may order restitution to comply with the decision of the appellate court.<sup>7</sup> If restitution would work injustice the money will be ordered into court.<sup>8</sup> Where the money is paid after appeal taken the lower court may order restitution.<sup>9</sup> Its execution will not be delayed to await a new trial, when ordered.<sup>10</sup> An order of restitution is a part of the judgment and is executed by a writ for that purpose commanding the party to make restitution<sup>11</sup> and it is a lien on the goods from the time it comes into the hands of the sheriff.<sup>12</sup> An attachment will not lie from the supreme court.<sup>13</sup>

The appellate court may in affirming a judgment in ejectment grant a stay until the damages can be assessed.<sup>14</sup>

On a re-trial of the cause after reversal it is out of order for counsel to allege that the appellate court was not unanimous when the record fails to show any dissent.<sup>15</sup> Nor can counsel read the opinion to the jury.<sup>16</sup> If the appellate court decides there was sufficient evidence

<sup>49</sup> *Neel v. McElhenny*, 189 Pa. 489.

<sup>50</sup> *Mutual, Etc., Co. v. Tenan*, 204 Pa. 332.

<sup>51</sup> *Am. Mfg. Co. v. S. Morgan Smith Co.*, 28 Supr. C. 124; 18 York, 25.

<sup>52</sup> *Steinmeyer v. Siebert*, 47 Pitts. L. J. 117.

<sup>53</sup> *Equitable Trust Co. v. Garis*, 194 Pa. 435.

<sup>1</sup> *Cassel v. Duncan*, 2 S. & R. 57.

<sup>2</sup> *Gould v. McFall*, 118 Pa. 455.

<sup>3</sup> *Fitzalden v. Lee*, 2 Dallas, 205; *Cahill v. Benn*, 6 Binney, 99.

<sup>4</sup> *Williams v. Coward*, 1 Grant, 21.

<sup>5</sup> *Hart v. Weidzelski*, 9 Kulp, 313.

<sup>6</sup> *Stough's Est.*, 10 D. R. 547.

<sup>7</sup> *Sommer v. Sommer*, 10 Lanc. Bar, 81.

<sup>8</sup> *Kirk v. Eaton*, 10 S. & R. 103; *Ranck v. Becker*, 13 S. & R. 41.

<sup>9</sup> *Whitesell v. Peck*, 176 Pa. 170.

<sup>10</sup> *Breeding v. Blocher*, 29 Pa. 347.

<sup>11</sup> *Duncan v. Kirkpatrick*, 13 S. & R. 292.

<sup>12</sup> *Boal's Ap.*, 2 Rawle, 37.

<sup>13</sup> *Russell v. Gray*, 6 S. & R. 208.

<sup>14</sup> *Pittsburg, Etc., R. Co. v. Jones*, 59 Pa. 433.

<sup>15</sup> *Phila., Etc., Co. v. Phila. R. Co.*, 177 Pa. 38.

<sup>16</sup> *Good v. Mylin*, 13 Pa. 538; *Ege v. Medlar*, 82 Pa. 86.

to go to the jury the lower court cannot give binding instructions.<sup>17</sup>  
It would be error to take the case from the jury.<sup>18</sup>

#### 75. Form of petition for reargument in the superior court.

E. Lowenstein	}	No. 126,	October Term, 1909.
v.		In Superior court, sitting at Philadelphia, orig'l	
J. S. Bache.		No. 291,	September 7, 1907.
		C. C. P., No. 3.	

To the Honorable, the judges of said court, the petition of —  
— by his attorney, respectfully represents that [here insert the grounds upon which a re-argument is desired, and point out the legal reasons which, in the opinion of counsel, would cause the court to change its decision, upon re-argument and such points of law or authorities as may be salient.]

The opinion of the superior court is hereto attached and made part hereof. In view of the premises, your petitioner respectfully prays that a re-argument of this cause may be ordered and he will ever pray, etc.

[Opinion of superior court.]

The petitioner may print or type-write his petition, as he sees fit.

*Order of Court.*

The court merely endorses on the petition "refused" or "allowed"  
"By the court."

#### 76. Petition for allowance of appeal to supreme court.

Thereupon, when refused, a petition is presented to the supreme court or a judge thereof for an allowance of an appeal from the final order of the superior court, refusing re-argument.

This petition is accompanied with the paper books of appellant and appellee in the superior court, the opinion of the superior court and a concise statement of the questions which petitioner wishes to have reviewed.

#### 77. Form of petition to supreme court.

[Title of case.]

To the Honorable, the chief justice and justices of the supreme court of Pennsylvania:

The petition of the commonwealth of Pennsylvania respectfully represents:

That on or about May 29, 1903, an action was commenced by your petitioner in the court of Common Pleas, No. 4, of the county of Philadelphia, of March Term, 1903, No. 4542, to recover from Joseph S. Vetterlein, trading as Vetterlein Brothers, the amount of certain mercantile license taxes for the year 1903.

That the said case was so proceeded in that it resulted on May 18, 1904, in a directed verdict for the plaintiff for fifty-three dollars and fifty cents, subject to a point of law reserved.

That on June 21, 1904, said court of Common Pleas, No. 4, entered judgment for defendant *non obstante veredicto*.

<sup>17</sup> Landreth v. Am. S. S. Co., 17 Phila. 231; 108 Pa. 264.

<sup>18</sup> Collins v. Busch, 15 Supr. C. 255; 191 Pa. 549.

That on June 28, 1904, an appeal was taken by your petitioner to the superior court of the state of Pennsylvania of October term, 1904, No. 147, and said appeal was duly argued before the said superior court. That on October 17, 1905, the superior court affirmed the judgment of the said court of Common Pleas, No. 4, in an opinion by Honorable Charles E. Rice, President Judge, three judges (Beaver, Porter and Morrison, JJ.), dissenting, no dissenting opinion, however, being filed.

[If a petition for re-argument was filed and refused, so insert here.]

*The question in the case* is whether a manufacturer who sells the goods of his factory, not at the place where they are manufactured, but at another place of business in another county, where the product of his first factory is stored and kept for sale, is liable to be assessed for mercantile license tax in the county where such sales are made.

Your petitioner prays that your honorable court grant an *allocatur* in the above case, in order that the judgment of the superior court may be reviewed and reversed,

And your petitioner will ever pray, etc.

Ira Jewell Williams,  
Hampton L. Carson, Atty. Gl.,  
For petitioner.

November 4, 1905: Appeal allowed.  
*Per curiam.*

## CHAPTER X.

### CERTIORARI TO INFERIOR JURISDICTIONS

1. Signification and nature of writ.
2. Writ to justices, aldermen, etc.
3. The affidavit—form.
4. Form of recognizance.
5. Præcipe—form.
6. Special allowance in summary convictions.
7. Rules of court as to practice.
8. Rules in Allegheny—return.
9. Rules in Allegheny—dismissal.
10. Rules in Allegheny—time of filing exceptions.
11. Rules in Allegheny—diminution of record.
12. Rules in Allegheny—super-sedeas—special bail.
13. Rules in Phila.—returns.
14. Rules in Phila.—exceptions.
15. Notice to district attorney.
16. Time limit of issuance of writ.
17. Want of formality when not considered.
18. Right lost by laches.
19. Service of writ.
20. Return day and return of record.
21. Legal effect of certiorari.
22. Amendment of record and transcript.
23. Exceptions.
24. Hearing and consideration.
25. Matters which will or will not be considered.
26. Evidence of facts *dehors* the record.
27. Evidence of fraud, etc.
28. Finality of judgment of the Court of Common Pleas.
29. Costs—stay of execution.
30. Certiorari and appeal cannot be synchronous.

#### I. Signification and nature of writ.

The term *certiorari* has reference to a record and the writ so entitled is generally a command from a superior to an inferior court or officer to certify a record in the matter complained of and send it up for inspection and review. It has been called a writ of error in all but form.<sup>1</sup> Judge Rogers in *Comth. v. McCallister*, says thus:<sup>2</sup>

"A *certiorari* is a writ, where the court would be certified of a record in another, or sometimes in the same court. And he to whom the *certiorari* is directed ought to send the same record, or the tenor of it, as commanded by the writ; and if he fail to do so, then an *alias* is awarded; afterwards a *pluries* with a clause of *vel causam nobis significas*; and then an attachment, if good cause be not returned upon the *pluries*. When the record is removed either by *certiorari* or writ of error, the supreme court have power to examine the record upon which judgment was given, and on such examination to affirm or reverse the same, according to law. The *certiorari* is a judicial writ, issuing out of the court to which the proceedings are to be removed, and is directed to the judge or officer who has the custody of the record or matter to be certified."

It is a writ at common law and as such is still issuable by the

<sup>1</sup> *Welker v. Welker*, 3 P. & W. 21.

<sup>2</sup> 1 Watts, 307.

supreme court to any inferior court under section 3, article 5, of the constitution.<sup>3</sup> It is the appropriate writ for removing a cause before judgment, while a writ of error is the remedy after judgment.<sup>4</sup>

It shall be specially allowed by the supreme court, upon sufficient cause shown, or when sued out with the consent of the commonwealth or by the commonwealth, through the proper district attorney.<sup>5</sup> By this writ the commonwealth, after a defendant is acquitted by the jury, may remove the record for review of a question of law, although defendant cannot be tried again.<sup>6</sup> The writ may be made returnable in a different district from that in which the case arose.<sup>7</sup> Under the act of Feb'y 15, 1870, P. L. 15, in murder and voluntary manslaughter the writ is of right; and by the act of May 19, 1874, P. L. 219, it was provided that it should be a supersedeas in capital cases, but no other, except by special order of the supreme court. The act of March 24, 1877, P. L. 40, further provided that it shall not be allowed except specially, in capital cases after twenty days from the day of sentence.

## 2. Writ to justices, aldermen, etc.

Section 10, article 5, of the constitution (see vol. 1, p. 150) gives judges of the Common Pleas power to issue the writ to justices of the peace and other inferior courts of record, which embraces a burgess who imposes a penalty under an ordinance.<sup>7a</sup>

Section 21, act of March 20, 1810, 5 Sm. L. 161, provides:

"No judge of any court within this commonwealth shall allow any writ of *certiorari* to remove the proceedings had in any trial before a justice of the peace, until the party applying for such writ shall declare on oath or affirmation before such judge,<sup>8</sup> that it is not for the purpose of delay, but that in the opinion of the party applying for the same the cause of action was not cognizable before a justice, or that the proceedings proposed to be removed, are to the best of his knowledge, unjust and illegal, and if not removed, will oblige the said applicant to pay more money, or to receive less from his opponent, than is justly due; a copy of which affidavit shall be filed in the prothonotary's office: *Provided*, That no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered and served within five days thereafter; and no execution shall be set aside in pursuance of the writ aforesaid unless the said writ is issued and served within twenty days after the execution issued."

<sup>3</sup> Comth. v. Delamater, 145 Pa. 210; Comth. v. Burkhart, 23 Pa. 521; Bauer v. Angeny, 100 Pa. 429; Comth. v. Ronemus, 205 Pa. 420.

<sup>4</sup> Comth. v. Frowenfield, 3 Grant, 99.

<sup>5</sup> Section 33, Act. 1860, P. L. 439; Comth. v. Capp, 48 Pa. 53; Comth. v. Simpson, 2 Grant, 438.

<sup>6</sup> Comth. v. Heikes, 26 Pa. 513; Comth. v. Wallace, 114 Pa. 405; Comth. v. Steimling, 156 Pa. 400 (Boyer's Coal Case).

<sup>7</sup> Hazen v. Comth., 23 Pa. 355.

<sup>7a</sup> Bolivar Boro' v. Coulter, 10 D. R. 171.

<sup>8</sup> May also be made before the justice who decided the cause, by Act of May 22, 1895, P. L. 100; Tiers v. Karpeles, 18 D. R. 593; Comth. v. Eades, 7 Jus. L. R. 248.

### 3. The affidavit — form.

3. The act of May 22, 1895, P. L. 100, provides:

"Section 1. It shall be lawful in all cases where parties desire to take a writ of *certiorari* from any court of Common Pleas in this commonwealth to a justice of the peace or alderman within the jurisdiction of said court to enter into the recognizance and make the affidavit, now required by law to be entered into and taken, before the justice or alderman, before whom the case in which said *certiorari* is taken, is pending; and upon the filing of said recognizance and affidavit, together with a *præcipe* as now required by law, with the prothonotary of the court of Common Pleas, such writ of *certiorari* shall issue with like force and effect and in the same manner as though the recognizance had been entered into and affidavit made before such prothonotary."

"Section 2. Nothing herein contained shall prevent any person so desiring from entering into said recognizance and making said affidavit before the prothonotary or other officer now empowered by law to take the same."

This act is cumulative and the affidavit and recognizance unless taken before a judge or the prothonotary of the county, must be taken before the magistrate, justice, etc., who heard the cause.<sup>8a</sup> It is sufficient if the act is substantially followed, but it must aver that it is not taken for the purpose of delay and that if not removed it will oblige the applicant to pay more money or receive less than is justly due.<sup>8b</sup> If the affiant is sworn it is sufficient although he failed to sign the affidavit.<sup>8c</sup>

The affidavit required may be made by the party, his agent or attorney,<sup>9</sup> or, in case of a corporation, by its chief officer, and in his absence, the secretary, treasurer or cashier,<sup>10</sup> but not agent.

Following is a form:

Henry Ziegler	}	Before Henry Meyer, justice of the peace in and for the township of Miles, Center County, Pa.
v. Marius Meyer		

Center County, ss.

Marius Meyer, above named, being duly sworn according to law, doth say that he does not apply for the writ of *certiorari* in the above case for the purpose of delay, but because in his opinion the proceedings proposed to be removed, are, to the best of his knowledge, unjust and illegal and if not removed will oblige him to pay more money than is justly due [or to receive less; or, because the

<sup>8a</sup> *Dorsey v. Wasson*, 25 C. C. 511; *Wesley v. Sharpe*, 19 Supr. C. 600; *Miller v. Trumppore*, 8 Kulp, 459; *Blitha v. Shipowski*, 3 Jus. L. R. 81; *Hicks v. People's, Etc., Assn.*, 1 Jus. L. R. 32; *King v. Wassen*, 24 Lanc. L. R. 7.

<sup>8b</sup> *Monell v. Phillips*, 1 T. & H. Pr., section 891; *Zerbe v. Bewry*, 3 Foster, 14; *Union Furniture Co. v. Housenick*, 12 D. R. 594.

<sup>8c</sup> *Peffer v. Beatty*, 11 Northam. 246.

<sup>9</sup> Under Act March 27, 1833, P. L. 99.

<sup>10</sup> Under Act March 22, 1817, 6 Sm. L. 439; *Washington, Etc., Co. v. Cullen*, 8 S. & R. 517; *Academy, Etc., v. Power*, 14 Pa. 442; *Leehigh County v. Yingling*, 6 C. C. 594.

justice had no lawful jurisdiction, as the case may be], and further saith not.

Marius Meyer.

Sworn to, etc.

This affidavit must substantially follow the language of the act as above.<sup>10a</sup> Where the affidavit fails to state that the party in his opinion will be required to pay more money than is justly due, it is fatally defective.<sup>10b</sup> It may be made by the attorney.<sup>10c</sup>

#### 4. Form of recognizance.

Under the act of March 27, 1853, P. L., in order that the certiorari may be a supersedeas of any execution a recognizance must be entered into, which may be in the following form:

I, Marius Meyer, defendant above named, and Cephas L. Gramly, both of the County of Centre, acknowledge ourselves to be indebted to Henry Ziegler, the plaintiff above named, in the sum of ninety-nine dollars to be levied of our several goods and chattels, lands and tenements, upon condition that if the above named Marius Meyer shall prosecute his writ of certiorari in the above case with effect, or if cast therein that he will pay the debt and costs which may be adjudged or found against him without delay, then this recognizance to be void, otherwise to be and remain in full force and virtue.

Marius Meyer,  
Cephas L. Gramly.

Taken, subscribed and acknowledged before me this 4th day of March, 1910.

\* [Seal.]

Henry Meyer, J. P.

Where the printed and written terms of the recognizance do not agree the part written governs.<sup>11</sup> The giving of a recognizance is not a prerequisite to the issuing of the writ, but it is necessary to supersede execution. Without it, the plaintiff may proceed to enforce his judgment.<sup>12</sup> The taking of a recognizance is a *quasi-judicial* act and it must be done in this case either by the judge or the prothonotary of the county or by the magistrate who heard the cause and no other.<sup>13</sup> The writ cannot be quashed or set aside on the ground that the recognizance is insufficient. The practice is to except when it may be made sufficient.<sup>14</sup>

The recognizance is in force whether the writ is allowed or not, where the defendant who took it, received its benefits.<sup>15</sup> The action upon it being by *scire facias*, judgment may be taken for want of

<sup>10a</sup> Monell v. Phillips, 1 T. & H. Pr., section 891; Zerbe v. Bewry, 3 Foster, 14.

<sup>10b</sup> Union Furniture Co. v. Housenick, 12 D. R. 594.

<sup>10c</sup> Meany v. Cannon, 11 D. R. 25.

<sup>11</sup> Erdman v. Hartman, 7 C. C. 609.

<sup>12</sup> Clark v. McCormack, 2 Phila. 68; Young's Petn., 9 Pa. 215; Leibner v. Rupert, 10 Kulp, 24; Thomas v. Glasgow, 2 D. R. 711; Hoy v. Derr, 7 Jus. L. R. 128; Conklin v. Conklin, 36 Supr. C. 126; McKintosh v. Rishel, 16 D. R. 651.

<sup>13</sup> Wesley v. Sharpe, 19 Supr. C. 600.

<sup>14</sup> Comth. v. Sprout (No. 1), 14 D. R. 356.

<sup>15</sup> Patton v. Miller, 13 S. & R. 254.



an appearance, after two returns of *nihil habet*.<sup>16</sup> The liability of the obligor is fixed when the judgment is reversed as to one though affirmed as to another defendant.<sup>17</sup>

##### 5. Præcipe for writ — form.

Upon filing the affidavit and recognizance with a præcipe for the writ the prothonotary issues it. Following is a form:

Louis Kleckner	}	In the court of Common Pleas of Centre County. Term, 1910.
v. Adam Kahl.		
	No. —	

To J. Calvin Harper, Esq.,  
Prothonotary.

Issue writ of certiorari to Henry Meyer, Esq., justice of the peace in and for Miles Township, said county, to certify and bring up the record in above entitled case, according to the acts of assembly in such case provided.

W. G. Runkle, P. D.

March 7, 1910.

##### 6. Special allowance in summary convictions.

Under the constitution of 1874 and the act of April 17, 1876, P. L. 29, a special allowance is necessary in cases of summary conviction,<sup>17a</sup> and proceedings before a mayor under city ordinances for a penalty.<sup>17b</sup>

In such cases the affidavit, recognizance and præcipe must be presented to the judge of the court of Common Pleas and his allowance formally be entered on the affidavit. In extreme cases it may be allowed *nunc pro tunc*.<sup>17c</sup>

On motion to quash writ in the Common Pleas, the overruling of the motion will be considered equivalent to allowing the writ *nunc pro tunc*.<sup>17d</sup> If the proceedings are clearly irregular on their face the writ may be allowed *nunc pro tunc*.<sup>17e</sup>

Section 2 of the act of April 26, 1855, P. L. 304, made it unnecessary to have a special allowance of the writ in civil cases, but in criminal cases or *quasi*-criminal, such as summary convictions where the proceeding is not merely to sue for and collect a penalty as debts of like amount are recovered it must be specially allowed.<sup>18</sup> The act of 1876, *supra*, is as follows, so far as it relates to summary convictions:

"In all cases of summary conviction in this commonwealth, before a magistrate or court not of record, either party may, within five days after such conviction, appeal to the court of Quarter Sessions

<sup>16</sup> Warner v. Moore, 3 Luz. L. R. 103.

<sup>17</sup> Erdman v. Hartman, 7 C. C. 609.

<sup>17a</sup> Comth. v. Antone, 22 Supr. C. 412; Polites Bros. v. Comth., 57 Pitts. L. J. 264.

<sup>17b</sup> Wilkes-Barre v. Kosek, 1 Kulp, 454; Wilkes-Barre v. Stewart, 10 Kulp 28; 16 Supr. C. 347. (See 11 Kulp, 153.)

<sup>17c</sup> Comth. v. Rider, 7 Jus. L. R. 121.

<sup>17d</sup> Comth. v. Butler, 39 Supr. C. 125.

<sup>17e</sup> Comth. v. Mitchell, 20 Montg. Co. 49.

<sup>18</sup> Comth. v. Antone, 22 Supr. C. 412; Rubel v. Paint Borough, 14 D. R. 117.

of the county in which such magistrate shall reside or court not of record shall be held, upon allowance of the said court of Quarter Sessions or any judge thereof upon cause shown. . . . *Provided*, That all appeals from summary convictions and judgments for penalties shall be upon such terms as to payment of costs and entering bail, as the court or judge allowing the appeal shall direct."

The part of this act relating to suits for penalties was declared unconstitutional because such suits were not embraced in the title.<sup>19</sup> The act of April 22, 1905, P. L. 284, was also declared an infraction of the constitution.<sup>20</sup> The distinction between a summary conviction and a suit for a penalty is that the former is brought in the name of the commonwealth to secure first a conviction and then a judgment for a penalty; while the latter is brought in the name of the commonwealth for the use of a party for the penalty as a debt and implies no turpitude. The two classes are wrongly joined in the act of 1876, *supra*,<sup>21</sup> and are reviewable by appeal to different jurisdictions, one criminal and the other civil.

No allowance is necessary in appealing from an action in *assumpsit* for a penalty;<sup>22</sup> but it was held that the Common Pleas may allow a *certiorari* to review a summary conviction under the fish and game law.<sup>23</sup> If the process be in the name of the commonwealth and the trial and conviction in the name of the city the variance is fatal.<sup>24</sup>

#### 7. Rules of court as to practice.

In the various jurisdictions, the practice is to a certain extent regulated by rules of court. Obviously not all the rules can be given here. Compare your rules with the following in Allegheny and Philadelphia counties.

#### 8. Return day and rule to compel return.

Rule 62, Allegheny County, provides:

"Writs of certiorari shall be made returnable in thirty days from the issuing thereof, and shall be served on the magistrate by the plaintiff at least twenty days before the return day; and if no return is made on or before the return day, upon proof that the writ has been served, a rule may be entered by the prothonotary on the magistrate, his proper representative or successor, as the case may be, to make return thereof immediately, and if such rule is not complied with an attachment may be issued."

#### 9. Rules in Allegheny — dismissal.

Rule 63, Allegheny County, provides:

"It shall be the duty of the plaintiff in error to cause the record

<sup>19</sup> *Mauch Chunk Boro' v. Betzler*, 6 D. R. 330; *Comth. v. Swift*, 17 C. C. 95; *Lesh v. Newton, Etc., Co.*, 3 Lack. Jur. 69; *Comth. v. Fasnacht*, 12 D. R. 327.

<sup>20</sup> *Comth. v. Weiler*, 31 C. C. 550.

<sup>21</sup> *Comth. v. McCann*, 174 Pa. 19.

<sup>22</sup> *South Bethlehem Boro' v. Wyandotte Gas Co.*, 9 Northam. 106.

<sup>23</sup> *Comth. v. Sprout*, No. 1, 14 D. R. 356.

<sup>24</sup> *Scranton v. Smith*, 6 Lack. Jur. 168.

to be returned, and if he neglects for ten days after the return day to take the proper steps to compel a return, the *certiorari* shall be dismissed, of course, by the prothonotary."

**10. Time of filing specifications of error.**

Rule 64, Allegheny County, provides:

"The plaintiff in error shall, within ten days after the return day, assign specifically the errors upon which he relies, and in default thereof the judgment below shall be affirmed, of course, by the prothonotary."<sup>25</sup>

**11. Suggestion of diminution of the record.**

Rule 65, Allegheny County, provides:

"Within ten days after the return, either party may suggest a diminution of the record, founded upon affidavit specifying the matters omitted or defective, and apply for a rule on the magistrate to make a fuller return."

**12. Certiorari not a supersedeas without special bail.**

Rule 61 of Allegheny County (D. R. C. 52), is as follows:

"No writ of *certiorari* shall be a supersedeas, until the prothonotary has given a certificate that the party suing out the same has entered approved bail for the amount of the demand and costs; and the entry and approval of such bail shall be in the same manner and subject to the same rules as bail for stay of execution."

**13. Rules in Philadelphia — returns.**

Section 3 of rule 5, Philadelphia, provides:

"It shall be the duty of the party suing out a writ of *certiorari*, to cause the record to be returned within ten days after its issue, in default of which the *certiorari* shall be dismissed. Rules on magistrates to return writs of *certiorari* directed to them in due season will be granted, if applied for, on the regular motion days."

**14. Rules in Philadelphia — exceptions.**

Section 4:

"In all cases of *certiorari*, the particular exceptions intended to be insisted on must be filed and a copy served on the opposite party two days before the next argument list is called, and in default thereof, the judgment of the magistrate shall be affirmed as of course. The assignment of general errors is insufficient and void."

**15. Notice to district attorney in summary convictions.**

Section 5:

"No motion for the allowance of a *certiorari* from a summary conviction before a magistrate will be entertained unless it appears that forty-eight hours' notice thereof has been given to the district attorney in writing."

Where a rule of court requires the writ to be returned within

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<sup>25</sup> *Karnes v. Rosena, Etc., Co.*, 5 D. R. 752; *Wilkins v. Anderson*, 11 Pa. 399.

twenty days from issuance, a writ returnable next term will be quashed;<sup>26</sup> also where it is not served within five days from its issue.<sup>27</sup>

#### 16. Time limit of issuance of writ.

Black, C. J., said:<sup>28</sup>

"The twenty days limitation does not apply to cases in which the justice has no jurisdiction, either of the parties or the subject-matter, and he has no jurisdiction of the former where they are not legally summoned. The fact that notice was not given may be proved by parol."

This means jurisdiction of cause,<sup>29</sup> but it has been held not of the person.<sup>30</sup>

The limitation applies to civil actions generally, but not to suits for penalties under ordinances.<sup>31</sup> The act of 1810, *supra*, does not repeal the act of April 13, 1791, 4 Carey & Bioren 66, 3 Sm. L. 34, section 20, which is as follows:

"Section 20. No fine or common recovery, nor any judgment in any real, personal or mixed action, nor any appeal from the said register's courts, shall be avoided or reversed, for any defect or error therein, unless the writ of error be commenced, or the appeal brought and prosecuted with effect, within seven years after such fines levied, common recovery suffered, judgment signed or entered of record, or decree be pronounced: *Provided nevertheless*, That if any person, who is or shall be entitled to any such writ of error or appeal, as aforesaid, shall at the time such title accrued, be within the age of twenty-one years, covert, *non compos mentis*, in prison or out of the limits of the United States of America, that then such person, his or her heirs, executors or administrators (notwithstanding the said seven years be expired), shall and may bring his, her or their writ of error or appeal, for the reversing of such fine, recovery or judgment, so as the same be done within five years after his, or her, full age, discovery, coming to sound mind, enlargement out of prison, or return into some one of the United States of America, but not afterwards nor otherwise."

This act which covers certiorari<sup>32</sup> also embraces those cases which are not provided for in section 22 of the act of March 20, 1810, P. L. 161,<sup>33</sup> as, for instance, a mayor's court of a city<sup>34</sup> or a burgess.<sup>35</sup>

<sup>26</sup> Thompson v. McDowell, 7 Jus. L. R. 141.

<sup>27</sup> Miller v. Distilling Co., 36 C. C. 356.

<sup>28</sup> Lacock v. White, 19 Pa. 495; P. & L. Dig., vol. 10, col. 17580.

<sup>29</sup> Comth. v. Butler, 39 Supr. C. 125; Wenger v. Hartman, 22 Lanc. L. R. 61; Woods v. Sampson, 54 Pitts. L. J. 328.

<sup>30</sup> Marvin v. Cloak Co., 14 Luz. L. R. 352.

<sup>31</sup> Caughey v. Mayor, 12 S. & R. 53; Comth. v. Betts, 76 Pa. 465; Wilkes-Barre v. Stewart, 11 Kulp, 153; Wilcox v. Knoxville, 2 D. R. 721; Pittsburg v. Madden, 3 D. R. 771; Leighton v. Roth, 7 D. R. 426.

<sup>32</sup> Young's Pet., 9 Pa. 215; Road in Salem Twp., 103 Pa. 250.

<sup>33</sup> Duffy v. O'Neill, 2 Kulp, 423.

<sup>34</sup> Wilkes-Barre v. Stewart, 11 Kulp, 153; Comth. v. McElwee, 30 C. C. 271.

<sup>35</sup> Rubel v. Paint Boro', 14 D. R. 117. (See P. & L. Dig., vol. 10, col. 17807.)

If the justice had no jurisdiction the Common Pleas has none on appeal.<sup>35a</sup> Except on a question of jurisdiction, *certiorari* will not lie after twenty days, unless good cause be shown for the delay.<sup>35b</sup>

Where the defendant has knowledge of the proceedings and applied to have the judgment opened, he must sue out his writ in twenty days.<sup>36</sup> It has been held the twenty days began to run when the defendant first learned of the judgment and he must have a reasonable time thereafter to sue out his writ.<sup>37</sup>

Under act of March 28, 1870, P. L. 596, as to Erie County and February 29, 1872, P. L. 190, as to Warren County, the defendant must prove to the judge that he had no knowledge of the judgment until the time for appeal had passed, to obtain the allowance of his writ.<sup>38</sup>

In York County, when not taken in twenty days, there must be a special allowance in any case.<sup>38a</sup>

#### 17. Want of formality when not considered.

Section 22 of the act of 1810, *supra*, provides:

"The justice shall certify the whole proceeding had before him, by sending the original precepts, a copy of the judgment and execution or executions, if any be issued: *Provided always*, That the proceedings of a justice of the peace shall not be set aside or reversed on *certiorari* for want of formality in the same if it shall appear on the face thereof that the defendant confessed a judgment for any sum within the jurisdiction of a justice of the peace; or that a precept issued in the name of the commonwealth of Pennsylvania requiring the defendant to appear before the justice on some day certain; or directing the constable to bring the defendant or defendants forthwith before him, agreeably to the provisions and directions contained in this act, and that the said constable having served the said precept, judgment was rendered on the day fixed in the precept or on some other day to which the cause was postponed by the justice, with the knowledge of the parties; and that no execution issued by a justice shall be set aside for informality, if it shall appear on the face of the same that it issued in the name of the commonwealth of Pennsylvania, after the expiration of the proper time, and for the sum for which judgment had been rendered, together with interest thereon and costs, and a day mentioned on which return is to be made by the constable before a justice of the peace; and that the judgment of the court of Common Pleas

<sup>35a</sup> *Birkhead v. Ward*, 35 Supr. C. 235; *Spatz v. Berks County*, 34 C. C. 198; *Meyers v. Lackawanna Co.*, 17 D. R. 317.

<sup>35b</sup> *Orr v. Baltzell*, 24 Montg. Co., 133; *Hastings v. McComsey*, 23 Lanc. L. R. 98.

<sup>36</sup> *Daily v. Bartholomew*, 1 Ashmead, 135; *Young v. Trunkley*, 22 C. C. 127; *Bristol Mfg. Co. v. Smith*, 6 D. R. 332; *Spade v. Drum*, 5 Kulp, 221; *P. & L. Dig.*, vol. 10, col. 17579.

<sup>37</sup> *Stedman v. Bradford*, 3 Phila. 258; *Fowler v. Eddy*, 110 Pa. 117; *Conklin v. Conklin*, 36 C. C. 126; *Morgan v. Miller Brick Co.*, 54 Pitts. L. J. 319.

<sup>38</sup> *Hill v. Olmstead*, 1 W. N. C. 387; *Pagett v. Truby*, 1 C. C. 596; *Sargent v. Richards*, 41 Pitts. L. J. 260.

<sup>38a</sup> *Giesy v. Anstine*, 20 York, 17.

shall be final on all proceedings removed as aforesaid, by the said court, and no writ of error shall issue thereon."

The decision of the Common Pleas on a certiorari is conclusive.<sup>38b</sup>

On judgments for \$5.33 or less the only method of review of the decision by a justice, alderman or magistrate is by *certiorari*, as no appeal lies.<sup>39</sup>

#### 18. Right lost by laches.

The writ is only issuable at the petition of one who discloses that he is a party in interest<sup>40</sup> and, except where the justice was without jurisdiction, the petitioner must proceed within twenty days after judgment or notice of it.<sup>41</sup> If by his own laches he delays unduly, he will lose his right.<sup>42</sup>

#### 19. Service of writ.

Section 21 of the act of 1810 requires service of the writ within five days after it is issued.<sup>1</sup> But where issued on a Saturday and returnable on Monday following, being the term, a reasonable time has been allowed to get service on a justice who is absent.<sup>2</sup> The plaintiff must see to the service.<sup>3</sup> The service required is by the original writ and not a copy, but when the justice returns in response to a copy it will be too late to object.<sup>4</sup> A general appearance by the defendant in error waives the right to object to its irregularity.<sup>5</sup> No notice is required to be given to the plaintiff, by the statute.<sup>6</sup> But where a rule of court requires it, or judgment of *non pros.* it will be enforced.<sup>7</sup>

#### 20. Return day and return of record.

Regularly a writ of certiorari is returnable on the first day of next term, and it is not within the province of a rule of court to change it, the act of June 11, 1879, P. L. 125, not applying.<sup>8</sup> The duty rests upon the party taking the writ to see that the proceedings

<sup>38b</sup> *Borland v. Ealy*, 43 Pa. 111; *Penna. Pulp & Paper Co. v. Stoughton*, 106 Pa. 458; *Boro' v. Wadlinger*, 142 Pa. 308; *Chase v. Miller*, 41 Pa. 403; *Palmer v. Lacock*, 107 Pa. 346. (As to road proceedings, see *Zimmerly v. Road Comrs.*, 25 Pa. 134; *Comth. v. Betts*, 76 Pa. 465.)

<sup>38</sup> *Stewart v. Keemle*, 4 S. & R. 72; *Ellis v. Brewster*, 6 Watts, 277.

<sup>39</sup> *Kerschner v. Mountz*, 4 D. R. 690; *Fenner v. McDaid*, 10 C. C. 262.

<sup>40</sup> *Stedman v. Bradford*, 3 Phila. 258; *Neal v. Duncan*, 9 Montg. 93; *Griffin v. Swick*, 12 C. C. 389; *P. & L. Dig.*, vol. 10, col. 17586; *C. R. A.*, vol. 2, col. 3013.

<sup>41</sup> *Shertzer v. Gonder*, 10 Lanc. Bar, 51; *Piatt v. Mathers*, 22 C. C. 193; *Tamaqua v. Morgan*, 24 C. C. 10; *Bertz v. Troast*, 17 Lanc. L. R. 169; *Fry v. Morgan*, 23 C. C. 662; *P. & L. Dig.*, vol. 10, col. 17591.

<sup>42</sup> *Central R. Co., Etc., v. Megargel*, 1 Lack. L. N. 172; *Richcreek v. Richcreek*, 2 York, 98.

<sup>1</sup> *Hendricks v. Hughes*, 3 Kulp, 9.

<sup>2</sup> *Brady v. Brice*, 4 Kulp, 121.

<sup>3</sup> *Perrego v. Nichols*, 3 Kulp, 472; *Holman v. Freeman*, 2 Jus. L. R. 228.

<sup>4</sup> *Harlan v. Tripp*, 7 D. R. 382.

<sup>5</sup> *Walker v. Hopple*, 16 W. N. C. 495.

<sup>6</sup> *Teter v. Cook*, 2 C. C. 171.

<sup>7</sup> *North Beaver Overseers v. Big Beaver Overseers*, 7 C. C. 340.

are returned accordingly;<sup>9</sup> which means the original precept, copy of record and judgment, as well as execution, if issued.<sup>10</sup> But after the proceedings are returned though later, the writ will not be dismissed.<sup>11</sup> A rule of court limiting the time to ten days after the term will be enforced.<sup>12</sup> The duty of the magistrate is to obey the writ and certify the record as it is before him. He cannot hold it up for costs under act of March 2, 1868, P. L. 257.<sup>13</sup>

## 21. Legal effect of certiorari.

The legal effect of a *certiorari* to a magistrate is that of a writ of error and it does not operate as a supersedeas unless a recognizance is entered into,<sup>14</sup> a bond being insufficient.<sup>15</sup> It was held in one case that where no bail was entered and the record was reversed, a writ of restitution would be refused after execution and sale.<sup>16</sup> The removal of the cause prevents the bringing of a new suit, without discontinuance of the original one.<sup>17</sup>

## 22. Amendment of record and transcript.

In a proper case the justice will be given leave to amend his record after removal so as to conform to the known facts,<sup>18</sup> but the court may in its discretion refuse leave.<sup>19</sup> If diminution of the record be suggested and the record is completed the exceptions fall.<sup>20</sup> If the record is imperfect as returned, a suggestion of diminution followed by a rule on the justice to perfect it, will supply the deficiency. If, as finally returned, it is ambiguous, equivocal or inconclusive, it may be pieced out by parol proof. Just what was done before the magistrate may be shown. If the record affirmatively exhibits a state of facts, it is binding equally upon the parties and the court. If upon any point it is silent, the point may be made out by depositions.<sup>21</sup> Where a part is omitted in the transcript the court may allow an amended transcript to be filed, which will be taken to be the correct one, if there is any variance.<sup>22</sup> But an independent paper from the justice, as to the cause of action, cannot be considered.<sup>23</sup> Amendments as to the service or return of the constable will not be allowed, because that is a matter to be moved

<sup>9</sup> Teter v. Cook, 2 C. C. 171.

<sup>10</sup> Franke v. Dodge (No. 1), 14 Lanc. Bar, 177.

<sup>11</sup> Perrego v. Nichols, 3 Kulp, 472.

<sup>12</sup> Brady v. Brice, 4 Kulp, 121.

<sup>13</sup> Andrews v. Fritz, 13 D. R. 329.

<sup>14</sup> Young's Petn., 9 Pa. 215.

<sup>15</sup> Thomas v. Glasgow, 2 D. R. 711.

<sup>16</sup> Leibner v. Rupert, 10 Kulp, 24.

<sup>17</sup> Stout v. Wertsner, 8 D. R. 507.

<sup>18</sup> Barlement v. Mecke, 22 C. C. 126; Wertzler v. Herschelroth, No. 1, 8 D. R. 423.

<sup>19</sup> Burgan v. Miners Mills Bor., 7 Kulp, 561; Stambaugh v. Baker, 10 D. R. 79; Hall v. Homan, 16 D. R. 789.

<sup>20</sup> Smith v. Ritner, 5 Lanc. L. R. 412.

<sup>21</sup> Woodward, P. J., in Beyerly v. Hunger, 1 Woodward, 354; Harshberger v. Farmer's Nursery Co., 1 Jus. L. R. 221.

<sup>22</sup> Jervis v. McFarlan, 1 Chester Co., 137.

<sup>23</sup> Geistwhite v. Bentzel, 8 York, 181.

before the justice.<sup>24</sup> Amendment as to parties where one partner is dead, has been allowed under the act of May 4, 1852, P. L. 574.<sup>25</sup> The writ itself may be amended so as to strike out the name of the constable where he was joined.<sup>26</sup> If the record as brought up is defective an amendment of the writ as to a defect of form is unnecessary.<sup>27</sup> Amendments before the justice to conform to the facts are allowable.<sup>28</sup>

### 23. Exceptions.

The time and manner of filing exceptions are usually regulated by rule of court, reference to which must be made in each jurisdiction.<sup>29</sup>

As a general rule the court will not notice errors which have not been excepted to;<sup>30</sup> and general exceptions will not avail. The particular error must be specified.<sup>31</sup> But for want of jurisdiction on the face of the record the court will reverse, though no exception was taken on that ground.<sup>32</sup> The same is true of any fatal error which the court discovers.<sup>33</sup>

Where a rule of court provides for affirming the judgment, if exceptions are not filed within a certain number of days, it must be observed,<sup>34</sup> and if not filed within the time required they may not be considered;<sup>35</sup> although this is largely a matter within the disposition of each particular judge.<sup>36</sup> Exceptions to the jurisdiction must be supported by depositions, unless the want of jurisdiction is apparent on the face of the record.<sup>37</sup>

### 24. Hearing and consideration.

Upon hearing the rule of consideration is indicated by sections

<sup>24</sup> *Burgan v. Miners' Mills Bor.*, 7 Kulp, 561; *Newcomb v. Miner*, 5 Kulp, 328; *Hildreth v. Reilly*, 2 Kulp, 270.

<sup>25</sup> *Hartman v. Kottcamp*, 2 York, 215.

<sup>26</sup> *Zerbe v. Bewry*, 3 Foster, 14.

<sup>27</sup> *McCarty v. Dougherty*, 16 C. C. 86.

<sup>28</sup> *Wilderman v. St. Mary's Church*, 13 D. R. 686; *Bridenbaugh v. Hetzler*, 18 York, 154; *Bushey v. Lerew*, 1 Jus. L. R. 118.

<sup>29</sup> See rules in *Allegheny and Philadelphia*, *supra*.

<sup>30</sup> *Curran v. Atkinson*, 1 Ashmead, 51; *Lucas v. Smedley*, 8 Del. Co. 18.

<sup>31</sup> *Lancaster v. Reese*, 14 D. R. 447; *McDole v. Miller*, 16 York, 158; *Neelis v. McKeown*, 6 Phila. 310; *Comth. v. Morgan*, 6 Jus. L. R. 119;

*Orr v. Baltzell*, 24 Montg. Co. 133.

<sup>32</sup> *Herrigas v. McGill*, 1 Ashmead, 152; *Andreas v. Keller*, 2 Northam. 209; *Wilhelm v. Mumma*, 16 D. R. 463; *Wenger v. Hartman*, 22 Lanc. L. R. 61.

<sup>33</sup> *Smith v. Miller*, 12 D. R. 374; *Stouffer v. Beestem*, 18 C. C. 605; *Fire Ins. Co. v. Keller*, 9 D. R. 61; *Chalfan v. Brey*, 23 C. C. 88; *P. & L. Dig.*, vol. 10, col. 17604.

<sup>34</sup> *Dubosq v. Guardians, Etc.*, 1 Binney, 415.

<sup>35</sup> *Hicks v. People's, Etc., Assn.*, 1 Jus. L. R. 32.

<sup>36</sup> *Healy v. Am. Ice Co.*, 18 Montg. Co. 63; *Comth. v. Savery*, 1 Chester Co. 179; *Mulligan v. Knickerbocker Ice Co.*, 2 Kulp, 317; *Egger v. Stine*, 12 C. C. 316.

<sup>37</sup> *McManaman v. Klock*, 9 C. C. 302; *Lucas v. Smedley*, 8 Del. Co. 18.



4 and 22 of the act of 1836, which forbid that the scrutiny be very technical.<sup>38</sup>

One judge, Stanton, who held the quality of justice not strained, lapsed into versified law and quoted:

"Be to their faults a little blind  
And to their virtues very kind."<sup>39</sup>

So every presumption consistent with the record will be made in favor of right conduct and regularity of proceeding,<sup>40</sup> and mere want of formality will be insufficient basis for reversal.<sup>41</sup> This is especially so where the right of appeal exists; but where it does not, the courts will exercise a finer scrutiny.<sup>42</sup> The court will not go into the merits of the case.<sup>42a</sup>

#### 25. Matters which will or will not be considered.

Numerous cases illustrate what the courts will consider, for which reference is made to P. & L. Digest, vol. 10, col. 17611 *et seq.* The court will not consider the merits of the cause before the magistrate,<sup>43</sup> and will therefore not review the evidence or its sufficiency,<sup>44</sup> except where the only evidence was incompetent;<sup>45</sup> or where the defense went to the jurisdiction, as in case of former recovery;<sup>46</sup> or another suit pending;<sup>47</sup> or when the claim should have been presented as a set-off in a prior suit.<sup>48</sup> The judgment will be reversed where it appears that the justice was partial and unfair<sup>49</sup> and he with the plaintiff combines to oppress the defendant,<sup>50</sup> and the justice misbehaved himself in office.<sup>51</sup> But the evidence must be strong enough to overcome the presumptions which clothe the officer.<sup>52</sup>

<sup>38</sup> Goodman v. Moyer, 1 Woodward, 92; Moore v. Messersmith, 2 D. R. 483; Davenport v. Mahon, 6 Kulp, 350.

<sup>39</sup> Prendergast v. O'Donnell, 7 Luz. L. R. 78; Comth. v. Challis, 8 Supr. C. 130; Comth. v. Mfg. Co., 6 D. R. 429.

<sup>40</sup> Gibbs v. Alberti, 4 Yeates, 373; Bradley v. Flowers, 4 Yeates, 436; Cope v. Buck, 3 Lanc. L. R. 353; Tombler v. Buzzard, 4 Northam. 279; Barnett v. Cleveland, 10 Del. Co. 77; Evans v. Brobst, 5 D. R. 30; P. & L. Dig., vol. 10, cols. 17608-9-10; C. R. A., vol. 2, col. 3017.

<sup>41</sup> Kerr v. Lowry, 2 D. R. 371; Cooke v. Shoemaker, 17 C. C. 641.

<sup>42</sup> Dauphin, Etc., Co. v. Pidgeon, 7 C. C. 448.

<sup>42a</sup> Freidinger v. Emig, 20 York, 84; Griffith v. Eichenberg, 17 D. R. 341.

<sup>43</sup> Kerr v. Lowry, 2 D. R. 371; vol. 2, C. R. A., col. 3017.

<sup>44</sup> Leslie v. Doyle, 1 Kulp, 272; Ziegler v. House, 1 D. R. 609; Harris v. Burke, 2 Kulp, 520; P. & L. Dig., vol. 10, cols. 17613-4; Todd v. Sherako, 12 Luz. L. R. 338.

<sup>45</sup> Sharpe v. Thatcher, 2 Dallas, 77; Vansciver v. Bolton, 2 Dallas, 114; Buckmyer v. Dubs, 5 Binney, 29.

<sup>46</sup> Light v. Ringler, 1 C. C. 156; Beynon v. Peterson, 7 Kulp, 259; Stouffer v. Beetem, 18 C. C. 605.

<sup>47</sup> Nalen v. Burke, 12 C. C. 490; Heaney v. Faust, 20 C. C. 73.

<sup>48</sup> Slyhoof v. Flitcraft, 1 Ashmead, 171; Stewart v. Norris, 2 Kulp, 311; Dumber v. Jones, 1 Ashmead, 215.

<sup>49</sup> Riley v. Enama, 9 Kulp, 187.

<sup>50</sup> Bean v. Yerger, 14 Montg. 89.

<sup>51</sup> McIlvaine v. Moran, 1 Chester Co. 458; Schmidt v. Johnson, 47 Pitta. L. J. 105.

<sup>52</sup> Sample v. Shidel, 20 C. C. 357.

He will not be reversed for a defect in the form of the execution,<sup>53</sup> nor because the execution has not been returned;<sup>54</sup> nor because he neglected to appeal pending negotiations for settlement<sup>55</sup> or for matters which might have been reached by appeal, such as misnomer.<sup>56</sup> If the justice had no jurisdiction of a part of the matter, it must be reversed.<sup>57</sup> But when irregular in part the court may quash in part and affirm in part.<sup>58</sup> When the record shows that a summons was issued it will not be reversed because the original is not sent up with the transcript.<sup>59</sup>

## 26. Evidence of facts dehors the record.

Although the general rule is that nothing but the record will be considered and no facts *aliunde* be admitted<sup>1</sup> and that the record imports verity<sup>2</sup> and cannot be contradicted by parol,<sup>3</sup> yet there are cases in which parol evidence is admissible to explain what is dubious,<sup>4</sup> as judgment after an indefinite adjournment without notice;<sup>5</sup> or reopening the case and giving judgment without notice;<sup>6a</sup> or to show want of jurisdiction,<sup>6b</sup> or that no evidence was given<sup>6c</sup> or that the summons was issued in blank.<sup>6d</sup> But a constable's return as a rule cannot be contradicted except for fraud.<sup>6e</sup>

The appellate court will not hear depositions as to what were the proofs before the magistrate;<sup>6</sup> however on a question of jurisdiction it will,<sup>7</sup> even if it contradicts the record,<sup>8</sup> but it is confined to what the depositions show,<sup>9</sup> and the writ must be taken out within twenty days where the defendant was duly served and knew of the

<sup>53</sup> *Kerr v. Lowry*, 2 D. R. 371.

<sup>54</sup> *Schaefer v. Smith*, 2 Foster, 52.

<sup>55</sup> *Henninger v. Woodring*, 2 Penny. 205.

<sup>56</sup> *Alexander v. Goldstein*, 13 Supr. C. 518; *Grube v. Getz*, 3 C. C. 124.

<sup>57</sup> *Ream v. Rock*, 15 Lanc. L. R. 327; *Grosky v. Wright*, 2 Kulp, 415.

<sup>58</sup> *Karnes v. Rosena Furnace Co.*, 5 D. R. 752.

<sup>59</sup> *Phila. v. Moore*, 8 Phila. 238.

<sup>1</sup> *Dumber v. Jones*, 1 Ashmead, 215; *Fisher v. Nyce*, 60 Pa. 107.

<sup>2</sup> *Saul v. Geist*, 1 Woodward, 306; *Luke v. Schleger*, 3 Kulp, 505.

<sup>3</sup> *Beyerly v. Hunger*, 1 Woodward, 354; *Williams v. McNeal*, 3 Luz. L. R. 37; *Haggerty v. Wurzbarger*, 6 Kulp, 416.

<sup>4</sup> *Eisenhart v. Hykes*, 4 Lanc. L. R. 98; *Fitzsimmons v. Evans*, 1 Ashmead, 52n.

<sup>5</sup> *Van Why v. Burgunder*, 3 Kulp, 202.

<sup>6a</sup> *Spriggle v. Millington*, 5 Jus. L. R. 140.

<sup>6b</sup> *Telike v. Mathievith*, 13 Luz. L. R. 212; *Turner v. Belles*, 15 D. R. 973; *Snyder v. Miller*, 20 York, 140; *Keech v. Price*, 16 D. R. 766.

<sup>6c</sup> *Cons. Tel. Co. v. Blakeslee*, 16 D. R. 777.

<sup>6d</sup> *Speicher v. Franklin*, 15 D. R. 723.

<sup>6e</sup> *Giesy v. Anstine*, 20 York, 17; *Whiteman v. Miner's, Etc., Dist.*, 17 D. R. 470; *Johnson v. Kline*, 14 Luz. L. R. 99; *Cooper v. Manning*, 8 Lack. Jur. 370; *Cox v. McGill*, 15 D. R. 571; *Easton v. Cericola*, 11 Northam. 252.

<sup>7</sup> *Buckmyer v. Dubs*, 5 Binney, 29.

<sup>8</sup> *Burginhofen v. Martin*, 3 Yeates, 479; *Light v. Ringler*, 1 C. C. 156; *Jones v. Thistle Lodge*, 10 Kulp, 52; *Ringwalt v. Swayne*, 13 Lanc. L. R. 357; *P. & L. Dig.*, vol. 10, col. 17625.

<sup>9</sup> *Youngblood v. Folkner*, 2 Kulp, 429; *Torbert v. Yocum*, 2 Foster, 319.

<sup>10</sup> *Cummins v. Leopard*, 4 Kulp, 430; *Creveling v. Kindig*, 3 Kulp, 217.

action.<sup>10</sup> Authorities differ as to whether the constable's return may be contradicted on the question of jurisdiction of the person of the defendant. Some hold that it may, but the evidence must be free from doubt.<sup>11</sup> Whilst others hold it is incompetent.<sup>12</sup> If the constable's return was altered this may be shown.<sup>13</sup> It may be shown that defendant had been legally declared a lunatic.<sup>14</sup> If the evidence sent up varies from the transcript the court will take the transcript as true.<sup>15</sup> The record cannot be explained by an *ex parte* affidavit,<sup>16</sup> nor will evidence not offered on the trial be considered.<sup>17</sup> Evidence *dehors* the record will only be considered on want of jurisdiction, fraud or unfairness and when it is excepted that there was no evidence.<sup>18</sup> Parol evidence is admissible to show that the docket was falsely made up;<sup>19</sup> or that the return of service is false.<sup>20</sup> But where the return is regular and it is not alleged that it was not made, it cannot be challenged by a copy.<sup>21</sup>

### 27. Evidence of fraud, etc.

Upon *certiorari*, as already stated, the court will hear evidence to prove fraud, corruption or partiality on the part of the magistrate.<sup>22</sup> Where the good faith of the proceeding is attacked it is proper for the court to know what occurred;<sup>23</sup> as e. g., to the date of the judgment when it is alleged the writ was sued out within twenty days;<sup>24</sup> or that the justice refused to hear a party's testimony<sup>25</sup> or falsified his docket entries,<sup>26</sup> which requires clear proof;<sup>27</sup> or that he was related to a party, disqualifying him;<sup>28</sup> or that judgment was entered by default without hearing any evidence.<sup>29</sup> But it is doubtful

<sup>10</sup> Neff v. Gallagher, 16 C. C. 219.

<sup>11</sup> Stouffer v. Beetem, 18 C. C. 605; P. & L. Dig., vol. 10, col. 17628.

<sup>12</sup> Link v. Repple, 7 C. C. 138; Bankert v. Sautt, 6 York, 157; Foy v. Rice, 3 Lack. Jur. 17; Young v. Trunkley, 22 C. C. 127; Biles v. Basler, 24 C. C. 3.

<sup>13</sup> Fidelity, Etc., Co. v. Ketrick, 3 Kulp, 225.

<sup>14</sup> Chase v. Stevens, 8 D. R. 394.

<sup>15</sup> Appell v. Oppenheimer, 12 D. R. 602.

<sup>16</sup> Moskovitz v. Orangers, 13 D. R. 153.

<sup>17</sup> Wagner v. Warrior Run Sch. Dist., 12 Luz. L. R. 195; Brubaker v. Sheibley, 19 Lanc. L. R. 241.

<sup>18</sup> Tammany Furn. Co. v. Dewey, 10 Kulp, 198; 2 C. R. A., col. 3019.

<sup>19</sup> Ansley v. Behres, 4 Lack. Jur. 331; Smith v. Miller, 12 D. R. 374.

<sup>20</sup> Bertzfield v. Bertzfield, 21 Lanc. L. R. 370; Minogue v. Ashland Boro', 14 D. R. 464; 27 Supr. C. 506; Comth. v. Blankenmyer, 8 Del. Co. 400; Nissley v. Hoffman, 20 Lanc. L. R. 49; Brown v. Cohn, 21 Lanc. L. R. 310.

<sup>21</sup> Kelly v. Eckenstein, 31 C. C. 651; Delaware Mer. Co. v. Fulton, 15 York, 106; Sibbett v. Central, Etc., Co., 17 York, 133.

<sup>22</sup> Shell v. McConnell, 1 Pearson, 27; York, Etc., Co. v. Farez, 17 C. C. 129; P. & L. Dig., vol. 10, col. 17631.

<sup>23</sup> Fisher v. Nyce, 60 Pa. 107.

<sup>24</sup> Shell v. McConnell, 1 Pearson, 27.

<sup>25</sup> Henley v. Potter, 3 C. C. 206.

<sup>26</sup> Comth. v. Blessington, 3 Lanc. L. R. 153; Neff v. Gallagher, 16 C. C. 219; Castner v. Fanning, 3 Kulp, 17.

<sup>27</sup> Clark v. Sheridan, 5 Kulp, 95; Orth v. Groff, 7 Lanc. L. R. 415.

<sup>28</sup> Spidle v. Robison, 2 C. C. 642.

<sup>29</sup> Eckstein v. McCoy, 3 Lanc. L. R. 178; Baker v. Richart, 2 D. R. 195.

whether the court should inquire into the competency of depositions before the justice.<sup>30</sup> If jurisdiction be non-apparent on the face of the record it is seldom that the court will give leave to supply it by parol.<sup>31</sup> Depositions have been admitted to show that the hour of hearing was changed at defendant's request.<sup>32</sup> To bring matters to the attention of the court regularly it must be done regularly by depositions on a rule granted by the court and not by affidavits.<sup>33</sup> A reargument will not be granted for alleged after-discovered evidence and law.<sup>34</sup>

### 28. Finality of judgment of the court of common pleas.

The judgment of the court of common pleas is final in a civil suit, as provided in section 22 of the act of 1810, *supra*,<sup>35</sup> and an appeal will be quashed.<sup>36</sup> The same is true under the enlarged jurisdiction of the act of July 7, 1879, P. L. 194,<sup>37</sup> and also under the trespass act of March 22, 1814, 6 Sm. L. 182.<sup>38</sup> The judgment becomes a judgment of the common pleas on which execution properly issues on *præcipe* to the prothonotary,<sup>39</sup> and this is also final.<sup>39a</sup>

When the writ is *non-prossed* the record is remitted to the justice for execution;<sup>40</sup> and the *sci. fa. sur.* recognizance must be issued out of the court where the record is, to-wit: the justice's office.<sup>41</sup> Since the act of May 11, 1901, P. L. 164, where the cause is reversed and judgment entered for the defendant, it carries costs and will be entered in the common pleas as a judgment of that court. The act is as follows:

"In all cases where any civil proceedings shall be removed by *certiorari* from before a justice of the peace by the defendant, that, in case said proceedings are reversed and judgment given by the court for the defendant, said judgment shall be entered of record in the prothonotary's office, and shall carry with it all costs incurred in the case."

<sup>30</sup> *Rickets v. Goldstein*, 24 C. C. 1.

<sup>31</sup> *Bennett v. R. Co.*, 7 Phila. 11; *Barnett v. Fisher*, 5 D. R. 277; *Limerick, Etc., Co. v. Taggart*, 12 Montg. 97; P. & L. Dig., vol. 10, col. 17636.

<sup>32</sup> *Hallman v. Vickers*, 8 Montg. Co. 96.

<sup>33</sup> *Jones v. Pettit*, 4 W. N. C. 14; *Sheffer v. Hess*, 5 C. C. 145; *Metro-politan, Etc., Co. v. Keating*, 5 Kulp, 357.

<sup>34</sup> *Eby v. Ream*, 9 Lanc. L. R. 33; No. 2, p. 250.

<sup>35</sup> *Cozens v. Dewees*, 2 S. & R. 112; *Diehm v. Parkes*, 1 Mona. 174; *Carroll v. Barnes*, 11 Supr. C. 590; *Allegheny, Etc., Co. v. Gundling*, 33 Supr. C. 621.

<sup>36</sup> *Crumley v. Crescent Coal Co.*, 13 Supr. C. 231; *Alexander v. Goldstein*, 13 Supr. C. 518; *Borland v. Ealy*, 43 Pa. 111.

<sup>37</sup> *Penna., Etc., Co. v. Stoughton*, 106 Pa. 458; *Stewart v. Lindsay*, 3 Penny. 85; *Phoenix, Etc., Co. v. Mullen*, 25 Supr. C. 547; *Fry v. Spatz*, 29 Supr. C. 592.

<sup>38</sup> *Minogue v. Ashland Bor.*, 27 Supr. C. 506; *Huntingdon, Etc., R. Co. v. Fluke*, 32 Supr. C. 126.

<sup>39</sup> *Robbins v. Whitman*, 1 Dallas, 410; *Echoff v. Harlan*, 1 Chester Co. 101.

<sup>39a</sup> *Deering Harvester Co. v. Zink*, 33 Supr. C. 512; *Adams v. Berge*, 30 Supr. C. 422.

<sup>40</sup> *Warner v. Moore*, 3 Luz. L. R. 108; *Welker v. Welker*, 3 P. & W. 21.

<sup>41</sup> *Tobin v. Griffith*, 4 Luz. L. R. 114; 6 Luz. L. R. 110.

The plaintiff below may begin another action without payment of costs unless judgment is entered in the common pleas for costs as required by the act of 1901, *supra*.<sup>42</sup> The defendant in error has a right of action for his costs, where no judgment is entered.<sup>43</sup> The common pleas has no power, on *certiorari*, to award an issue on disputed facts;<sup>44</sup> and where the judgment has been affirmed, the court will not open it to let the defendant into a defense.<sup>45</sup> The finality of the judgment of the common pleas must be understood to apply to a class of cases embraced in the act of 1810, *supra*. In cases arising under the landlord and tenant law, the principle does not apply.<sup>46</sup> Section 22 of the act of 1810, *supra*, applies to magistrates in Philadelphia.<sup>47</sup> By act of March 24, 1865, P. L. 750, relating to Philadelphia a writ of *certiorari* operates as a *supersedeas* in proceedings by landlords to oust their tenants if issued within ten days after judgment and if security be given as required. The finality of the judgment affects all the proceedings in the cause.<sup>48</sup>

### 29. Costs — stay of execution.

Section 25 of the act of 1810, *supra*, provides:

"In all cases where the proceedings of a justice of the peace shall be removed by *certiorari* at the instance of the plaintiff and the same be set aside by the court, and on a second trial being had before the same or any other justice of the peace, if judgment shall not be obtained for a sum equal to or greater than the original judgment which was set aside by the court, he shall pay all costs accrued on the second trial before the justice of the peace, as well as those which accrued at the court before whom the proceedings have been set aside, including any fees which the defendant may have given any attorney, not exceeding four dollars, in such trial, together with fifty cents per day to the said defendant, while attending on the said court in defense of the proceedings of the said justice of the peace."

A similar provision follows when defendant sues out the writ. The conclusion of the section is:

"Which costs shall be recovered before any justice of the peace, in the same manner as sums of a similar amount are recoverable; and in such cases the legal stay of execution shall be counted from the date of the original judgment rendered by the justice of the peace."

The application of this section depends upon the comparison of successive judgments.<sup>49</sup> For the various cases under this section, see P. L. Dig. of Dec., vol. 10, cols. 17643-4-5-6.

<sup>42</sup> Nissley v. Hoffman, 22 Lanc. L. R. 339.

<sup>43</sup> Nagle v. Grale, 26 C. C. 198.

<sup>44</sup> Pool v. Morgan, 10 Watts, 53.

<sup>45</sup> Williams v. Moore, 9 Kulp, 310.

<sup>46</sup> Clark v. Yeat, 4 Binney, 185; Fowler v. Eddy, 110 Pa. 117. (See Murdy v. McCutcheon, 95 Pa. 435.)

<sup>47</sup> Carroll v. Barnes, 11 Supr. C. 590.

<sup>48</sup> Silvergood v. Storrick, 1 Watts, 532; Palmer v. Lacock, 107 Pa. 346.

<sup>49</sup> Hartman v. Bechtel, 1 Woodward, 140; Atkinson v. Crossland, 4 Watts, 450.

An order setting aside the justice's proceedings cannot be vacated after the term, on a question of costs.<sup>49a</sup>

### 30. Certiorari and appeal cannot be synchronous.

The rights to an appeal and *certiorari* are not to be exercised synchronously.<sup>50</sup> Where a party has assumed both remedies, he will be permitted to elect which he will abandon and which pursue.<sup>51</sup> He may abandon his appeal and take out a *certiorari*.<sup>52</sup> An ineffectual appeal is no bar to a *certiorari*, as such.<sup>53</sup> But an appeal will not be allowed *nunc pro tunc*, after argument and affirmance of the record.<sup>54</sup> An appeal taken at the same time as a *certiorari* will be dismissed.<sup>55</sup> On a motion to reinstate an appeal a *certiorari* is irregular and when the appeal is reinstated, the *certiorari* will be quashed.<sup>56</sup> The quashing of a *certiorari* to an original judgment does not prevent an appeal from the judgment of revival.<sup>57</sup>

<sup>49a</sup> Killian v. Risbell, No. 3, 16 D. R. 702.

<sup>50</sup> Phila. v. Kendrick, 1 Brewster, 406; Russell v. Shirk, 3 C. C. 287; Mullen v. Phoenix, Etc., Co., 51 Pitts. L. J. 127.

<sup>51</sup> Ward v. Harligan, 1 W. N. C. 72; Teter v. Cook, 2 C. C. 171.

<sup>52</sup> Comth. v. Fiegle, 2 Phila. 215; Hibbert v. Scull, 9 Del. Co. 190.

<sup>53</sup> Covert v. Harrower, 2 Jus. L. R. 1.

<sup>54</sup> Dehart v. Kerlin, 4 C. C. 396; Finley v. Smith, 7 C. C. 661; Wertzler v. Herschelroth, 8 D. R. 426.

<sup>55</sup> Phila. v. Kendrick, 1 Phila. 406.

<sup>56</sup> Schlager v. Horn, 4 Kulp, 357.

<sup>57</sup> Watson v. Wehrly, 2 D. R. 530.

## CHAPTER XI.

### JUDGMENTS.

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64. Effect of revival as to purchasers, etc.
65. Effect on lien by various proceedings.
66. *Scire facias* to revive — practice on.
67. Service on legal representatives.
68. Effect of issuance as revival.
69. Restricted lien — revival a new judgment.
70. Defenses to *sci. fa.*
71. Effect of judgment of revival.
72. Lien as to attachment execution, etc.
73. Revival before due.
74. Lien by *sci. fa.* and *fi. fa.*
75. Lien of award.
76. Lien of judgment transferred to another county.
77. Judgment docket and entry of liens.
78. Opening judgment — payment into court.
79. Petition to open judgment on a lease.
80. Form of petition.
81. Judgment *non obstante verdicto*.
82. Effect of the act of 1905.
83. Judgment on verdict — rule in Phila.
84. Rule to open judgment.
85. Motion to strike off a judgment.
86. Satisfaction of judgments.
87. Special provisions in Phila.
88. Notice to be given.
89. Issue or appointment of an auditor.
90. When prothonotary may enter satisfaction.
91. Satisfaction by process of law, entry of.
92. Satisfaction on petition and hearing.
93. Satisfaction to be marked on all the dockets.
94. Form of petition to open judgment averred to be fraudulent.
95. Form of order granting rule to show cause.
96. Answer.
97. Form of petition for issue.
98. Form of order awarding issue.
99. Form of order for judgment on the verdict.
100. Form of judgment on the verdict.
101. Form of *præcipe* for judgment.



### 1. Judgments defined.

"Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record."<sup>1</sup> In approving this definition Chief Justice Gibson<sup>2</sup> quotes Coke: "*Judicium quasi juris dictum*, the very voice of law and right; and therefore *judicium semper pro veritate accipitur*."

"A judgment is the conclusion of law, either upon the facts found or admitted by the parties, or upon their default in the course of the suit."<sup>3</sup> It is either interlocutory, i. e., given in the midst of the cause upon some plea, proceeding or default,<sup>4</sup> or it is final, putting an end to the action by an award of redress to one party, or discharge of the other.

By statute of 3d and 4th William IV, C. 42, section 18, it was enacted that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have any relation to any other day: *Provided*, That it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*."

### 2. Judgments on pleas.

If judgment be for the plaintiff on verdict, under plea of abatement, it is peremptory, *quod recuperat*, and therefore, in actions for damages, if the jury do not assess them, a *venire de novo* must be awarded. But if it be on demurrer, or on replication of *nul tiel* record, it is not final, but merely a *respondeat ouster*. Judgment for the defendant is, that the writ be quashed, unless the matter pleaded in abatement is some temporary disability, such as infancy, etc., in which case the judgment is that the plaintiff must remain without day, until, etc.<sup>5</sup>

Judgment in demurrer is either interlocutory or final, in the same manner as judgment by default. If the defendant plead several matters to the same or several counts of the declaration and the plaintiff demur to some of the pleas and take issue upon others, if the defendant succeed upon any of them and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact, should they be found for him; but the only judgment that shall be entered is *nil capiat per breve*.<sup>6</sup> Judgment upon the plea of *nul tiel* record is also either final or interlocutory.

### 3. Judgment on verdict.

Following the practice of England, upon a verdict of a jury, four days are allowed before entry of judgment, to enable the defeated party to move for a rule for a new trial, or in arrest of judgment. If the last of the four days comes on Sunday, the motion may be made on the day following under act of 1883.

This subject is treated under "New trial," *supra*.

<sup>1</sup> Blackstone's Com. Book 3, 395\*.

<sup>2</sup> Campbell v. Kent, 3 P. & W. 72-7.

<sup>3</sup> Troubat & Haly's Pr. (1837), section 1c. 27.

<sup>4</sup> Wharton's Law Lexicon.

<sup>5</sup> Tidd's Pr. 642.

<sup>6</sup> 1 Saunder's Pleading, 80n.

Before the successful party is entitled to have a judgment entered upon the verdict he should pay the jury fee of four dollars to the sheriff and exhibit a receipt to the prothonotary,<sup>7</sup> who thereupon enters judgment formally upon the docket unless there be a motion or rule pending as above.<sup>8</sup> The pleadings and the record will indicate the scope of the judgment.<sup>9</sup> As to judgments upon awards of referees and arbitrators, see "Trials," *supra*. Also judgments upon causes tried by the court.

#### 4. Signing and entering judgment.

By the act of March 21, 1772 (section 2), 1 Sm. L. 390, it is provided:

"That any judge or officer of any of the courts of record within this province, that shall sign any judgments, shall at the signing the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket or record, which he shall sign, which day of the month and year shall be also entered upon the margin of the record where the said judgment shall be entered."

#### 5. Time of taking effect.

Section three of the same act provides as follows:

"That such judgments, as against purchasers, *bona fide*, for valuable consideration of lands, tenements or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of return of the original, or filing of the bail (bail), any law, usage, or course of any court, to the contrary notwithstanding."

#### 6. When judgment relates back.

This section has been held to apply for the protection of innocent purchasers and incumbrancers and not to a plaintiff in a domestic attachment against the same defendant; for, as to him, the judgment relates back to the first day of the term according to the English rule.<sup>10</sup> The same rule was held as to a defendant who died solvent, during the term and before the judgment was formally entered, so as to enable the plaintiff to issue execution thereof, without a *scire facias*; but if he had been insolvent, the case would have been different.<sup>11</sup> This fiction is thus explained by Nelson, J., U. S. Supreme court:<sup>12</sup>

"If the execution can be regularly *tested* in the lifetime of a deceased defendant, it may be taken out and executed against his goods and chattels after his death, the same as if that event had not intervened. The theory or fiction upon which this result is ar-

<sup>7</sup> Act Mar. 29, 1805, 4 Sm. L. 237. (See rules of court on this subject.)

<sup>8</sup> *Hussey v. White*, 10 S. & R. 346.

<sup>9</sup> *Coyle v. Reynolds*, 7 S. & R. 328; *Reidenauer v. Killinger*, 11 S. & R. 119.

<sup>10</sup> *Hooton v. Will*, 1 Dallas, 450.

<sup>11</sup> *Leiper v. Levis*, 15 S. & R. 108.

<sup>12</sup> *Erwin's Lessee v. Dundas*, 4 Howard, 58 (75).

rived at is, that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant, and the goods being bound from the teste, or presumed issuing, execution upon them is deemed to have commenced in the lifetime of the party, and being an entire thing, may be completed notwithstanding his death."

#### 7. Judgment index.

"In addition to the entries made by the prothonotaries of the several courts in their respective appearance, continuance or judgment dockets an entry of the parties' names, term and number, date and amount of the judgment is made in a docket, called the judgment-index, in alphabetical order, commencing with the name of the debtor; and referring to the judgment itself. It was originally invented by courts for their own ease, as well as the security of purchasers to avoid the inconvenience of turning over the rolls at large; and the practice of docketing judgments appears to have first obtained in the court of Common Pleas, where the dockets were entered on a separate roll, called the docket roll." \* \* \*

"The judgment-index may be referred to at reasonable times by the attorneys of the courts, and presents to creditors, purchasers and others a ready access to information, important to their respective interests. As the officers are liable for the consequences of neglect in the entering or searching for judgments, particular accuracy is requisite in the discharge of this branch of their duties." <sup>13</sup>

#### 8. Entry of judgment *nunc pro tunc*.

"Entry of judgment *nunc pro tunc*, is not of right but of favor. It rests in discretion, influenced, in its exercise, by peculiarity of circumstances; and its propriety is not, therefore, to be inquired into by writ of error. It might be otherwise by appeal, were that form of removal provided. \* \* \* A party seeking to avoid the consequences of delay, must not appear to have consented, much less contributed, to its production; and here judgment was suspended by exceptions on both sides, of which the procrastination attempted to be charged exclusively on the defendant, was the inevitable consequence." <sup>14</sup>

#### 9. Interest on judgments.

Section 2 of the act of 1700, 1 Sm. L. 7, providing for execution on lands, is as follows:

"That the lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale, or till satisfaction be made." <sup>15</sup>

Whilst this rule is enforced as to sheriff's sales a different rule obtains in the Orphans' court where interest is calculated to the

<sup>13</sup> Wharton's *Troubat & Haly's Practice*, vol. 1, p. 554.

<sup>14</sup> *Ley v. The Union Canal*, 5 Watts, 104.

<sup>15</sup> *Potter v. Langstrath*, 151 Pa. 216, citing *Siter's Ap.*, 26 Pa. 178; *Bachdell's Ap.*, 56 Pa. 386.

return day of the sale instead of the day of sale;<sup>16</sup> and in the case of an assigned estate interest is calculated to the day of final confirmation of the sale.<sup>17</sup> Upon a *levari facias*, interest is reckoned to the day of sale, upon the judgment on the *sci. fa. sur* mortgage which gives interest upon interest to that extent.<sup>18</sup>

Interest is a legal incident of every judgment and continues to the time of sale or until satisfaction is made. A defendant who pays into court cannot thereby stop interest.<sup>18a</sup>

#### 10. Entry of judgment on warrant.

Section 28 of the act of February 24, 1806, 4 Sm. L. 278, provides:

"That it shall be the duty of the prothonotary of any court of record, within this commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney at law or other person to confess judgment, to enter judgment against the person or persons, who executed the same for the amount, which from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar,<sup>19</sup> to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing, on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid."

#### 11. Entry of judgment on several notes.

The act of May 26, 1897, P. L. 94, provides:

"Whenever hereafter any person or persons shall be the owner or owners of two or more notes containing authority to enter judgment, all executed by the same person or persons which are over due or may become due at the same time, and each containing a warrant of attorney authorizing the entry of judgment thereon, it shall be lawful for the owner or owners of said notes, at their option, to combine the same and to cause the entry of a single judgment on all said notes in any of the ways authorized in the warrants of attorney contained therein."<sup>20</sup>

#### 12. Præcipe for judgment.

The act of April 22, 1889, P. L. 41, provides:

"The courts of this commonwealth may, by rule or standing order,

<sup>16</sup> Ramsey's Ap., 4 Watts, 71. (See Wanger's Ap., 14 W. N. C. 429, where interest was allowed to the confirmation.)

<sup>17</sup> Burkholder's Ap., 94 Pa. 522, citing Carver's Ap., 89 Pa. 276; Tomlinson's Ap., 90 Pa. 224; Herbst's Ap., 90 Pa. 353.

<sup>18</sup> Mohn v. Hiester, 6 Watts, 53.

<sup>18a</sup> Watson v. McManus, 223 Pa. 583. (See Shippen, Ch. J., in Fitzgerald v. Caldwell, 4 Dallas, 252, quoted as to judgment before a justice of the peace in Berryhill v. Wells, 5 Binney, 56.)

<sup>19</sup> Act of April 2, 1868, P. L. 3, specifies 75 cents.

<sup>20</sup> Hollon v. Hirst, 14 D. R. 195.

authorize the prothonotary to enter judgment upon præcipe for want of an appearance, for want of a declaration or plea, or for want of an affidavit of defense, and to enter judgment thereon with the same effect as if moved for in open court."

### 13. By whom the entering of judgment may be procured.

The scope and effect of the act of 1806, *supra*, is to authorize the prothonotary to enter judgment on the application of the plaintiff or his assignee without the intervention of an attorney, and there must be a clearly expressed power and authority—a mere wish or desire being defective.<sup>21</sup> A want of authority cannot be cured, though a defect in the execution of a power may be amended.<sup>22</sup> Whilst a defendant may appear in person and confess judgment authorizing its entry,<sup>23</sup> if he applies for judgment on such warrant, without authority from the holder, it will be held irregular and stricken off.<sup>24</sup> The prothonotary will be liable if he wilfully neglects any duty, in making the entry.<sup>25</sup> The mere omission of the pronouns in filling out the note does not minimize the power.<sup>26</sup> The warrant to confess and not a copy must be before the prothonotary at the time,<sup>27</sup> and he marks it filed as a record. If the paper is itself a confession there need be no warrant of attorney.<sup>28</sup> Where the authorization is on default judgment may be entered, and when the power is once exercised it cannot be used for another entry.<sup>29</sup> No declaration is necessary although the warrant mentions it.<sup>30</sup>

### 14. Kind of instrument and manner of entry.

This act provides for the entry of judgment upon a note, bond or other instrument in writing, of a similar kind binding the defendant to pay a certain sum of money or to do a definite thing.<sup>31</sup>

If the judgment entered is regular in form and the court had jurisdiction, it will be presumed that the attorney acted with authority.<sup>32</sup> A warrant to the prothonotary need not be under seal,<sup>33</sup> or be attested or acknowledged.<sup>34</sup> A warrant of attorney, however,

<sup>21</sup> Rabe v. Heslip, 4 Pa. 139.

<sup>22</sup> Helvete v. Rapp, 7 S. & R. 306. (See sufficient form of docket entry.)

<sup>23</sup> Reed v. Hamet, 4 Watts, 441.

<sup>24</sup> Ingersoll v. Dyott, 1 Miles, 245.

<sup>25</sup> Comth. v. Conrad, 1 Rawle, 249.

<sup>26</sup> Sweesey v. Kitchen, 80 Pa. 160; Heilig's Est., 18 Montg. Co. 91.

<sup>27</sup> Maloney v. White, 24 C. C. 23.

<sup>28</sup> Moore v. Hutchinson, 1 Phila. 377.

<sup>29</sup> James v. Crownover, 6 Atl. 42; Ely v. Karmany, 23 Pa. 314; Bur-gunder v. Lederer, 12 C. C. 222; Phila. v. Johnson, 208 Pa. 645; Dixon v. Miller, 20 C. C. 335.

<sup>30</sup> Rex v. Nelson, 15 Phila. 323; Montelius v. Montelius, Brightly's N. P. 79.

<sup>31</sup> White v. Shriver, 2 Watts, 474.

<sup>32</sup> Betz v. Valer, 15 Phila. 324, citing Gram's Ap., 4 Watts, 43; Morgan v. Neville, 74 Pa. 52, and others.

<sup>33</sup> Cook v. Gilbert, 8 D. & R. 567; Bryan v. Bryan, 2 W. N. C. 479; Boyd v. Thompson, 153 Pa. 78.

<sup>34</sup> Caldwell v. Walters, 18 Pa. 79.

should be sealed.<sup>35</sup> The instrument containing the warrant to enter judgment should be filed intact; any other practice being bad.<sup>36</sup> Where the bond is accompanied with a signed warrant to confess which recites the bond, judgment may be entered on the latter without a statement, and the bond be returned.<sup>37</sup> A second note given to replace one lost is sufficient warrant to enter judgment at maturity although a memorandum is made upon it that in case the first is found, it is to be returned to the maker.<sup>38</sup>

A warrant of attorney by one not *sui juris*, as a lunatic, or an infant, is void, and the judgment confessed by it will be vacated when the disability is shown.<sup>39</sup> The motion to vacate takes the place of *audita querela*, *error coram nobis* or bill; for, as Chief Justice Gibson said: <sup>40</sup> "But as the equity side of our courts of law is not broad enough to admit of relief by bill, we are compelled to give effect to the principle by pleading or evidence, as the court below ought to have done."

A waiver of inquisition in the confession is no part of the judgment and the entry of it by the prothonotary will not conclude a person incapable of making it, as a lunatic.<sup>41</sup> But where a bond is given with a waiver of inquisition and other conditions and a warrant of attorney to appear for the defendant and confess judgment, all the conditions of the bond become a part of the judgment.<sup>42</sup> Where the amount is limited in the warrant, the attorney cannot confess for more.<sup>43</sup> The confession of a judgment by an agent does not bind his principal, when ignorant of his rights in the premises.<sup>44</sup> If an agent confess judgment for more than he ought without fraud, the judgment will not be void but the amount will be reduced.<sup>45</sup> In case of two defendants, if the attorney appears for but one, his confession binds him only.<sup>46</sup> In amicable actions, by ancient custom, a judgment may be confessed by an attorney for his client even without a written warrant.<sup>47</sup> If his authority is contained in a lease it may be filed *nunc pro tunc*.<sup>48</sup> To sustain a judgment on a declaration there must be an appearance for the defendant and a formal confession.<sup>49</sup>

*Separation of warrant to confess.*

Section 4 of rule 23, Philadelphia, provides:

<sup>35</sup> Cook v. Gilbert, *supra*. (But see *dictum* in Kneedler's Ap., 92 Pa. 428, followed in Singer Mfg. Co. v. Cole, 11 C. C. 214; Benz v. Langan, 5 Northam. 139.)

<sup>36</sup> Fraley's Ap., 76 Pa. 42; Banning v. Taylor, 24 Pa. 289.

<sup>37</sup> United Security, Etc., Co. v. Vaughn, 22 C. C. 167.

<sup>38</sup> Herchelroth v. Stauffer, 31 C. C. 158.

<sup>39</sup> Knox v. Flack, 22 Pa. 337.

<sup>40</sup> Schrader v. Decker, 9 Pa. 14.

<sup>41</sup> Hope v. Everhart, 70 Pa. 231.

<sup>42</sup> Hageman v. Salisberry, 74 Pa. 280, distinguishing Hope v. Everhart and preceding cases.

<sup>43</sup> Mutual, Etc., Assn. v. Fallen, 21 C. C. 617.

<sup>44</sup> Rowen v. King, 25 Pa. 409.

<sup>45</sup> Davenport v. Wright, 51 Pa. 292.

<sup>46</sup> Kimmel v. Kimmel, 5 S. & R. 294.

<sup>47</sup> Limbert v. Jones, 118 Pa. 589.

<sup>48</sup> Betz v. Valer, 15 Phila. 324 (39 Leg. Int. 190.)

<sup>49</sup> Lytle v. Colts, 27 Pa. 193.

"Where the warrant of attorney constitutes an integral part of a lease or other original contract, from which it cannot be separated without injury, it shall be sufficient to file a copy of the lease or contract."

#### 15. Revocation of warrant by death or otherwise.

A warrant to confess judgment dies with the maker of it.<sup>50</sup> But an agreement for judgment is different, and judgment may be entered thereon after the death of a party, though no execution can issue upon it without a *scire facias* to the legal representatives.<sup>51</sup>

"A warrant of attorney to confess a judgment cannot be expressly revoked," said Read, J.<sup>52</sup> Lunacy at the time of entry of judgment is not sufficient to set aside the judgment.<sup>53</sup> Power given to an attorney to agree to a judgment, but not in the form of a warrant to confess, may be revoked at any time before the confession.<sup>54</sup> Whilst the power to enter judgment on the death of the maker expires with his death,<sup>55</sup> and a judgment irregularly entered thereon might be stricken off on application of parties in interest, the filing of the note with the prothonotary is a compliance with section 24 of the act of February 24, 1834, P. L. 70, which reads as follows:<sup>56</sup>

"No debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors or administrators, within the period of five years after his decease, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of five years, shall be filed, within the said period of five years, in the office of the prothonotary of the county where the real estate to be charged is situate, and then to be a lien only for the period of five years after said bond, covenant, debt or demand becomes due."

By act of June 8, 1893, P. L. 392, "five" years was changed to "two" years; while the act of June 14, 1901, P. L. 562, changes the lien from "two" years to "five" years in the latter event.

#### 16. Time and practice in entering judgment.

The power to confess judgment, unless otherwise restricted in the warrant or direction is exercisable before the debt becomes due.<sup>1</sup> The post-dating of a note which is delivered and becomes operative

<sup>50</sup> Gordon v. Bartley, 4 W. N. C. 37; Lanning v. Pawson, 38 Pa. 480; Wentz v. Bealor, 14 C. C. 37; Kountz v. Natl. Transit Co., 197 Pa. 398; Byrod v. Sweigert, 12 D. R. 565; Campbell's Est., 11 Kulp, 215; Marcy v. Haggerty, 28 C. C. 335.

<sup>51</sup> Webb v. Wiltbank, 1 Clark, 324.

<sup>52</sup> Baker v. Lukens, 35 Pa. 146.

<sup>53</sup> Spencer v. Reynolds, 9 C. C. 249.

<sup>54</sup> Sherman v. Brenner, 1 W. N. C. 193.

<sup>55</sup> See note 50, *supra*.

<sup>56</sup> Sleeper v. Hickey, 26 Supr. C. 59, citing Stevenson v. Virtue, 13 Supr. C. 103.

<sup>1</sup> Integrity, Etc., Co. v. Rau, 153 Pa. 488.

thereon, does not postpone the right to enter judgment.<sup>2</sup> The right to enter judgment as of a particular term carries with it the right to enter it at a succeeding term.<sup>3</sup> The actual entry of a judgment is not to be treated as a nullity in the first instance.<sup>4</sup> A warrant given by a borough can only be exercised in the county wherein the borough is located.<sup>5</sup> A judgment of confession against a partnership should show the full name of each and every partner,<sup>6</sup> and be indexed against each separately. The plaintiff may file a formal declaration against the firm by its name and give the full name of every partner and judgment may be entered accordingly.<sup>7</sup> It was early held that judgment could not be entered on a bond before it reached the office of the prothonotary, as by leaving it at the house of the prothonotary the night before;<sup>8</sup> but if the prothonotary receives a note at his house after office hours and marks it filed as of that juridical day and enters judgment thereon accordingly as of that day it will be regular and the docket will not be altered.<sup>9</sup>

Judgment may be entered upon a warrant not under seal, although more than six years have run from its date, since the statute must be pleaded by the defendant.<sup>10</sup> It is not for the prothonotary to determine. The judgment may be opened so that the defendant may plead it.<sup>11</sup> If the instrument be under seal the statute of limitations does not apply and a defense as to lapse of time must rest upon the presumption of payment.<sup>12</sup>

#### 17. Judgment on warrant over ten years old.

Where it is provided by rules of court that when a warrant is above ten years old leave of court shall be obtained before judgment is entered, without such leave the judgment will be stricken off.<sup>13</sup> Following is section 7 of rule 33 in Berks County, to which the rule in other jurisdictions is similar:

"If a warrant of attorney, or written power to enter or confess judgment be above 10 and under 20 years old, the court or a judge thereof must be moved for leave to enter judgment, which motion must be founded upon an affidavit of the due execution of the warrant or written power, and that the money is unpaid and the parties living. But if the warrant or written power be above 20 years old, there must be a rule to show cause served upon the party, if within the state, or if without the state, notice of the rule must

<sup>2</sup> Volkenand v. Drum, 143 Pa. 525.

<sup>3</sup> Lewis v. Smith, 2 S. & R. 142.

<sup>4</sup> Hauer's Ap., 5 W. & S. 473; Drexel's Ap., 6 Pa. 272.

<sup>5</sup> Oil City v. McAboy, 74 Pa. 249.

<sup>6</sup> Gardner v. Austin, 14 C. C. 549.

<sup>7</sup> Miller v. Royal Flint Glass Works, 172 Pa. 70. (As to effect of seal, see Boyd v. Thompson, 153 Pa. 78.)

<sup>8</sup> Chambers v. Denie, 2 Pa. 421.

<sup>9</sup> Polhemus' Ap., 32 Pa. 328. (But see *infra*, par. 43.)

<sup>10</sup> Morris v. Hannick, 10 Phila. 571; P. & L. Dig., vol. 10, col. 15840.

<sup>11</sup> Herman v. Rinker, 106 Pa. 121; Sossong v. Rosar, 112 Pa. 197; Ellinger's Ap., 114 Pa. 505; Bates v. Cullum, 163 Pa. 234; P. & L. Dig., vol. 10, cols. 16069-70-1-2.

<sup>12</sup> Lorah v. Nissley, 156 Pa. 329.

<sup>13</sup> Coon v. Catten, 3 Kulp, 37; Lanning v. Davies, 3 Kulp, 319.



ARTICLE IV. EXECUTION.

§ 1. The execution of a judgment of general circulation shall be made by the sheriff.

§ 2. In the execution of a judgment, the execution was to be taken off, as there was no objection in its discretion, permitted to be made by the sheriff, where third parties are concerned, does not complain and the sheriff passes a good title.<sup>16</sup>

§ 3. Warrants.

§ 4. On the 1st day of 1888, a judgment may be entered on a legal holiday.<sup>17</sup> If the judgment is a judgment and a precept is issued by the agent of the plaintiff and on Monday morning and issue of the warrant and delivery of a warrant to the sheriff.

§ 5. A power of attorney to confess confession of judgment which applies to personality shall be ascertainable from the instrument which authorizes the prothonotary to enter a judgment on a contract of installment.<sup>24</sup> As to the place of performance of the contract.<sup>25</sup> On an authority of judgment when it becomes due and the prothonotary must first require a confession. Such affidavit cannot be filed

§ 6. A judgment by the same person;<sup>27</sup> the judgment must be entered in the firm name.<sup>28</sup>

§ 7. The sheriff. 10 C. C. 276; Chambers

§ 8. Connay v. Halstead, 73 Pa.

§ 9. Waverly Natl. Bank v. Halstead, 176 Pa. 45; Musser v.

§ 10. Smiley, 26 Supr. C. 318. Pa. 70.

No valid judgment can be entered on the confession of a minor.<sup>29</sup> In a confession upon a lease the power once exercised is exhausted.<sup>30</sup> A power once executed or its purpose accomplished, is no longer to be exercised.<sup>31</sup> Where the judgment is confessed in the event of breach of condition, such breach must be shown by affidavit filed.<sup>32</sup> The confession must be in pursuance of the warrant and in the time and manner and in favor of and against the parties designated.<sup>33</sup> If interest is omitted by mistake, judgment cannot be entered for interest, though it may be allowed by the court under its equitable powers.<sup>34</sup> A judgment once entered extinguishes the note, or rather, it is merged in the judgment;<sup>35</sup> and it will not be opened on slight allegations of alteration.<sup>36</sup>

*Rule in Philadelphia.*

"No judgment by confession shall be entered in any amicable action, unless there shall be filed, at the time of filing the agreement, a particular statement of the cause of action signed and sworn to by the parties or their attorneys, and when said statement is signed by the attorney of the defendant, there shall also be filed with the same, his warrant of attorney; but this rule shall not apply to judgments on warrants of attorney filed, or to revivals of judgments by agreement."

**20. Judgment against one of several joint debtors.**

The act of April 6, 1830, P. L. 277, provided:

"Section 1. In all suits now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, co-partners, promissors or the endorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process or judgment shall not be a bar to recovery in another suit against the defendant or defendants not served with process."

"Section 2. That from and after the passing of this act, in all cases of amicable confession of judgment, by one or more of several obligors, co-partners or promissors, or the endorsers of promissory notes, such judgment shall not be a bar to recovery, in such suit or suits as may have to be brought against those who refuse to confess judgment."

The latter section is held to apply to future suits.<sup>37</sup> The law

<sup>29</sup> *Zimmerman v. Ackerman*, 22 Lanc. L. R. 326; *Knox v. Flack*, 22 Pa. 337; *Matthews v. Throckmorton*, 18 W. N. C. 481.

<sup>30</sup> *Phila. v. Johnson*, 208 Pa. 645; 23 Supr. C. 591; *Dixon v. Miller*, 20 C. C. 335.

<sup>31</sup> *Swift's Ap.*, 87 Pa. 502.

<sup>32</sup> *Patterson v. Pyle*, 1 Mona. 351; *Secor v. Shippey*, 7 C. C. 555.

<sup>33</sup> *Eddy v. Smiley*, 26 Supr. C. 318, citing *Weaver v. McDevitt*, 21 Supr. C. 507; *Abrams v. Musgrove*, 12 Pa. 292.

<sup>34</sup> *Gump's Ap.*, 65 Pa. 476.

<sup>35</sup> *Kimmel's Ap.*, 91 Pa. 471.

<sup>36</sup> *Saunders v. Baldwin*, 9 D. R. 552.

<sup>37</sup> *Welsh v. Hirst*, 1 Phila. 50.

above quoted being remedial is liberally construed to effect the remedy.<sup>38</sup>

And where the judgment was obtained against some of the partners in another state, in the absence of proof of a different law in that state, the *lex fori* will be presumed to be in force there.<sup>39</sup> It will be construed to apply to suits on contracts that are joint though not several;<sup>40</sup> and to actions before justices<sup>41</sup> and aldermen.<sup>42</sup> While service upon a member of a firm binds the firm the judgment cannot be executed against the individual property of a partner who was not served with process.<sup>43</sup> Upon a judgment thus obtained the firm property can be sold,<sup>44</sup> and also the individual property of the partner served.<sup>45</sup> A judgment confessed by one partner will be stricken off on the application of the others who dissent.<sup>46</sup> When such a judgment, originally obtained before a justice of the peace is transferred by exemplification into another county for execution its validity cannot be assailed<sup>47</sup> unless it be void,<sup>48</sup> but the court has power to restrict the execution to such property as is subject to it.<sup>49</sup> The act, *supra*, applies to joint actions as well as contracts.<sup>50</sup> The summons in the original suit should issue against all the persons jointly liable,<sup>51</sup> but the second writ only against those not served with the first,<sup>52</sup> and in the same court or forum,<sup>53</sup> in order to have a remedy against those who were not served in the first action.<sup>54</sup>

Unless the suit is brought as above stated, after six years the statute of limitations may be successfully pleaded.<sup>55</sup> The act of April 11, 1848, P. L. 536 (section 4), wiped out the cases which had held to the common-law doctrine that a deceased partner's estate was not liable unless the survivor be shown to be insolvent,<sup>56</sup> and now the legal representatives may be sued pending suit against the survivors.<sup>57</sup>

<sup>38</sup> Myers v. Nell, 84 Pa. 369; Moore v. Hepburn, 5 Pa. 399; Campbell v. Steele, 11 Pa. 394.

<sup>39</sup> Bennett v. Caldwell, 70 Pa. 253, citing Cabarga v. Seeger, 17 Pa. 514; Holmes v. Broughton, 10 Wendell (N. Y.), 75.

<sup>40</sup> Miller v. Reed, 27 Pa. 244.

<sup>41</sup> Vanemen v. Hardman, 3 Watts, 202.

<sup>42</sup> Davis v. Sidle, 10 D. R. 435.

<sup>43</sup> Reed, J., in Cover v. Brown, 7 D. R. 19.

<sup>44</sup> Ross v. Howell, 84 Pa. 129; Freiler v. Kear, 126 Pa. 470; McNaughton's Ap., 101 Pa. 550.

<sup>45</sup> Boyd v. Thompson, 153 Pa. 78.

<sup>46</sup> McCleery v. Thompson, 130 Pa. 443.

<sup>47</sup> Lacock v. White, 19 Pa. 495; King v. Nimick, 34 Pa. 297.

<sup>48</sup> McKinney v. Brown, 130 Pa. 365; Schuylkill County v. Minogue, 160 Pa. 164.

<sup>49</sup> Cover v. Brown, *supra*.

<sup>50</sup> Lewis v. Williams, 6 Wharton, 264.

<sup>51</sup> Moore v. Hepburn, 5 Pa. 399.

<sup>52</sup> Magaw v. Clark, 6 Watts, 528.

<sup>53</sup> Wann v. Pattengale, 14 Pa. 313.

<sup>54</sup> Vanzandt v. Winters, 22 Supr. C. 181.

<sup>55</sup> Talcott v. Rosenblum, 21 C. C. 494; Wann v. Pattengale, 14 Pa. 313.

<sup>56</sup> Brewster's Admx. v. Sterrett, 32 Pa. 115; Moore's Ap., 34 Pa. 411.

<sup>57</sup> Creswell v. Blank, 3 Grant, 320.

## 21. Scire facias where judgments are entered at different times.

Section 6 of the act of August 2, 1842, P. L. 459, provides:

"That in all original actions and proceedings to revive judgment which have been or hereafter may be instituted against two or more defendants, in which judgment has been entered on record at different periods, against one or more of said defendants, by confession or otherwise, or hereafter may be so entered, the entries so made or to be made shall be considered good and valid judgments against all the defendants, as of the date of the respective entries thereof, and the day of the date of the last entry shall be recited in any subsequent proceedings, by *scire facias* or otherwise, as the date of judgment against all of them, and judgment rendered accordingly: *Provided*, That the provisions of this section shall not affect the liens of any such judgment."

The force of this act is that the judgment may be entered by the prothonotary as of the date of the last judgment or confession, the first being interlocutory only.<sup>58</sup> The power of the prothonotary to liquidate such judgments the same as the court could where the sum is ascertainable is well-established.<sup>59</sup>

## 22. Effect of entry at different times.

Section 7 of the act of August 2, 1842, P. L. 459, is as follows:

"From and after the passage of this act, where an entry of judgment has or shall be made on the records of any court against two or more defendants, at different periods such entries shall operate as good and valid judgment against all the defendants, and the plaintiff may proceed to the collection of the money due thereon, with costs, as if the entries had all been made at the date of the last entry."

The two sections are construed to recognize but one judgment against all as of the date of the last, for purposes of execution or *scire facias*.<sup>60</sup> Where some make no defense judgment must be taken against them before judgment can be asked against one who files an affidavit.<sup>61</sup> Where some are served and one is not, judgment can be taken against those served.<sup>62</sup> But the common-law duty still remains on the plaintiff to pursue all the joint debtors in the same suit.<sup>63</sup>

## 23. Judgment by default against one of several defendants.

It is provided further by the act of April 4, 1877, P. L. 52, that:

"Where judgment has been or may hereafter be obtained in any court of record of this commonwealth, against one or more of several co-defendants, in default of appearance, plea or affidavit of defense, said judgment shall not be a bar to recovery in the same suit against

<sup>58</sup> Weikel v. Long, 55 Pa. 238.

<sup>59</sup> Watkins v. Phillips, 2 Wharton, 209; Noble's Admr. v. Laley, 50 Pa. 281; Harger v. Commrs., 12 Pa. 251.

<sup>60</sup> Murtland v. Floyd, 153 Pa. 99; Finch v. Lamberton, 62 Pa. 370.

<sup>61</sup> Robinson v. Floyd, 153 Pa. 98.

<sup>62</sup> Van Zandt v. Winters, 22 Supr. C. 181.

<sup>63</sup> Murtland v. Floyd, 153 Pa. 99.

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the other defendants jointly, or jointly and severally liable as co-obligors, co-partners or otherwise."

This was merely declaratory of the practice as it then was and it was held to embrace a judgment for want of a sufficient affidavit of defense.<sup>1</sup>

*Rule in Philadelphia.*

Section 1 of rule 23, Philadelphia, is as follows:

"Judgment for default of any kind may be moved before and entered by the prothonotary, who shall assess the damages in all cases in which the amount thereof is set forth with certainty in the statement of claim filed."

This rule pursues the act of April 22, 1889, P. L. 41.<sup>1a</sup>

**24. Suits against legal representatives of co-obligors, etc.**

Section 4 of the act of April 11, 1848, P. L. 536, provides:

"In any suit or suits which may hereafter be brought against the executors or administrators of a deceased co-partner, for the debt of the firm, it shall not be necessary to aver on the record, or prove on the trial, that the surviving partner or partners is or are insolvent; to enable the plaintiff to recover."

"Section 5. Where a judgment shall hereafter be recovered against one or more of several co-partners, or joint and several obligors, promissors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits, against any person or persons, who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process."

This applies to co-sureties.<sup>2</sup>

**25. Judgments against co-obligors.**

Section 2 of the act of 1848, *supra*, is as follows:

"Where a judgment shall hereafter be obtained against two or more co-partners, or joint or several obligors, promissors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone."

**26. Contribution, how compellable.**

It is provided by section 9 of the act of April 22, 1856, P. L. 534, that:

"Whensoever the real estate of several persons shall be subject to the lien of any judgment to which they should, by law or equity, contribute, or to which one should have subrogation, against another or others, it shall be lawful for anyone having the right to have contribution or subrogation, in case of payment, upon suggestion by

<sup>1</sup> Bean v. Seyfert, 12 Phila. 224.

<sup>1a</sup> Lumber Co. v. Home Ins. Co., 167 Pa. 231.

<sup>2</sup> Miller's Estate, 14 Lanc. L. R. 137.

avit and proof of the facts necessary to establish such right, to  
 n a rule on the plaintiff to show cause why he should not levy  
 and make sale of the real estate liable to execution for the  
 ment of said judgment, in the proportion, or in the succession, in  
 h the properties of the several owners shall, in law or equity,  
 able to contribute towards the discharge of the common incum-  
 ce, otherwise, upon the payment of such judgment, to assign the  
 for such uses as the court may direct; and the court shall have  
 r to direct to what uses the said judgment shall be assigned,  
 when assigned, direct all executions thereupon, so as to sub-  
 e the rights and equities of all parties whose real estate shall  
 able thereto; and if the plaintiff shall refuse to accept his debt  
 make such assignment of his judgment, the executions thereupon  
 the hands of the plaintiff shall be so controlled and directed by  
 court as to subserve said rights and equities."

he foregoing act does "not give the equity or the right to sub-  
 tion; it provides merely the mode of enforcing such right in  
 in cases; as for example, where the plaintiff in a judgment  
 h binds several properties is about to collect it and there are  
 ties to be adjusted between the terre-tenants." The act does  
 provide an exclusive remedy.<sup>3</sup>

where mortgaged land is sold in pieces and at different times the  
 al pieces are liable for the mortgage debt in the inverse order  
 eir alienation.<sup>4</sup>

Actual payment discharges a judgment at law; but in equity, it  
 still subsist if the justice of the case requires it; and an equitable  
 to such judgment may exist without any actual assignment of  
 The purpose of the above act was to secure the legal rights of  
 plaintiff in a judgment as well as the equities of the terre-tenants  
 r a common incumbrance.<sup>6</sup>

The jurisdiction of equity is not taken away by a subsequent  
 lishment of a remedy in the courts of law,"<sup>7</sup> "and notwithstand-  
 the act of 1806, remedies at law and in equity may co-exist,  
 be concurrent and at the election of the plaintiff."<sup>8</sup>

the benefits of the act, *supra*, are to be obtained, however, only  
 strict compliance with it, and the mode of procedure is expressed

the right to contribution or subrogation must be clearly made out  
 the petition,<sup>10</sup> and the amount must be ascertained, as well as  
 fact that both funds are in the hands of a common debtor of

Illigan's Ap., 104 Pa. 503, quoted in Pratt v. Waterhouse, 158 Pa. 45.  
 ailer v. Stanley, 10 S. & R. 450; Cowden's Ap., 1 Pa. 267. (See  
 enter v. Koons, 20 Pa. 222.)

leming v. Beaver, 2 Rawle, 128; Morris v. Oakford, 9 Pa. 498; Mc-  
 ick's Admr. v. Irwin, 35 Pa. 111.

rna's Ap., 65 Pa. 72, quoted in Pratt v. Waterhouse, 158 Pa. 45.  
 Pratt v. Waterhouse, 158 Pa. 45, citing Wesley Church v. Moore, 10

73, commenting on Arna's Ap., *supra*, and Phelps's Ap. 98 Pa. 546.

ycinena v. Peries, 6 W. & S. 243; Biddle v. Moore, 3 Pa. 161; Church  
 land, 64 Pa. 432.

artman v. Longacre, 13 Montg. 54.

Wilson v. Ritchie, 4 W. N. C. 37.

both creditors.<sup>11</sup> It applies where the estates of several shall be subject to the lien of a judgment to which they should contribute.<sup>12</sup> The practice is not to take a rule for subrogation; but a rule to show cause why the plaintiff should not do the things required by the act.<sup>13</sup>

The form of the rule should substantially follow the equitable relief desired in the particular case. In the case of a surety it was held that he must ask for this relief without undue laches, or he will not be entitled to it.<sup>14</sup> A surety who has paid the judgment for his principal succeeds to the rights of the plaintiff and needs no subrogation.<sup>15</sup> He has a right to have the judgment marked to his use on the docket when he pays it, and this is the practice.

The rule on the plaintiff must be in the alternative, i. e., either to levy his execution in the succession prescribed by the court or to accept his debt so that the terre-tenant claiming the equity may stand in his shoes and be subrogated to his rights.<sup>16</sup> A lessee under an oil lease who buys judgments which were liens on the land prior to his lease may invoke this act.<sup>17</sup>

### 27. The judgment docket.

It is provided by section 3 of the act of March 29, 1827, P. L. 155, that:

"It shall be the duty of each of the prothonotaries of the several courts of Common Pleas, District Courts and Circuit Courts in this commonwealth to make, prepare and keep a docket, to be called the judgment docket, in which said docket no case shall be entered until after there shall have been a judgment or award of arbitrators in such case, and into which shall be copied the entry of every judgment and every award of arbitrators, immediately after the same shall have been entered; which entries so to be made in the said judgment docket, shall be so made that one shall follow the other in the order of time in which the said judgments and awards shall have been rendered, entered or filed as aforesaid; and the entries in each case in said judgment docket shall particularly state and set forth the names of the parties, the term and number of the case, and the date, and in case the judgment shall be for a sum certain, the amount of the judgment or award; and when any judgment shall be revived by *scire facias*, or otherwise, or when any execution shall issue in any case, a note thereof shall be made in the proper judgment docket, at the place where the other entries in such case may have been made; and whenever any transcript of any *testatum* execution, or any transcript, shewing the balance appearing to be due from any executor, administrator or guardian, or from any collector of any township, ward or district, shall be delivered to any of the said prothonotaries, the docket entries made in such case

<sup>11</sup> Fessler v. Hickernell, 82 Pa. 150.

<sup>12</sup> Roddy's Ap., 72 Pa. 98.

<sup>13</sup> Packer v. Vandevender, 13 C. C. 31.

<sup>14</sup> Hutcheson v. Reash, 15 Supr. C. 96; Packer v. Vandevender, 13 C. C. 31.

<sup>15</sup> Duffield v. Cooper, 87 Pa. 443; Farrow v. Yoder, 23 C. C. 326.

<sup>16</sup> Gunther v. Fuller, 3 Luz. L. R. 1; Wade v. Filan, 5 Luz. L. R. 106.

<sup>17</sup> Porter v. Vanderlin, 158 Pa. 146.



ll be copied into the said judgment docket, in like manner as judgments and awards are herein directed to be copied; and the fee for all the entries made in each case, in the judgment docket shall be five and a half cents and no more."

#### 8. Judgment index and ad sectam.

By section 5 of the same act prothonotaries were required to prepare and keep "at least two indexes of the matters contained in such books, one of which said indexes, shall among other things contain the names of plaintiffs, and the other the names of defendants, so arranged as to afford an easy and ready reference to said matters." The one with the names of the plaintiffs first was called "the index"—the one with the defendants first "the *adsectam*."<sup>18</sup>

#### 9. Special acts as to judgment dockets.

By act of April 5, 1866, P. L. 533—the prothonotary of Warren County was required to keep a register of judgments, separate from the judgment docket. For entry on this register his fee was fixed at 10 cents in each case.

The act of Feb'y 23, 1867, P. L. 246, authorized the prothonotary of Lancaster County to divide his judgment docket into as many volumes as there are letters in the alphabet or as many as are convenient to the public convenience.<sup>19</sup>

#### 10. Counties where confessed judgments need not be entered on the appearance or continuance docket.

Section 11 of the act of March 23, 1853, P. L. 708, provides:

"That all judgments hereafter entered in the prothonotary's office in the counties of Chester, Delaware and Berks, on notes, bonds, or other instruments of writing in which judgment is confessed, containing a warrant to confess judgment, may be entered at once in the judgment docket and need not be entered in any other docket, but all judgments heretofore entered in any such office in said counties, in the judgment docket without previous entry in any other docket, shall be as valid and effectual as if previously entered in the appearance or continuance docket: *Provided*, That an index of the judgments entered in the judgment docket shall be kept, as is required by existing laws; and provided further, that the entries made in the said docket shall be as full as if said judgments were entered in the appearance or continuance docket."

This act was extended to Bucks County by act of Feb'y 8, 1856, P. L. 35.

By act of Feb'y 27, 1854, P. L. 125, it is provided "that all judgments hereafter entered in the prothonotary's office of the Court of Common Pleas of Montgomery and Philadelphia Counties, on bonds, notes, warrants of attorney, or other instruments of writing in which judgment is confessed, or containing a warrant to confess judgment, shall be entered at once in the judgment docket and need not be entered in the appearance or continuance docket."

Bowen v. Wilcox, Etc., Co., 86 Ill. 11.

Extension docket in Cambria County. (See P. L. 1867, p. 346.)



entered in any other docket: *Provided*, That an index of the judgment docket shall be kept as required by existing laws."

When entered as fully on the judgment docket as formerly on the appearance or continuance docket it is called the D. S. B. (*Debit sans breve*) docket. This has been abandoned in Philadelphia.

### 31. Necessity of entry on judgment index.

Section 3 of the act of April 22, 1856, P. L. 532, provides that —

"The lien of no judgment, recognizance, execution levied on real estate in the same or another county, or of writs of *scire facias*, to revive or have execution of judgments, shall commence or be continued, as against any purchaser or mortgagee, unless the same be indexed in the county where the real estate is situated in a book to be called the judgment index; and it shall be the duty of the prothonotary or clerk forthwith to index the same, according to priority of date, and the plaintiff shall furnish the proper information to enable him to perform said duty."

As to recognizances in the Orphans' Court this act has been held to be inapplicable, nor does it apply to a recognizance in partition.<sup>20</sup>

Under the above act it is the duty of the plaintiff to see that his judgment is properly entitled and indexed so as to affect purchasers or mortgagees;<sup>21</sup> or lien creditors.<sup>22</sup>

It has been held where there was no other person in the county to whom the name might apply, an entry against a defendant giving only the initial of his Christian name as he usually wrote it was sufficient as against a subsequent lien with his full Christian name.<sup>23</sup> The use of a name is to distinguish the person from all others and the owner may contract it so as to become his customary appellation. It may be shown by parol whose individual name the record contains.<sup>23</sup> But where the omission of a middle letter in the name is such as to mislead purchasers or subsequent creditors it will be fatal to the lien;<sup>24</sup> also where a wrong initial is used;<sup>25</sup> or where an initial is used for a middle name when the defendant had none.<sup>26</sup> It will not aid the case to insert the initial on the index subsequently in a later judgment.<sup>27</sup> When an error is made in the initial letter of the last name the doctrine of *idem sonans* does not apply.<sup>28</sup> But where the initial is the same and the colloquial pronunciation the same as "Bubb" and "Bobb" the rule of *idem sonans* does apply.<sup>29</sup>

<sup>20</sup> Holman's Ap., 106 Pa. 502.

<sup>21</sup> Ridgway's Ap., 15 Pa. 177; Smith's Ap., 47 Pa. 128.

<sup>22</sup> Crouse v. Murphy, 140 Pa. 335.

<sup>23</sup> Jones' Est., 27 Pa. 336, Woodward, J., citing Gordon v. Holliday, 1 Wash. C. C. R. 289.

<sup>24</sup> Woods v. Reynolds, 7 W. & S. 406; Crouse v. Murphy, 140 Pa. 335; Hutchinson's Ap., 92 Pa. 186.

<sup>25</sup> Peck's Ap., 11 W. N. C. 31.

<sup>26</sup> King v. King, 2 Chester, 45; Grover, Etc., Co. v. Gruber, 2 Pearson, 288.

<sup>27</sup> Bickel's Ap., 15 W. N. C. 234.

<sup>28</sup> Heil's Ap., 40 Pa. 453, where "Yoeat" was spelled "Joest."

<sup>29</sup> Myer v. Fegaly, 39 Pa. 429. (See in the opinion of Hayes, J., a review of the authorities and in the opinion of Ch. J. Lowrie, a characterization of Pennsylvania German which "has a *norma loquendi* of its

But the names "Baker" and "Becker" are not sufficiently identical to come within the rule.<sup>30</sup>

A judgment entered on the judgment docket against partners without giving their Christian names is not notice to subsequent purchasers or incumbrancers.<sup>31</sup>

A judgment in the name of "George Brown, Sr." was held postponed where he had in all other cases signed his name as George Brown only.<sup>32</sup> But in a case where a man signed his name indiscriminately "William" and "William J." the distribution was made in the order in which the judgments stood.<sup>33</sup> In a case where a married woman gave a judgment in the name of "Mrs. W. A. Newton" and subsequently gave a mortgage in the name of "Nancy A. Newton" the judgment was postponed to the mortgage although her husband joined in the latter as "William Newton."<sup>34</sup>

A *fi. fa.* and levy under it upon after-acquired real estate when accompanied with a *sci. fa.* will create a lien even if the judgment has not been revived, but the levy must be docketed as required by the act *supra*, or it will not have priority over a subsequent mortgage.<sup>35</sup> The docketing of the *fi. fa.* is no notice of the levy.<sup>36</sup> Where a judgment and mortgage are docketed the same day they take *pro rata*.<sup>37</sup> A correct entry in the judgment docket will not cure an incorrect one in the judgment index,<sup>38</sup> for the searcher for liens need not go beyond the judgment index. If the prothonotary has not properly indexed a judgment he is liable for the loss.<sup>39</sup>

### 32. Assignments of judgments to be indexed.

Section 1 of the act of May 24, 1878, is as follows:

"It shall be and is hereby made the duty of the prothonotaries of the several courts of Common Pleas in this commonwealth, to procure and keep a book, which shall be called "Index to assigned judgments," and to properly index in the same all assignments that may hereafter be made of judgments or parts of judgments remaining upon the records of their respective offices, which said index shall, among other things, contain the names of the parties to whom said judgments are assigned, so arranged as to afford an easy and ready reference to said assignments."

"Section 2. In addition to the fee now authorized to be charged for filing assignments, the said prothonotaries are hereby authorized to charge and receive a fee of ten cents for every assignment so indexed, to be paid by the assignee."

own." See also *Jenny v. Zehnder*, 101 Pa. 296; *Shield's Est.*, 3 Luz. L. Obs. 174; *Bergman's Ap.*, 88 Pa. 120; *Cadden's Est.*, 8 Luz. L. R. 109; *German, Etc., Assn. v. Grecula*, 5 Lack. Jur. 28.

<sup>30</sup> *Delaney v. Becker*, 14 Supr. C. 392.

<sup>31</sup> *Ridgway's Ap.*, 15 Pa. 177; *York Bank's Ap.*, 36 Pa. 458.

<sup>32</sup> *Rusterholtz v. Brown*, 10 D. R. 21.

<sup>33</sup> *Butts v. Cruttenden*, 14 Supr. C. 449.

<sup>34</sup> *Penna., Etc., Assn. v. George*, 201 Pa. 43; 24 C. C. 100.

<sup>35</sup> *Ramsey v. Ramsey*, 29 C. C. 417.

<sup>36</sup> *Ross' Ap.*, 106 Pa. 86.

<sup>37</sup> *Ramsey v. Ramsey*, 29 C. C. 417.

<sup>38</sup> *Barry's Est.*, 3 Luz. Leg. R. 141.

<sup>39</sup> *Barry's Est.*, *supra*, *Conyngham, J.*

"Section 3. This act shall not apply to counties that have special acts in relation to indexing assigned judgments."<sup>40</sup>

**33. Ad sectam judgment docket.**

It is provided by section 1 of the act of June 11, 1879, P. L. 134, that—

"Where the judgment or lien docket in any of the counties of this commonwealth has been heretofore or may hereafter be kept in the form of an *ad sectam* index docket, all judgments and liens entered thereon, in order of time, alphabetically, are hereby declared to be as good and valid in law as though properly entered in a judgment docket, with two indexes: *Provided*, That said docket shall set forth the names of parties, date of entry, number and term of case, and where the same is for a sum certain, the amount of the judgment, award, verdict, transcript or other lien, required by law to be entered on a judgment docket, with date of interest thereon, and in case of satisfaction, a note thereof shall be entered by the prothonotary on said docket, in the margin thereof."

**34. Scire facias to be entered on ad sectam docket.**

Section 2 of the act next, *supra*, says:

"Where a *scire facias* is issued to revive a judgment or other lien, or to show cause why execution should not issue thereon, an entry shall be made by the prothonotary on said *ad sectam* judgment docket, in order, alphabetically, giving the names of parties, date, term, and number of *scire facias*, and term and number of original case."

**35. Rules on entries in appearance and D. S. B. docket.**

Section 3 of the act last, *supra*, says:

"When, in addition to the judgment or lien docket in the form of an *ad sectam* index docket, aforesaid, two other dockets are kept by the prothonotary, in the first of which all suits brought and appeals are entered, and in the second all judgments by confession, transcripts, exemplifications and other liens, are recorded in order of time of entry, the proper court may direct by rule or standing order, that whenever a judgment is obtained in any case and entered on the first of said dockets, and before entry in the judgment or lien docket, the prothonotary shall forthwith copy into said second docket the names of the parties, form of action, amount of judgment, with costs, and state whether obtained by verdict or otherwise, and to what term and number in said first docket so that every judgment entered in said court, by confession or otherwise, shall appear in said second docket, in order of time of entry, and shall take its number and term thenceforth from the entry on said second docket, and be so recorded in the judgment or lien docket: *Provided*, It shall not be necessary to keep an *ad sectam* index to said second docket, other than the *ad sectam* judgment docket; and said first docket may be called an appearance docket and the second either a

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<sup>40</sup> The act of Mar. 2. 1869, P. L. 350, required the prothonotary of Luzerne county to enter on the judgment docket and properly index all assignments, his fee to be 25 cents in each case.

Common Pleas or a D. S. B.<sup>41</sup> docket: *Provided*, That where any county has a judgment docket not filled, it shall not be required to adopt the form prescribed in this act, until it is necessary to procure a new judgment docket."

This docket was dispensed with in Philadelphia on reorganization of the courts after the Constitution of 1873.

### 36. Duration of lien of judgment.

It is provided by section 2 of the act of April 4, 1798 (3 Sm. L. 331):

"That no judgment hereafter entered in any court of record, within this commonwealth, shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be so entered, unless the person who may obtain such judgment, or his legal representatives, or other persons interested, shall within the said term of five years, sue out a writ of *scire facias* to revive the same."

### 37. Duration of lien of award.

The act of April 21, 1840, P. L. 449, provides in section 1:

"That no award of arbitrators now entered, or hereafter to be entered, shall continue a lien upon the real estate of the party against whom the same shall have been made for a longer period than five years from the day on which such award shall be or shall have been entered, notwithstanding any appeal which may have been entered therefrom, unless revived within that period, according to the provisions of the act to which this is a supplement (*supra*) and the supplement to the same, passed March 26, 1827."<sup>42</sup>

### 38. Nature and extent of lien.

It was held that a plaintiff is only interested in his lien and not the property bound by it;<sup>43</sup> but this statement may be qualified to say that he is interested in the land so as to give him a standing to protect it from waste;<sup>44</sup> and to draw the assigned insurance in case of loss;<sup>45</sup> but the mere holding of a judgment does not confer an insurable interest.<sup>46</sup> He may maintain an action in his own name against an owner for removing a house from the premises after levy and before sale.<sup>47</sup>

Upon a sale of the undivided interest of a tenant in common under a judgment which was a lien upon the entire tract, the plaintiffs of several judgments are entitled to the proceeds in their order upon the record.<sup>48</sup> But no right of possession is conferred by the lien.<sup>49</sup>

<sup>41</sup> *Debit sans breve* — entry of debt in detail. This docket was dispensed with in Phila. on reorganization of the courts after the constitution of 1873.

<sup>42</sup> P. L. 129 (9 Sm. L. 303).

<sup>43</sup> *Grevemyer v. Southern, Etc., Co.*, 62 Pa. 340.

<sup>44</sup> *Witmer's Ap.*, 45 Pa. 455.

<sup>45</sup> *Caley v. Hoopes*, 86 Pa. 493.

<sup>46</sup> *Light v. Mutual, Etc., Co.*, 169 Pa. 310.

<sup>47</sup> *Christian v. Mills*, 16 W. N. C. 393.

<sup>48</sup> *Hildebrand v. Wertz*, 1 Lanc. Bar, No. 34.

<sup>49</sup> *Raymond v. Schoonover*, 181 Pa. 352.

After the title has been conveyed *bona fide*, no lien attaches;<sup>50</sup> but a conveyance in fraud of creditors is void and a lien may be obtained against it notwithstanding such conveyance;<sup>51</sup> but the debt must have been contracted before the conveyance, and if only part was so contracted it will be a lien only *pro tanto*.<sup>52</sup> Where the land is sold by the sheriff and before the deed is acknowledged a judgment is entered against the defendant, it acquires no right to participate in the proceeds.<sup>53</sup> But where judgment is entered on the day of the sale although at an hour later than the sale it dates from the beginning of the day and comes in on the fund.<sup>54</sup> There are no fractions of a day as between judgments, but in a contest between alleged liens and *bona fide* conveyances there may be.<sup>55</sup> In Pennsylvania every kind of interest in land is bound by a judgment; both legal and equitable.<sup>56</sup> A judgment after sheriff's sale under mortgage is postponed to the equitable rights of the conveyance subject to that mortgage.<sup>57</sup>

Unless revived by *sci. fa.* a judgment is no lien upon defendant's real estate acquired after its entry,<sup>58</sup> whether by descent or purchase,<sup>59</sup> and it applies to lien creditors as well as purchasers;<sup>60</sup> and also to an interest in land subsequently acquired when revived.<sup>61</sup> But a lien may be created by an execution accompanied with a levy;<sup>62</sup> which to affect a subsequent purchaser or mortgagee must be docketed and indexed as required by section 3 of the act of April 22, 1856, P. L. 532:

"That the lien of no judgment, recognizance, execution levied on real estate in the same or another county, or of writs of *scire facias* to revive or have execution or judgments, shall commence or be continued as against any purchaser or mortgagee unless the same be indexed in the county where the real estate is situated in a book to be called the judgment index; and it shall be the duty of the prothonotary or clerk forthwith to index the same according to priority of date, and the plaintiff shall furnish the proper information to enable him to perform said duty."

### 39. Interest of heir or estate in expectancy.

A judgment against an heir binds his interest in the land of the intestate, but does not take priority over a debt due the estate

<sup>50</sup> Benson v. Maxwell, 14th Atl. 161.

<sup>51</sup> McKee v. Gilchrist, 3 Watts, 230; Miner v. Warner, 2 Grant, 448; Hiestand v. Williamson, 128 Pa. 122.

<sup>52</sup> Henderson v. Henderson, 133 Pa. 399; Stiles v. Bradford, 4 Rawle, 394.

<sup>53</sup> Hahn v. Smith, 1 P. & W. 484; Fackler v. Bale, 1 Pearson, 171.

<sup>54</sup> Small's Ap., 24 Pa. 398.

<sup>55</sup> Small's Ap., 24 Pa. 398; Metzler v. Kilgore, 3 P. & W. 245; 1 Reed's Penna. Blackstone, 418; Long's Ap., 23 Pa. 297.

<sup>56</sup> Carkhuff v. Anderson, 3 Binney, 4; Thomas v. Simpson, 3 Pa. 60.

<sup>57</sup> Emlen v. Bogg, 2 Yeates, 167.

<sup>58</sup> Colhoun v. Snider, 6 Binney, 135; Ross' Ap., 106 Pa. 82; P. & L. Dig., vol. 10, cols. 16228-9.

<sup>59</sup> Packer's Ap., 6 Pa. 277.

<sup>60</sup> Lea v. Hopkins, 7 Pa. 492.

<sup>61</sup> Dennison's Ap., 1 Pa. 201.

<sup>62</sup> Ross' Ap., 106 Pa. 82; Stauffer v. Comrs., 1 Watts, 300.

from such heir.<sup>1</sup> If the judgment is obtained before the right vests, it seems an execution must issue to acquire a lien.<sup>2</sup> After a sale of decedent's land on a judgment against him the remaining proceeds descend as lands and a judgment obtained against an heir after his right has vested binds his interest.<sup>3</sup> So does a judgment against an heir after an order to sell but before the sale takes place;<sup>4</sup> or against the owner of an executory devise<sup>5</sup> or a reversion;<sup>6</sup> or an interest in the dower after the death of the widow, remaining in the land.<sup>7</sup> But a mere expectancy subject to the discretion of a trustee is not the subject of a lien prior to its determination.<sup>8</sup> A widow's dower charged on realty and secured by recognizance in the Orphans' Court may be seized and sold under execution;<sup>9</sup> and the same is true after partition;<sup>10</sup> the purchaser being personally liable in the court having jurisdiction of his person.<sup>11</sup> Where a conveyance to husband and wife jointly vests a tenancy by entireties, a judgment against the survivor will take priority over a subsequent mortgage in which both joined.<sup>12</sup> The interest of the husband as tenant by the curtesy is not subject to lien during the life of his wife.<sup>13</sup>

#### 40. Leaseholds and other interests.

A judgment is not a lien upon a leasehold estate;<sup>14</sup> though the interest is leviable.<sup>15</sup> But when the holder of the lease has a contract which ripens into full ownership a judgment will be a lien.<sup>16</sup> The right of a remainderman to damages for destruction of a building is bound by a judgment.<sup>17</sup> But a conveyance of ground rent may be so hampered with conditions that there is nothing left for a judgment to lien on.<sup>18</sup> A judgment is no lien on rents in the hands of an assignee for benefit of creditors.<sup>19</sup> Where a judgment is a lien on an interest in land it is also a lien upon the fund it is converted into.<sup>20</sup> A judgment against a tenant by the curtesy initiate after issue born binds his estate in his wife's lands which have been ordered to be appraised in partition but which have not been accepted or sold at the date of the recovery of the judgment. And

<sup>1</sup> *Manifold's Est.*, 5 W. & S. 340.

<sup>2</sup> *Gheen's Est.*, 5 W. N. C. 319.

<sup>3</sup> *McCormick v. Sullenberger*, 2 Pearson, 346.

<sup>4</sup> *Wither's Ap.*, 14 S. & R. 185.

<sup>5</sup> *Ogden v. Knepler*, 1 Pearson, 145.

<sup>6</sup> *Amelong v. Dorney*, 16 S. & R. 323.

<sup>7</sup> *Steckel v. Koons*, 102 Pa. 493; *McCoy v. Frey*, 10 York, 9.

<sup>8</sup> *Handy's Est.*, 182 Pa. 68.

<sup>9</sup> *Shaupe v. Shaupe*, 12 S. & R. 9; *Thomas v. Simpson*, 3 Pa. 60.

<sup>10</sup> *Kunselman v. Stine*, 183 Pa. 1.

<sup>11</sup> *Kunselman v. Stine*, 192 Pa. 462.

<sup>12</sup> *Fleek v. Zillhaver*, 117 Pa. 213.

<sup>13</sup> *Gamble's Est.*, 1 Parsons, 489.

<sup>14</sup> *Krause's Ap.*, 2 Wharton, 398.

<sup>15</sup> *Bismarck, Etc., Assn. v. Bolster*, 92 Pa. 123.

<sup>16</sup> *Ely v. Beaumont*, 5 S. & R. 124; *Vandevender's Case*, 2 Browne, 304.

<sup>17</sup> *DeWitt v. Lehigh V. R. Co.*, 21 Supr. C. 10.

<sup>18</sup> *Bank of Commerce v. Peace*, 27 Supr. C. 643.

<sup>19</sup> *Kohr's Est.*, 9 Lanc. Bar, 96.

<sup>20</sup> *Shorb v. Parr*, 4 C. C. 460.



this lien continues to bind securities given for the wife's share of the valuation. It seems the birth of issue is not necessary, under the act of assembly, to give the husband an estate which is subject to judgments against him.<sup>21</sup> An order to sell land in the Orphans' Court does not convert it into personalty until the sale is confirmed.<sup>22</sup>

The rule as to valuation of a life estate is to estimate it at one-third the value of the fee including the life estate.<sup>23</sup>

A judgment against a municipality is not a lien on its realty,<sup>24</sup> because the land cannot be taken in execution.<sup>25</sup> But under the act of April 7, 1870, P. L. 58, the lands of any corporation not excepted by the 72d section of the act of June 16, 1836, P. L. 774, are subject to lien.<sup>26</sup> The exceptions are "county, township, or other public corporate body."

#### 41. Interest of vendor after agreement to convey.

After an agreement to convey land the interests respectively of the vendor and vendee, are bound by judgments against either according to the interest acquired by one and retained by the other, whether legal or equitable.<sup>27</sup> A judgment is a lien on every kind of equitable interest in lands of the debtor.<sup>28</sup> The lien upon an equitable interest attaches to the legal estate when it ripens and dates from the time of entry as to the whole estate.<sup>29</sup> So the interest of one as trustee for himself and associates is bound.<sup>30</sup> Where one, however, fails to comply with the conditions, he has no interest to bind.<sup>31</sup>

Even an inchoate right is bound; such as to land bought at an Orphans' Court sale, and before confirmation;<sup>32</sup> or a purchaser at a sheriff's sale.<sup>33</sup> But where the purchaser does not comply with the conditions he acquires no interest.<sup>34</sup> After assignment for the benefit of creditors whatever interest the assignor may have left is bound.<sup>35</sup>

<sup>21</sup> Lancaster County Bank v. Stauffer, 10 Pa. 398.

<sup>22</sup> Ferree v. The Comth., 8 S. & R. 312.

<sup>23</sup> Dennison's Ap., 1 Pa. 201; Hoffman's Est., 2 Pearson, 317.

<sup>24</sup> Schaffer v. Cadwallader, 36 Pa. 126.

<sup>25</sup> Wharton's brief in Schaffer v. Cadwallader, *supra*; Wilson v. Comrs., 7 W. & S. 197; Williams v. Controllers, 18 Pa. 275.

<sup>26</sup> Phila., Etc., R. Co.'s Ap., 70 Pa. 335. (See Good's Reference Index, 1908, p. 484, for all the cases.)

<sup>27</sup> Chahoon v. Hollenback, 16 S. & R. 425; Catlin v. Robinson, 2 Watts, 373; Stewart v. Coder, 11 Pa. 90; P. & L. Dig., vol. 10, cols. 16242-3-4-5-6.

<sup>28</sup> Champlin v. Williams, 9 Pa. 341; P. & L. Dig., vol. 10, col. 16247; Russell's Ap., 15 Pa. 319; Krause's Ap., 2 Wharton, 398.

<sup>29</sup> Water's Ap., 35 Pa. 523; Lyon v. McGuffey, 4 Pa. 128; P. & L. Dig., vol. 10, col. 16248; Guthrie v. Watson, 24 Pitts. L. J. 57.

<sup>30</sup> Drysdale's Ap., 15 Pa. 457.

<sup>31</sup> Deitzler v. Mishler, 37 Pa. 82.

<sup>32</sup> Addams v. Hoffman, 2 Woodward, 93; Holmes' Ap., 108 Pa. 23.

<sup>33</sup> Morrison v. Wurtz, 7 Watts, 437; Stephen's Ap., 8 W. & S. 186; Slater's Ap., 28 Pa. 169.

<sup>34</sup> Jacobs' Ap., 23 Pa. 477.

<sup>35</sup> Webb v. Dean, 21 Pa. 29; Lane's Est., 1 Susq. Leg. Chron. 35.

#### 42. Interest of vendee under agreement.

A judgment is a lien against whatever interest a vendee of land acquires under his agreement, equitable at first,<sup>36</sup> but legal when his title is complete,<sup>37</sup> whether the deed is to his assignee<sup>38</sup> or his appointee; for the lien of a judgment is not the object but an incident and it rests upon the construction of the statute of Westminster II, and not on any principle of general equity or the common law.<sup>39</sup> A judgment which binds the incipient interest has priority over one entered when that title has ripened to its fullness in law,<sup>40</sup> and also over a mortgage for advances;<sup>41</sup> or a purchase money mortgage not recorded as required by law.<sup>42</sup> An assignment of interest if not recorded, will not avoid the lien of a subsequent judgment.<sup>43</sup> But if the assignment is legal and effective and the assignor subsequently takes title he will do so as trustee for his assignee and a judgment after the assignment does not bind.<sup>44</sup> An interest that is lienable may be obtained by improvements under an agreement;<sup>45</sup> also, when acquired by a parol contract which by performance is exempt from the statute of frauds;<sup>46</sup> also an estate at will which ripens into an absolute title.<sup>47</sup> But the vendor's lien for unpaid purchase money will not be affected.<sup>48</sup> Where land is equitably converted into personalty by a will a subsequent judgment against the beneficiary is no lien.<sup>49</sup> Until the devisee has elected under a will which converts into personalty, to take as realty, no lien attaches.<sup>50</sup>

#### 43. Time when lien begins.

It has been seen, *supra*, that as to the lien of judgments there is no division of the day, as between judgments. A judgment dates from the beginning of the day when it is lodged with the prothonotary in his office, although it may not be docketed until afterwards.<sup>1</sup> The prothonotary may receive a warrant to confess at his residence and mark it filed before midnight, entering it in the morning as

<sup>36</sup> *Loudermilch v. Loudermilch*, 2 Pearson, 134; citing *Carkhuff v. Anderson*, 3 Binney, 4; *Schock v. Bankes*, 20 Pitts. L. J. 191.

<sup>37</sup> *Richter v. Selin*, 8 S. & R. 425; *Semple v. Moron*, 4 Phila. 85; *Fair, Etc., Co.'s Est.*, 183 Pa. 103; *P. & L. Dig.*, vol. 10, col. 16254.

<sup>38</sup> *Winter v. Thompson*, 3 Lack. Jur. 398.

<sup>39</sup> *Gibson*, Ch. J., in *Reed's Ap.*, 13 Pa. 476; *Roth v. Humrich*, 76 Pa. 128.

<sup>40</sup> *Stephens' Ap.*, 8 W. & S. 186.

<sup>41</sup> *Lynch v. Dearth*, 2 P. & W. 101; *Merkel's Ap.*, 10 W. N. C. 116.

<sup>42</sup> *Foster's Ap.*, 3 Pa. 79.

<sup>43</sup> *Russell's Ap.*, 15 Pa. 319.

<sup>44</sup> *Taylor v. Preston*, 79 Pa. 436.

<sup>45</sup> *Baird v. Lent*, 8 Watts, 422.

<sup>46</sup> *Pugh v. Good*, 3 W. & S. 56; *Hutchinson v. Kerr*, 3 Penny. 122.

<sup>47</sup> *Lloyd's Ap.*, 82 Pa. 485.

<sup>48</sup> *Canon v. Campbell*, 34 Pa. 309; *Auwerter v. Mathiot*, 9 S. & R. 397; *Vierheller's Ap.*, 24 Pa. 105.

<sup>49</sup> *Allison v. Wilson*, 13 S. & R. 330; *Paist's Ap.*, 1 Mona. 523; *Evans' Ap.*, 63 Pa. 183; *P. & L. Dig.*, vol. 10, cols. 16262-3-4.

<sup>50</sup> *Henderson v. Henderson*, 133 Pa. 399; *Hunter v. Anderson*, 152 Pa. 286; *P. & L. Dig.*, vol. 10, col. 16265.

<sup>1</sup> *Burns v. Burns*, 18 Phila. 389; *Small's Ap.*, 24 Pa. 398.



of the day before.<sup>2</sup> But if he does so, the owner of a judgment filed and entered that day, may object and require the judgment to be entered as of the following day.<sup>3</sup> When a question arises as to the date of a record it must be tried by the record itself.<sup>4</sup> Although the exact time of entering judgment may be noted, as between judgments there is no fraction of a day;<sup>5</sup> but when the judgment is entered on the same day but after the death of the defendant the court will take cognizance of it and such judgment will not be preferred over other creditors.<sup>6</sup> This is because of the superior rule that the rights of the creditors are fixed at the moment of the death of the debtor.<sup>7</sup> And so, also, as between a judgment and a conveyance recorded on the same day it may be shown which had precedence.<sup>8</sup> But where there is no evidence on the subject the judgment will relate back to the beginning of the day.<sup>9</sup>

As between judgments and mortgages entered on the same day there is no priority; though the parties may agree to such priority, if the right is not allowed to sleep unexercised.<sup>10</sup> A judgment creditor's admission that a mortgage was entitled to priority may be accepted on distribution.<sup>11</sup> A verbal understanding not noted on the record will not affect an assignee.<sup>12</sup> But the rule above stated does not apply where a judgment accompanies a mortgage.<sup>13</sup> Where a judgment is entered on the same day as an execution is levied on after-acquired land, they share *pro rata*.<sup>14</sup> A judgment by default is a lien from its date although the damages are not liquidated at the time, if the claim is for a sum certain.<sup>15</sup> But if there is no definite sum claimed, the judgment is a lien from the date of liquidation only.<sup>16</sup> Under the act of March 23, 1877, P. L. 34, the lien of a verdict dates from its rendition. A decree in equity for money has the same effect as a judgment, as a lien.<sup>17</sup> The same applies to a decree for the payment of expenses of a committee for a habitual drunkard.<sup>18</sup> The act of 1859 did not give the right to transfer a decree in equity to another county for lien.<sup>19</sup>

<sup>2</sup> Polhemus' Ap., 32 Pa. 328.

<sup>3</sup> Chambers v. Denie, 2 Pa. 421.

<sup>4</sup> Adams v. Betz, 1 Watts, 425; Kostenbader v. Kuebler, 199 Pa. 246.

<sup>5</sup> Metzler v. Kilgore, 3 P. & W. 245; Emerick v. Garwood, 1 Browne, 20; McClure v. Roman, 52 Pa. 458; McAfoose's Ap., 32 Pa. 276; Neff v. Barr, 14 S. & R. 166; P. & L. Dig., vol. 10, col. 16269.

<sup>6</sup> Patterson's Ap., 96 Pa. 93.

<sup>7</sup> McClintock's Ap., 29 Pa. 360; Roumfort v. McAlarney, 82 Pa. 193.

<sup>8</sup> Mechanic's Bank v. Gorman, 8 W. & S. 304.

<sup>9</sup> Boyer's Est., 51 Pa. 432; Ladley v. Creighton, 70 Pa. 490.

<sup>10</sup> Claason's Ap., 22 Pa. 359; Magaw v. Garrett, 25 Pa. 319.

<sup>11</sup> Maze v. Burke, 12 Phila. 335.

<sup>12</sup> Hendrickson's Ap., 24 Pa. 363.

<sup>13</sup> Miller v. Fluck, 8 C. C. 585.

<sup>14</sup> Wheatland v. Wheatland, 16 Montg. 153; Wilson's Ap., 90 Pa. 370.

<sup>15</sup> Comth. v. Baldwin, 1 Watts, 54; Sellers v. Burk, 47 Pa. 344; Fulton's Est., 51 Pa. 204; Kistler v. Mosser, 140 Pa. 367; P. & L. Dig., vol. 10, cols. 16273-4.

<sup>16</sup> Phillips v. Hellings, 5 W. & S. 44.

<sup>17</sup> Act March 29, 1859, P. L. 289.

<sup>18</sup> Hohman's Ap., 127 Pa. 209.

<sup>19</sup> Brooke v. Phillips, 83 Pa. 183.

#### 4. Continuance of lien by revival.

a judgment be not revived within five years from its entry, either by amicable *scire facias* or by writ of *scire facias* issued adversely, the lien expires as to other creditors who have a lien at the time or procure one subsequently;<sup>20</sup> or as against purchasers,<sup>21</sup> whether or not the deed is recorded.<sup>22</sup> It remains a lien against the defendant, however, without revival.<sup>23</sup> After five years it loses its character as to one who bought the land whilst it was a lien.<sup>24</sup> The acts "or creditors of the grantor or bargainor" in the act of May 1893, P. L. 108, as to recording within 90 days, are inoperative.<sup>25</sup> The act of June 1, 1887, P. L. 289, amends section 1 of the act of March 26, 1827, to read as follows:

All judgments entered in any court of record in this Commonwealth, or revived in manner prescribed by this act, or the act to which this is a supplement,<sup>26</sup> shall continue a lien on the real estate of the defendant for the term of five years from the day of entry or revival thereof; and no judgment shall continue a lien on such real estate for a longer period than five years from the day on which such judgment may be entered or revived, unless renewed, within that period, by agreement of the parties and *terre-tenants* filed in writing, and entered on the proper docket, or a writ of *scire facias* in writing the same be sued out within said period, according to the provisions of the act to which this is a supplement, notwithstanding an execution may be issued within a year and a day after the rendering of such judgment, or a stay of execution may be entered on such judgment, or a time subsequent to the rendering of such judgment may be appointed, by agreement of the parties, for payment of the money for which such judgment may be rendered, on any part thereof, or notwithstanding any other condition, or contingency may be attached to such judgment; nor shall the revival of such judgment by agreement, as aforesaid, or the issuing of a *scire facias*, either with or without entry of judgment thereon, have the effect of continuing such lien for a longer period than five years from the day on which it may be entered, or revived, or such *scire facias* may have issued; and no proceeding shall be available to continue the lien of said judgment against a *terre-tenant*, whose deed on the land bound by said judgment has been recorded, except by agreement, in writing, signed by said *terre-tenant* and entered upon the proper lien docket or the *terre-tenant*, or *terre-tenants* be named in such in the original *scire facias*."

#### 5. Revival before due by *sci. fa.* or amicable agreement.

Section 3 of the act of March 26, 1827, P. L. 129, provides:

*Bank of N. America v. Fitzsimons*, 3 Binney, 342; *Carl v. Strine*, 10 Pa. 141; *Miller v. Miller*, 147 Pa. 548; *McCahan v. Elliott*, 103 Pa.

*Arrison v. Comth.*, 1 Watts, 374.

*Pipher v. Duke*, 13 Supr. C. 279.

*McCahan v. Elliott*, 103 Pa. 634.

*Little v. Smyser*, 10 Pa. 381; *Zerns v. Watson*, 11 Pa. 260; *Colborn v. Trimpey*, 36 Pa. 463; *Colwell v. Easley*, 83 Pa. 31.

*Davey v. Ruffell*, 162 Pa. 443.

April 4, 1798, 3 Sm. L. 331.

"That upon all judgments already entered, or which may hereafter be entered, in any court of record within this commonwealth, it shall be lawful to sue out a writ of *scire facias* to revive the same, according to the provisions of this act and the act to which this is a supplement, or to revive the same by agreement of the parties, filed and docketed as aforesaid, notwithstanding the day for the payment of the money for which such judgment may be rendered, or any part thereof, may not have arrived at the time of suing out such writ of *scire facias*, or the revival of such judgment by agreement, as aforesaid, and notwithstanding any other condition or contingency may be attached to such judgment, or any execution may have been issued on such judgment; and, moreover, no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of the revival in manner herein prescribed, of any judgment whatever."

Section 4 allowed the prothonotary 50 cents for entering the revival. In counties having a D. S. B. docket the fee charged is \$1.75.

#### 46. Form of amicable sci. fa.

Oscar Hansen	}	In the court of Common Pleas of Berks County, Pa.
v.		
James Jansen.		
	No. —	Term, 19—.

#### *Amicable Scire Facias*

To revive and continue the lien of judgment entered to  
No. .... of ..... Term, 19—.

It is hereby agreed, by and between the parties above named, that an amicable *scire facias* on the above stated judgment be entered on the records of the said court by the prothonotary thereof, in the above form (as of the present, last or any subsequent term), with the same effect as if a *scire facias* had regularly issued and been returned by the sheriff, "*scire feci*." And it is further agreed that judgment of revival be, and the same is hereby, confessed by the defendant in favor of the plaintiff for the sum of — dollars, with all the waivers and conditions contained in the original judgment with costs and release of all errors, etc., according to the act of assembly in such case made and provided, with costs.

Witness our hands and seals this — day of — 19—.

Witness present:

.....  
.....

.....[Seal.]  
.....[Seal.]  
.....[Seal.]  
.....[Seal.]

#### 47. Service of *scire facias* on terre-tenants.

By the act of 1887, *supra*, all *terre-tenants* must be made parties *as such*, to the *scire facias* to revive. Section 3 of the act of April 4, 1798, 3 Sm. L. 331, is as follows:

"That all such writs of *scire facias* shall be served on the *terre-tenants*, or persons occupying the real estates bound by the judgment,

and also, where he or they can be found, on the defendant or defendant, his or their feoffee or feoffees, or on the heirs, executors or administrators, of such defendant or defendants, his or their feoffee or feoffees; and where the land or estate is not in the immediate occupation of any person and the defendant or defendants, his or their feoffee or feoffees, or their heirs, executors or administrators cannot be found, proclamation shall be made in open court, at two succeeding terms, by the cryer of the court in which such proceedings may be instituted, calling on all persons interested to show cause why such judgment should not be revived; and on proof of due service thereof, or on proclamation having been made in the manner hereinbefore set forth, the court from which the said writ may have issued, shall, unless sufficient cause to prevent the same is shown at or before the second term subsequent to the issuing of such writ, direct and order the revival of any such judgment, during another period of five years, against the real estate of such defendant or defendants, and proceedings may in like manner be had again to revive any such judgment at the end of the said period of five years, and so from period to period, as often as the same may be found necessary."

The purpose and effect of this law as related to the practice prior to its passage are discussed by Judge Washington of the U. S. Circuit Court, in the case of *Hurst v. Hurst*, 3 Sm. L. 362.

The twelfth section of the act of 1901, *supra*, provides:

"The writ of *scire facias* to revive a judgment, in any of the classes of cases mentioned in sections ten and eleven of this act, shall be served as is provided for the original *scire facias* therein, unless personal service was made upon the defendants in the original proceeding; in which event two returns of *nihil habet* to the writs to revive, shall be equivalent to personal service upon the defendants."

#### 48. Form of *scire facias* to revive, etc.

Berks County, ss.

The Commonwealth of Pennsylvania, to the sheriff of Berks County, greeting:

Whereas, — heretofore in our Court of Common Pleas, held at Reading, in and for the county of Berks, on the — day of — in the year of our Lord one thousand nine hundred and — before the honorable, the judges of the said court, by consideration of the said court, recovered judgment against — — late of the county aforesaid, for a certain debt of — — dollars, which to the said plaintiff in our said court was adjudged for — damage, which — sustained, as well by occasion of the detention of that debt, as for — costs and charges by — in and about — suit in that behalf expended, whereof the said defendant — — convict, as by records in our said court remaining manifestly appears: [set out judgment].

And whereas, The time during which the judgment aforesaid will by law continue a lien on the real estate of the defendant as aforesaid is nearly expired, and the said plaintiff being desirous that the lien aforesaid shall be revived and continue for another term of five years:

We therefore command you, That by honest and lawful men of



your bailiwick, you make known to the said — — so that — be and appear before our judges, at Reading, at our County Court of Common Pleas, there to be held for the county of Berks, the second Monday of — next, to show, if anything for — know or ha to say why the judgment aforesaid, against the said defendant, should not be revived according to an act of the legislature of this commonwealth, in such case made and provided, *et quare executionem non*, if to — it shall seem expedient so to do. And have you then there the names of those persons by whom you shall cause it to be made known to —, and this writ.

Witness the honorable — —, president of the said court, at Reading, the — day of — in the year of our Lord one thousand nine hundred and —.

— — Prothonotary.

#### 49. Continuation of lien against decedent's land.

The act of June 18, 1895, P. L. 197, so amends section 25 of the act of February 24, 1834, that it reads:

"All judgments, which at the time of the death of a decedent shall be a lien on his real estate, shall continue to bind such real estate during the term of five years from his death, although such judgments be not revived by *scire facias* or otherwise after his death; and such judgments shall, during such term, rank according to their priority at the time of such death, and after the expiration of such term such judgments shall not continue a lien on the real estate of such decedent as against a *bona fide* purchaser, mortgagee or other judgment creditor of such decedent, or of his heirs or devisees, unless revived by *scire facias* or otherwise according to the laws regulating the revival of judgments."

The administrator should be made a party.<sup>27</sup> The service acts of 1901 and 1903 do not apply to *scire facias* to revive judgments and the preliminary affidavit is not required.<sup>28</sup>

#### 50. Liens of unsecured debts of decedents.

Section 1 of the act of May 3, 1909, P. L. 386, provides:

"That no debts of a decedent, including the cost of settlement of the estate,—except as provided in sections three and four hereof,—shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent, and such action shall be indexed, within said period, against the decedent and such executor or administrator, in the judgment index in the county in which such action is brought, and also in the county in which the real estate sought to be charged is situate, and be duly prosecuted to judgment; or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of two years, be filed within said period after his decease, in the office of the prothonotary of the county where the real estate to be charged is situate, and be indexed in the judgment index in said county

<sup>27</sup> Eby v. Patton, 18 D. R. 52.

<sup>28</sup> McDonough v. Lydon, 18 D. R. 466.

against the decedent and the executor or the administrator and then to be a lien only for the period of five years after said bond, covenant, debt or demand is so filed and indexed, unless the same be revived by writ of *scire facias* against the decedent, his heirs, executors, or administrators, and the devisee, alienee, or owner of the land sought to be charged, in the manner now provided in the case of the revival of judgments: *Provided*, That in no case shall the lien continue for a period longer than two years after the said bond, covenant, debt or demand becomes due. And it shall be the duty of the prothonotaries of the several counties of this commonwealth, when an action is brought or statement is filed as aforesaid in his office, upon *præcipe* of the plaintiff or his attorney, to index the same against the decedent, his executor, or administrator and any other defendants therein, in the judgment index, as other liens are indexed; and the prothonotary of any court in which said action may be brought, shall upon request, furnish a copy of such *præcipe*, which when duly certified under the seal of the court, may be filed in any other county of this commonwealth, in which the real estate sought to be charged with the debts of such decedent may be situate, and when so filed shall be indexed, against the parties named therein, upon the judgment index in such county."

*Judgments which have lost their lien.*

"Section 2. Judgments which were not a lien on the real estate of the decedent by entry or revival, by due process of law, within five years prior to the death of such decedent, shall not be revived as a lien against real estate by the death of the defendant, but shall rank and be treated simply as ordinary debts of record, and the lien thereof shall be continued only as provided in section one hereof."

*Judgments which are a lien at the death, continued.*

"Section 3. All judgments which at the time of the death of a decedent shall be a lien on his real estate shall continue to bind such real estate during the term of five years from his death, although such judgments be not revived by *scire facias*, or otherwise after his death; and such judgments shall, during such term, rank according to their priority at the time of such death, and, after the expiration of such term, such judgments shall not continue a lien on the real estate of such decedent, unless revived by *scire facias* or otherwise, according to the laws regulating the revival of judgments."

*Mortgages and bonds, how affected.*

"Section 4. Nothing herein shall in any way affect or impair the lien of any mortgage, given and executed and duly recorded during the lifetime of any decedent; but the bond secured by such mortgage, except as to real estate on which said mortgage is a lien, shall be subject to all the provisions hereof."

**51. Judgments of criminal courts.**

The act of May 8, 1901, P. L. 143, provides:

"That where any court of Quarter Sessions of the Peace or court of Oyer and Terminer of this commonwealth has heretofore made or entered, or shall hereafter make or enter, any order, sentence, decree or judgment for the payment of any moneys whatsoever, in any matter or thing within the jurisdiction of the said court, a

copy of the said order, sentence, decree or judgment may be certified to any court of Common Pleas of the same county, and be entered and indexed in said court as a judgment with like force and effect as if the same had been recovered therein as a judgment of the latter court."

#### 51a. Revival and collection.

"Section 2. That when said order, sentence, decree or judgment is entered as a judgment in the court of Common Pleas, aforesaid, the same may be revived, by *scire facias et quare executionem non*, and be collectible by writs of *feri facias*, *venditioni exponas*, and by *testatum feri facias* and *testatum venditioni exponas* to other counties, to sell real and personal estate, and by *alias*, *pluries* and such other writs of execution as shall be necessary to collect said judgment, which writs aforesaid shall issue in the same manner and be of like force and effect for the sale of personal and real estate as if the said judgment had been originally recorded in the said court, except that the defendant in any such writs shall not be entitled to the benefit of any exemption laws."

#### 52. Lien of judgments of federal courts.

The act of June 24, 1895, P. L. 247, provides:

"That the prothonotaries of the several courts of Common Pleas of this commonwealth be and they are hereby authorized and required to enter transcripts of the records of judgments and decrees rendered in the Circuit or District Courts of the United States within the state, when duly certified, and index the same in the same manner as transcripts of records of judgments and decrees obtained in any of the courts of general jurisdiction of this state are entered and indexed, to make them liens, and are authorized to charge and receive the same fees for the same, and no judgment or decree entered in the Circuit or District or other court of the United States, shall be a lien on any real estate in any county of this commonwealth, unless the same shall be so entered in the court of Common Pleas of the county wherein such real estate is situate: *Provided*, That nothing herein contained shall be construed to require the docketing of a judgment or a decree of a United States court, or the filing of a transcript thereof, in or within the same county in which the judgment or decree is rendered by such United States court."

The authority for this act of the legislature is derived from the act of Congress of August 1, 1888, C. 729, U. S. Comp. Stat. 701, which provides that where a state law authorizes judgments and decrees of the United States Court to be recorded in conformity with the requirements relating to judgments of state courts of general jurisdiction, the judgments of the United States Court "shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by a court of general jurisdiction of such state."

Before the act of 1895, *supra*, a judgment of a U. S. court was a lien co-extensive with the district in which entered and the act

1888 was not retroactive.<sup>1</sup> A judgment now is a lien only in the county where rendered unless transferred and when transferred cannot be assailed in the county to which transferred.<sup>2</sup>

### 3. Lien of judgment in supreme court.

The act of March 2, 1799, 3 Sm. L. 358, provides:

No judgment rendered in the Supreme Court or in the Circuit Courts, shall be a lien on real estates, excepting in the county in which judgment shall be rendered."<sup>3</sup>

### 4. Judgments on writs of *scire facias executionem non*.

Section 4 of the act of May 6, 1844, P. L. 565, provides:

All judgments heretofore entered on writs of *scire facias quare executionem non*, shall have the same effect to revive and continue the lien of the original judgment, as if entered upon writs of *scire facias annuum et diem*."

After the passage of this act Dougherty's Estate<sup>4</sup> was decided (per opinion by Chief Justice Gibson), but no mention is made of it. However, the purpose of the act is indicated by the decision in *Gasche v. Peterman*,<sup>5</sup> to which it doubtless relates.

In the case last cited it was held, "That a plaintiff who proceeds on a writ of *scire facias quare executionem non*, before he has a right to execute at all, shall not elude his want of a case by turning his writ into a writ of *scire facias* to continue the lien and have judgment for that when he could not have an award of execution."<sup>6</sup>

In the case of *Gasche v. Peterman*, the writ was "in the common form of the *scire facias quare executionem fieri debet*, etc., which has never been used in practice under the statute of Westminster II, requiring the sheriff 'by honest and lawful men of his bailiwick, to give notice to the said Charles Gasche, with notice to Mathias Gasche, *terre-tenant*, that he be and appear before our judges, etc., to answer, if anything for himself he hath or knows to say, why the said Henry Peterman ought not to have his execution against him for the debt and damages aforesaid, if to him it shall seem expedient, according to the form, force and effect of the said recovery."<sup>7</sup>

It appears, therefore, that the act, *supra*, was not prospective but retrospective, and that a *scire facias quare executionem non* is a different writ from a *scire facias post annum et diem*, as stated by Chief Justice Gibson, Ch. J., in *Dougherty's Est.*<sup>8</sup> The form of a *scire facias* to revive and continue the lien is different.<sup>9</sup>

A writ of *scire facias* issued within the five years but returned *tarde venit* may be kept alive by promptly issuing an *alias*.<sup>10</sup> It was held that where an execution issued within the year a *sci. fa.*

<sup>1</sup> *Bank v. Thompson*, 173 Ill. 593.

<sup>2</sup> *Nelson v. Greffy*, 131 Pa. 273.

<sup>3</sup> See par. 52, *supra*, act 1895; *McGill, in re*, 6 Pa. 504.

<sup>4</sup> 9 W. & S. 189.

<sup>5</sup> 3 W. & S. 351.

<sup>6</sup> *Gibson in Dougherty's Est.*, 9 W. & S. 189.

<sup>7</sup> *Gasche v. Peterman*, 3 W. & S. 351.

<sup>8</sup> See also *Pennock v. Hart*, 8 S. & R. 369.

<sup>9</sup> See form, *supra*, par. 48.

<sup>10</sup> *Pennock v. Hart*, 8 S. & R. 369.



was not necessary to continue the lien.<sup>11</sup> To a *sci. fa. quare executionem non* the defendant may plead that the *cesset* has not expired.<sup>12</sup>

The only defenses to a *scire facias* are that no judgment exists or that it has been satisfied.<sup>12a</sup> Set-off which involves a question of partnership cannot be set up.<sup>12b</sup>

### 55. *Scire facias* — nature of.

It was said by Chief Justice Gibson:<sup>13</sup>

"But though a *scire facias* is said to be so far an action that the parties to it may plead to issue, it is in truth no more than a judicial writ which lies only in the court where the record remains.<sup>14</sup> In *Wright v. McNutt*<sup>15</sup> it is said not to be a new suit, but a continuation of the old one; in *Phillips v. Brown*,<sup>16</sup> that it is a step towards execution and in *Dixon v. Heslop*<sup>17</sup> that it is merely the handmaid of the original cause."

He says further:

"It is doubtless true that our judgment on a *scire facias post annum et diem*, is not, as in England, a bare award of execution; but that it is itself a judgment *quod recuperet* on which the execution commonly issues as on an original one; still an accidental difference of practices ought not to be allowed to change the nature of the process."

At the common law, after a year and a day had elapsed, if the plaintiff had not taken out an execution, he was compelled to sue on his judgment. But by the statute of Westminster II, 13 Edward I. C. 45 (Robert's Digest, 240), which gave a writ of *fiere facias* within a year, it was also provided that if more than a year has passed without execution,

"The sheriff shall be commanded that he give knowledge to the party of whom it is complained, that he be afore the justices at a certain day, to show if he have anything to say why such matters enrolled or contained in the fine, ought not to have execution. And if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the sheriff shall be commanded to cause the thing enrolled or contained in the fine to be executed."

### 56. Lien as to terre-tenant.

By section 8 of the act of April 16, 1849, P. L. 664, it is thus provided:

"That in all cases when a judgment has been or shall be regularly revived between the original parties, the period of five years

<sup>11</sup> *Young v. Taylor*, 2 Binney, 218.

<sup>12</sup> *Pennock v. Hart*, *supra*.

<sup>12a</sup> *Huppert v. Huppert*, 5 Schuylkill, 29; *Curry v. Morrison*, 40 Supr. C. 301.

<sup>12b</sup> *Curry v. Morrison*, 40 Supr. C. 301.

<sup>13</sup> *Dougherty's Est.*, 9 W. & S. 189.

<sup>14</sup> 2 Bacon's Abr., 356.

<sup>15</sup> 1 T. R. 389.

<sup>16</sup> 6 T. R. 282.

<sup>17</sup> 6 T. R. 366.

during which the lien of the judgment continues, shall only commence to run in favor of the *terre-tenant* from the time that he or she has placed their deed on record: *Provided*, That this act shall not apply to any cases which have been finally adjudicated, or when the *terre-tenant* is in actual possession of the land bound by such judgment, by himself or tenant."

This was passed in consequence of Armstrong's Ap. 5 W. & S. 352, where it was held that an amicable revival without the *terre-tenant* in possession being a party did not bind him although his deed was not recorded. That was under the act of March 26, 1827, 9 Sm. L. 303 — which was not changed as to a *terre-tenant* in possession, by the act of 1849. If he is out of possession or his deed is not recorded he is bound by the revival without notice to him.<sup>18</sup> He cannot save himself by showing that the judgment creditor had knowledge of an unrecorded conveyance. But where the judgment creditor knew of the conveyance by the husband to his wife her possession is sufficient to require proceedings to revive within five years from the date of such deed. It is not knowledge of the deed but the record of it that affects the judgment creditor, but he is bound by actual possession.<sup>19</sup> To make the record effective an intervening deed must also be recorded so as to show the chain of title.<sup>20</sup> Secret conveyances are not to be encouraged and especially between husband and wife.

#### 57. Continuation of lien in new county.

The act of May 4, 1852, P. L. 584, provides:

"That in all cases of the erection of a new county out of part or parts of one or more other counties, where judgments were originally entered in the old county or counties, and have been or shall be transferred into the new, and therein shall be or shall have been proceeded in by *scire facias* within five years from the last rendition of judgment in the old county or counties, the lien thereof shall be continued and preserved as to real estate in the new county although the same shall not have been revived in the old county: *Provided*, That this act shall not affect any case where the money has been distributed."

#### 58. Revival as to soldiers in actual service.

Section 1 of the act of April 11, 1862, P. L. 484, provides:

"That in all cases, where there are judgments against any person or persons, who have been, or may be, mustered into the service of this state or of the United States, it shall be lawful for the plaintiff or plaintiffs in such judgments, to issue writs of *scire facias* for revival of the same, the issuing of which writ, on any such judgment shall be sufficient to continue the lien of the same, but judgment of revival shall not be entered during the time the defendant is, or defendants are in actual service as aforesaid; and before taking judgment, after such defendant or defendants shall have been dis-

<sup>18</sup> Porter v. Hitchcock, 98 Pa. 625; Buck's Ap., 100 Pa. 109; overruling McCray v. Clark, 82 Pa. 457. (See Kelley v. Place, 26 C. C. 120.)

<sup>19</sup> Wetmore v. Wetmore, 155 Pa. 507.

<sup>20</sup> Smith v. Eline, 18 C. C. 560, citing Lyon v. Cleveland, 170 Pa. 611.

charged from service, it shall be the duty of the plaintiff or plaintiffs, to give notice to the defendant or defendants, of the intended application to the court for judgment at least ten days before such judgment shall be asked for, and said defendant or defendants, shall have the right to enter an appearance and take defence as in other cases."

"Section 2. That if, within three months after the term of service of any such defendant or defendants, shall have expired, or when they shall have been discharged, he or they shall not return to and acquire a residence in the county in which such judgment is entered, it shall be lawful for the plaintiff or plaintiffs to issue an *alias scire facias* and upon a return of *nihil* thereon, the court may render judgment or revival of such judgment."

This was passed to revive and continue a subsisting lien not to revive an expired one.<sup>21</sup>

The act of April 28, 1899, P. L. 151, provides in section 59, that "no civil process shall issue against any person mustered into the service of this state or of the United States during so much of the term as he shall be engaged in active service under orders, nor until thirty days after he shall have been relieved therefrom: *Provided*, That the operation of all statutes of limitations and presumptions, arising from lapse of time shall be suspended upon all claims against such person during such term."

#### 59. Lien of verdict.

The act of March 23, 1877, P. L. 34, provides:

"That whenever a verdict is rendered by a jury in any of the courts of Common Pleas of this commonwealth for any specific sum of money, in such case the verdict shall be a lien upon the real estate situate within the proper county of the party or parties against whom said verdict shall be rendered, which lien shall remain unless the court grant a new trial or arrest the judgment; and it shall be the duty of the prothonotary of the court of Common Pleas to enter such verdict on the lien docket where judgments are entered, marking the same 'verdict,' and specifying the amount of said verdict and the date of its rendition."

This act is purely a lien law and does not authorize the entry of judgment on the same day as the verdict. Under the immemorial custom the party against whom the verdict is rendered has four days in which to move in arrest of judgment and for a new trial.<sup>22</sup> The lien which is thus given to a verdict is limited to five years from its rendition.<sup>23</sup>

A verdict will not be disturbed because the jury fee is not paid.<sup>24</sup> It was ruled in Philadelphia that this act does not authorize the indexing of a verdict for the defendant against the plaintiff.<sup>25</sup> The act, however, says "the party or parties against whom said verdict shall be rendered."

<sup>21</sup> Moyer v. McNulty, 22 C. C. 153.

<sup>22</sup> Moravian Seminary v. Bethlehem, 153 Pa. 583; Parkinson v. Snyder, 2 W. N. C. 428.

<sup>23</sup> Fuellhart v. Thompson, 11 Supr. C. 273.

<sup>24</sup> Bush v. Mullin, 17 W. N. C. 522.

<sup>25</sup> Deacon v. Greenfield, 23 W. N. C. 264.

A verdict so docketed as a lien cannot be transferred to another county, until judgment is entered upon it.<sup>26</sup> The exemplification cannot be cured by filing a certificate of judgment subsequently. It will be stricken off on a rule for that purpose.<sup>27</sup>

Where a verdict has been assigned and subsequently judgment has entered on it, but not marked to the use of the assignee, it carries the equitable ownership and the fund was not attachable by a creditor of the assignor.<sup>28</sup>

#### 60. Proceedings in Philadelphia and Berks, to ascertain the lien of a judgment upon particular property.

Section 2 of the act of Sept. 6, 1860 (P. L. 1861, p. 840), provides:

"The defendant in any judgment may apply, by petition, to any of the courts in said city and county,<sup>1</sup> setting forth that a judgment in force against him in such court is apparently a lien on real estate against which the plaintiff or plaintiffs is not equitably entitled to enforce the same, and would not be entitled to claim any part of the proceeds thereof by virtue of said judgment, if the property were sold by any judicial sale, whatsoever, to which petition shall be attached a description of the property so claimed to be exempt from the lien of the judgment; whereupon the court shall issue a citation, directed to the plaintiff or plaintiffs, to show cause why a decree should not be made, that the lien of such judgment should not extend to said property or affect the title thereof; and unless the plaintiff or plaintiffs shall in answer thereto aver, under oath or affirmation, that he or they believe the judgment to be an existing lien on such property, or part thereof, specifying what part, which he or they are legally and equitably entitled to enforce as such, and that he or they claim and desire to hold and enforce such judgment, the court shall make a decree, such as aforesaid, and the property in question shall be and remain forever discharged from the lien of such judgment. If the plaintiff should answer the citation as aforesaid, then the court shall order an issue to be formed to try the question, whether the judgment is an existing lien which the plaintiff is legally and equitably entitled to enforce as aforesaid; and on the determination of such issue, if decided against the defendant, his petition shall be dismissed, and if against the plaintiff, a decree, such as aforesaid, discharging the property from the lien of the judgment shall be made: *Provided*, However, that if the answer and claim of the plaintiff, as aforesaid, shall apply only to part of the property in the defendant's petition mentioned, the issue shall only refer to such part, and a decree, discharging the residue of the property from the lien of the judgment as aforesaid shall at once be made without the determination of the issue: And *provided also*, That whenever the defendant shall deposit in court an amount of money sufficient to cover the judgment, interest and costs, or the

<sup>26</sup> Bailey v. Eder, 90 Pa. 446.

<sup>27</sup> Bailey v. Eder, *supra*.

<sup>28</sup> Bechtel v. Lauer Brewing Co., 21 C. C. 449.

<sup>1</sup> Phila. (See act Mar. 22, 1865, P. L. 574, as to Berks County.)

bonds of this commonwealth to an equal value, in the opinion of the court, from which, in case the issue should be decided against him, the judgment shall be paid and otherwise returned to the defendant or his assigns the decree discharging the land from the decree of the judgment shall at once be made; the proceedings in the issue otherwise to proceed, the money or the securities aforesaid being substituted for the land: And *provided further*, That the defendant making any such application as aforesaid, shall pay the costs of any such proceedings, including a reasonable fee to plaintiff's attorney, to be fixed by the courts, and shall give security therefor before the issuing of any citation as aforesaid."

#### 61. Transfer of judgments to other counties.

The act of April 16, 1840, P. L. 410, provides:

"That in addition to the remedies now provided by law, hereafter any judgments in any [District Court or] court of Common Pleas in Pennsylvania, may be transferred from the court in which they are entered, to any other [District Court or ] court of Common Pleas, in this commonwealth, by filing of record in said other court, a certified copy of the whole record in the case; and any prothonotary receiving such certified copy of record, in any case in which judgment has been entered by another court, or in another court, by transcript from justices of the peace, shall file the same and forthwith transcribe the docket entry thereof, into his own docket, and the case may then be proceeded in, and the judgments and costs collected by executions, bill of discovery or attachment, as prescribed by the act entitled "An act relating to executions" passed the sixteenth day of June, one thousand eight hundred and thirty-six; and as to lien, revivals, execution, and so forth, it shall have the same force and effect, and no other, as if the judgment had been entered, or the transcript been originally filed in the same court to which it may thus be transferred."

By act of April 2, 1841, P. L. 142, the above act was extended to judgments of the Supreme Court for the Eastern District, rendered in the city and county of Philadelphia; and by the 7th section of the act of April 4, 1843, P. L. 132, it was provided that the act, *supra*, "should not be construed to destroy or impair the validity of the lien of any judgment in the county in which the same was originally entered, or to which the same may be transferred under the provisions of said section."

#### 62. Transfer after death of party.

Section 11 of the act of April 16, 1845, P. L. 540, provided:

"It is hereby declared to be the true intent, meaning and construction of the first section of the act, entitled "An act relating to executions, and for other purposes," approved April 16th, eighteen hundred and forty, that any record therein mentioned, where any party to the judgment may at any time have died, might be transmitted and filed in any court in any county, either before or after the substitution of the legal representatives of any deceased party, and the substitution be made after filing such record; and that in all cases in which any such record should be transferred and filed before any such substitution, the court into which the record might

be removed, should, after substitution of parties, proceed thereon as if the judgment had been originally entered in said court; and no judgment or record so transmitted and filed before such substitution, shall be set aside, stricken off, or in any way affected or invalidated, by reason of there being no substitution of parties before such transmission and filing thereof, and all records and judgments which may have been set aside or stricken off shall be and the same are hereby restored to all intents and purposes: *Provided*, This section shall not interfere with, or affect any case which may have been adjudicated by the Supreme Court, or settled by the parties in interest: *Provided, also*, That this section shall not affect any interest of any person who may have entered any judgment, subsequent to such setting aside or striking off, and before such restoration."

### 63. Transferring awards of arbitrators to other counties.

The act of May 5, 1876, P. L. 110, provides as follows:

"That in addition to the remedies now provided by law, any award of arbitrators, in any court of Common Pleas, either before the time limited for an appeal has expired, or after the appeal has been entered, may be transferred to any other court of Common Pleas in this commonwealth, by filing of record, in said other court, a certified copy of the whole record in the case. Whenever an appeal is entered, after such record has been transferred, it shall be the duty of the plaintiff, within twenty days thereafter, to file, with such transferred record, a certificate of the entry of such appeal; and any prothonotary receiving such certified copy of record or certificate shall file the same, and forthwith transcribe the docket entry thereof into his own docket, and thereupon such award shall continue a lien on the real estate of the defendant, in the county to which the same has been transferred, until reversed upon appeal or satisfied according to law; upon judgment entered on the appeal, or upon a satisfaction of the judgment, it shall be the duty of the plaintiff, within twenty days thereafter, to file, with said transferred record, a certificate of said judgment or satisfaction. Any neglect of the plaintiff to file the certificate of appeal, judgment or satisfaction, as aforesaid, within the time herein provided, shall entitle the defendant, or any other person interested, to have said transferred record stricken off."

"Section 2. After judgment the plaintiff may proceed upon said transferred record and judgment for the collection thereof with costs, by execution, bill of discovery or attachment, in like manner as if the same were a judgment of the court to which it has been transferred."

### 64. Effect of revival as to purchasers, etc.

The acts of 1798 and 1887, *supra*, as to revival were intended to affect the rights of purchasers, mortgagees and judgment creditors only and not the original parties or their heirs, devisees, etc.<sup>1</sup> The act of June 14, 1901, P. L. 562, amending the act of June 8, 1893,

<sup>1</sup> Bank of N. A. v. Fitzsimons, 3 Binney, 342; Pipher v. Duke, 13 Supr. C. 279; Biesecker v. Cobb, 13 Supr. C. 56; Baxter v. Allen, 77 Pa. 468; Ziegler v. Schall, 209 Pa. 526; Powell v. Hoover, 12 Luz. L. R. 206.



provides that no debts of a decedent, except they be secured by mortgage or by judgment entered or revived by *scire facias* within five years prior to the death of such decedent shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, etc." (See *supra* par. 50.)

This act does not change the status of judgments or record debts, though it has been held that a claim based on the order of a court of Quarter Sessions of another county which never was a lien on the after-acquired real estate in the county of the last domicile of the decedent, is not such a record debt as would relieve the claimant from the necessity of suing within two years.<sup>2</sup> Neither are debts due the commonwealth exempted from the same fate.<sup>3</sup>

In bringing suit upon a debt not of record it is sufficient to sue the legal representatives and the heirs need not be joined.<sup>4</sup> But where under a will partition is had the proceeds will be treated as personalty and the claimant will not be barred.<sup>5</sup>

The claimant of an unsecured debt must comply with the act of 1909.<sup>6</sup>

The lien of a judgment subsisting against a decedent at his death continues as against the heirs and devisees until the presumption of payment arises. But if it is not revived every five years, it will be postponed as to other lien creditors who keep their liens alive.<sup>7</sup> A judgment revived against the heirs only binds the realty, which "estate" means in its strict sense.<sup>8</sup> On a *scire facias* to charge realty of a deceased agent in the hands of the heirs, the judgment against the administrator is conclusive as to the personalty, but not the real estate, and the heirs may contest it on original grounds and show why it should be reduced.<sup>9</sup>

The lien of a judgment takes priority over the claims of general creditors as to the land it covers though not revived;<sup>10</sup> but not in case of defendant's assignment for the benefit of all his creditors.<sup>11</sup> The principle does not apply to a *terre-tenant* who dies;<sup>12</sup> nor an assignee for creditors.<sup>13</sup> The act of 1887 did not change the act of 1834, as to judgment creditors.<sup>14</sup>

#### 65. Effect on lien by various proceedings.

A judgment which is reversed ceases its lien with the reversal.<sup>15</sup>

<sup>2</sup> Henry's Est., 34 Supr. C. 597.

<sup>3</sup> Koering's Est., 34 Supr. C. 425.

<sup>4</sup> Weber's Est., 16 D. R. 974.

<sup>5</sup> Gibb's Est., 17 D. R. 366.

<sup>6</sup> McNutt's Est., 15 D. R. 429; Emerich's Est., 172 Pa. 191.

<sup>7</sup> Colenburg, et al. v. Venter, 173 Pa. 113. (See Cake's Est., 157 Pa. 457. See P. & L. Dig., vol. 10, cols. 16, 282-3-4; Biesecker v. Cobb, 13 Supr. C. 56; 2 C. R. A., cols. 2881-2.)

<sup>8</sup> Messmore v. Williamson, 189 Pa. 73.

<sup>9</sup> Paul v. Grimm, 183 Pa. 330, following Sergeant's Heirs v. Ewing, 36 Pa. 156.

<sup>10</sup> Aurand's Ap., 34 Pa. 151; P. & L. Dig., vol. 10, col. 16285.

<sup>11</sup> Laidley's Ap., 2 Lanc. L. R. 119; P. & L. Dig., vol. 10, col. 16286.

<sup>12</sup> Long v. McConnell, 158 Pa. 573.

<sup>13</sup> Fulton's Est., 51 Pa. 204.

<sup>14</sup> Searight's Est., 163 Pa. 210.

<sup>15</sup> Cope's Ap., 96 Pa. 294.

the issuance of a *fi. fa.* and levy on land, except as to the defendant, no longer has the effect of prolonging the lien beyond five years.<sup>16</sup> But this does not apply to judgments against executors for debts due from their testators, as to whom the limitation does not run.<sup>17</sup> A verdict and judgment in an attachment execution will not preserve the lien of the original judgment as against intervening imbrancers.<sup>18</sup>

Nor will an appearance of the defendant affect the original which has lost its lien, so as to sustain an execution;<sup>19</sup> nor the pendency of a feigned issue.<sup>20</sup> Since as well as before the act of 1883, the five years within which a revival must be made or a *sci fa.* issued are computed as exclusive of the day on which judgment was entered,<sup>21</sup> and if the last day falls on Sunday it is excluded and the writ may issue on Monday.<sup>22</sup>

Assignment for the benefit of creditors does not affect the need of revival;<sup>23</sup> nor an extent under execution by virtue of the act of Oct. 13, 1840, (P. L. 1841, 1).

A judgment in favor of the commonwealth does not need to be revived to hold its lien or its priority.<sup>24</sup>

Judgment for arrears of ground rent holds a similar position, since it arises from the deed rather than the judgment.<sup>25</sup>

But it seems that a judgment for purchase money of land rests on a different basis and therefore must be revived. If not a junior judgment will gain priority. It is not like an unrecorded mortgage of which a subsequent creditor had notice.<sup>26</sup> A judgment on a bond of indemnity holds no higher ground.<sup>27</sup>

Where an assignee for creditors sells land under an order of court, pursuant to the act of Feb'y 16, 1876, P. L. 4, the judgment creditor's status is not changed because a lien expires before delivery of the deed.<sup>28</sup>

Where the owner of a judgment becomes owner of the land his judgment is merged and extinguished by operation of law.<sup>29</sup>

As between the parties a judgment is alive until the presumption of payment arises and needs no revival<sup>29a</sup> except for purposes of execution.

When a judgment is five years old an execution cannot regularly issue thereon without a *scire facias quare executionem non*, which

<sup>16</sup> *Ebright v. Phila. Bank*, 1 Watts, 397; *Meason's Est.*, 4 Watts, 341; *Wright v. Ehrman*, 20 Pa. 256; *Stephen's Ap.*, 38 Pa. 9.

<sup>17</sup> *Shearer v. Brinley*, 76 Pa. 300.

<sup>18</sup> *Cake's Est.*, 186 Pa. 412.

<sup>19</sup> *Esser v. Smith*, 15 Phila. 144.

<sup>20</sup> *Robins v. Bellas*, 2 Watts, 359.

<sup>21</sup> *Green's Ap.*, 6 W. & S. 327.

<sup>22</sup> *Lutz' Ap.*, 124 Pa. 273.

<sup>23</sup> *Ferrence's Ap.*, 107 Pa. 180; *P. & L. Dig.*, vol. 10, col. 16295; *Shaeffer v. Child*, 7 Watts, 84.

<sup>24</sup> *Comth. v. Baldwin*, 1 Watts, 54.

<sup>25</sup> *Wills v. Gibson*, 7 Pa. 154.

<sup>26</sup> *Ruth's Ap.*, 54 Pa. 173.

<sup>27</sup> *Wien v. Albright*, 10 *Lanc. Bar.* 53.

<sup>28</sup> *Herbst's Ap.*, 90 Pa. 353; *Tomlinson's Ap.*, 90 Pa. 224.

<sup>29</sup> *Koons v. Hartman*, 7 Watts, 20.

<sup>29a</sup> *Sherrard v. Johnston*, 193 Pa. 166; *Leidich's Est.*, 11 D. R. 565.



is a notice to the defendant that unless he shows cause against it, an execution will issue.<sup>29b</sup> The common practice is to issue with it a *sci. fa.* to revive and continue the lien, or if the lien is lost, to revive.

#### 66. Scire facias to revive — practice on.

At the common law there is no limit of time in which a *scire facias* to revive a judgment may issue. It is not analogous in practice to a warrant of attorney to confess, which when ten years old, must be accompanied with an affidavit that the parties are alive and the debt unpaid, before leave may be given to enter it.<sup>30</sup> Neither is nine years between a *sci. fa.* and an *alias* such delay as to prevent a mere revival.<sup>31</sup>

But to continue the lien and hold its order and status, with reference to other liens it must issue within five years. Whether it comes within the five years is not determined from the date of the *præcipe* but the date of issuing and docketing the writ.<sup>32</sup>

An award of arbitrators appealed from will lose its lien unless revived.<sup>33</sup> The mere issuance of the writ is sufficient to stop the cessation of the lien;<sup>34</sup> but to bind the *terre-tenant* he must be made a party to the original writ,<sup>35</sup> if he be in possession or has his deed recorded.<sup>36</sup> This is so whether of an amicable or an adverse *sci. fa.* to revive and continue the lien.<sup>37</sup> If the writ is returned served on the *terre-tenant* and *nihil* as to the defendant it is a good *scire feci*.<sup>38</sup> If after issuance the sheriff loses the writ, on affidavit of the prothonotary to the facts a duplicate writ may issue and if too late to be served may be returned *tarde venit* and an *alias* and a *pluries* issue, against which defendant cannot be heard to object.<sup>39</sup> It is not sufficient to file an amicable *sci. fa.*<sup>40</sup> or issue an adverse writ: they must be docketed as well, and noted on the record of the original judgment.<sup>41</sup> The confession of judgment must identify the original judgment which it revives.<sup>42</sup>

Where a number of judgments are consolidated in one by amicable revival, it will be presumed that the prothonotary has made the proper

<sup>29b</sup> *Sherrard v. Johnson*, 193 Pa. 166; *Hibberd v. Terry*, 14 D. R. 599; *Miller v. Miller*, 147 Pa. 545; *City, Etc., Assn. v. Nickey*, 21 C. C. 226; *Carrier's Seminary v. Young*, 30 C. C. 170.

<sup>30</sup> *Lesley v. Nones*, 7 S. & R. 410; *Chambers v. Carson*, 2 Wharton, 365; *Stewart v. Peterson*, 63 Pa. 230.

<sup>31</sup> *Gallagher v. Glasgow*, 16 Phila. 72.

<sup>32</sup> *Hock's Ap.*, 1 Pittsburg, 325.

<sup>33</sup> *First Natl. Bank v. Kauffman*, 2 Leg. Rec. 33.

<sup>34</sup> *Hughes v. Torrence*, 111 Pa. 611; *P. & L. Dig.*, vol. 10, cols. 16359-60.

<sup>35</sup> *Uhler v. Moses*, 10 Supr. C. 194; reversed, 200 Pa. 498; *Suter v. Findley*, 5 Supr. C. 163; act April 16, 1849; *P. L.* 663.

<sup>36</sup> *Lyon v. Cleveland*, 170 Pa. 611; *Salmon v. Bachman*, 8 C. C. 144; *Barrel v. Adams*, 26 Supr. C. 635.

<sup>37</sup> *Wetmore v. Wetmore*, 155 Pa. 507; *Baum v. Custer*, 22 W. N. C. 145.

<sup>38</sup> *Silverthorn v. Townsend*, 37 Pa. 263.

<sup>39</sup> *Sweet v. Freeman*, 5 Law Times (N. S.), 5.

<sup>40</sup> *McCleary's Ap.*, 1 W. & S. 299.

<sup>41</sup> *Mellon's Ap.*, 96 Pa. 475.

<sup>42</sup> *Worman's Ap.*, 110 Pa. 25; *Reap v. Battle*, 4 Kulp, 453.

in each case.<sup>44</sup> It has been held that a writ issued in the name of the deputy prothonotary tested in the name of the president judge with the seal affixed is legal,<sup>45</sup> but it is loose practice, all writs should be attested by the prothonotary and if issued by deputy, per ——— deputy.

The *sci. fa.* should follow the original judgment which is sought to be revived as to amount, date and parties; if it does not it has been held fatal on plea of *nul tiel* record.<sup>46</sup> Immaterial variances will not affect the lien.<sup>47</sup> The judgment of revival constitutes a new judgment practically and the revival of this must refer to it as the original, and so on.<sup>48</sup> As to the original judgment the *sci. fa.* may be pleaded in bar to a second *sci. fa.* upon it.<sup>49</sup>

The revival continues the lien as to a *terre-tenant* whose deed is recorded or who is not in possession although he is not joined, the *sci. fa.* to revive as to him should be based on the revived judgment, not the original judgment.<sup>50</sup>

A *terre-tenant* is not a mere occupier but one who claims a right in the land derived from the former owner or the defendant.<sup>51</sup> He must derive his claim either mediately or immediately from the defendant in the judgment.<sup>52</sup> He must claim title under and not adversely.<sup>53</sup>

A trustee in bankruptcy is not entitled to notice as if a *terre-tenant*.<sup>54</sup> A revival as to lands erroneously embraced in a levy and sale confers no lien on them.<sup>55</sup> A wife who is a tenant by entirety holding under a deed to her and her husband, does not become a *terre-tenant* by conveyance to her of her husband's interest so that a judgment against him can be revived to affect her right in the whole, discharged of the lien.<sup>56</sup>

The *terre-tenant* is not required to file an affidavit of defense. He may plead that he is not a *terre-tenant* of the defendant and that he has no lands upon which the judgment is a lien.<sup>57</sup> Only the *terre-tenant* can make the plea that the land is discharged from the lien.<sup>58</sup> The service of the *sci. fa.* on the *terre-tenant* will keep the lien alive without service on the legal representative of the original defendant.<sup>59</sup>

Beshler's Est., 129 Pa. 268.

Harden v. Roberts, 9 C. C. 160.

Walker v. Pennell, 15 S. & R. 68; Worman's Ap., 110 Pa. 25; P. & L. vol. 10, col. 16373.

Landon v. Brown, 160 Pa. 538; P. & L. Dig., vol. 10, cols. 16373-4;

Re v. Harden, 154 Pa. 387.

Collingwood v. Carson, 2 W. & S. 220.

Custer v. Detterer, 3 W. & S. 28. (But see P. & L. Dig., vol. 10, col. 8.)

Lyon v. Cleveland, 170 Pa. 621.

Geiger v. Hill, 1 Pa. 509.

Dengler v. Kiehner, 13 Pa. 38, per Gibson.

Mitchell v. Hamilton, 8 Pa. 486; Drum v. Kelly, 34 Pa. 415.

Ephrata Natl. Bank v. Schaeffer, 18 Lanc. L. R. 385.

Hunter v. Hulings, 37 Pa. 307.

Hetzl v. Lincoln, 30 C. C. 625; French v. Mehan, 56 Pa. 286; Fleck v. Millhaver, 117 Pa. 213.

Kelley v. Place, 26 C. C. 120.

Silverthorn v. Townsend, 37 Pa. 263.

Colborn v. Trimpey, 36 Pa. 463.

So also, when the *terre-tenant* purchases subject to the lien of a judgment, a revival of it after five years concludes him.<sup>60</sup>

#### 67. Service on legal representatives.

In order to pass title where no *terre-tenant* is concerned the legal representative must be brought in before judgment.<sup>61</sup> The widow, heirs and devisees need not be brought in.<sup>62</sup> Where there are two defendants one of whom is dead service may be made on the survivor and the executors of the former.<sup>63</sup> Judgment cannot be taken on two returns of *nihil*,<sup>64</sup> in such case. But where the defendant is not dead, by long established practice derived from the courts of England two returns of *nihil* are equivalent to a return of service,<sup>65</sup> and in case of a *sci. fa.* on a mortgage two returns of *nihil* are equivalent to *scire feci* whether defendant be living or dead, as that is confined to the county where the land lies.<sup>66</sup>

#### 68. Effect of issuance as revival.

The issuing of a *sci. fa.* within the five years after entry of the judgment continues the lien for five years more,<sup>1</sup> which applies as well to the *terre-tenant*,<sup>2</sup> and if no service be had on the *terre-tenant* an *alias* may be issued and served at any time within five years from the issuance of the *sci. fa.*<sup>3</sup>

Where, owing to a rule for a new trial or a motion in arrest of judgment on a verdict obtained within five years, the time expires before judgment is entered, the lien is not lost.<sup>4</sup> If a judgment is not thus kept revived periodically a junior judgment will take priority, even though there be sequestration of the estate.<sup>4</sup>

#### 69. Restricted lien — revival a new judgment.

Where the original judgment was restricted to specific property, so that it could not apply to any other a general verdict will be so moulded as to make the revival coincide with the original.<sup>5</sup>

The lien against an insolvent debtor is not indefinitely prolonged by an assignment and when revived against him after his discharge,

<sup>60</sup> Colborn v. Trimpey, 36 Pa. 463.

<sup>61</sup> Taylor v. Gaughan, 4 Lack. Jur. 66. (See Hoke v. Wentz, 13 York, 101, as to service in another county; Eby v. Patton, 18 D. R. 52.)

<sup>62</sup> Grover v. Boon, 124 Pa. 399; Middleton v. Middleton, 106 Pa. 252; Specht v. Sipe, 15 Supr. C. 207.

<sup>63</sup> Comth. v. Vanderslice, 8 S. & R. 452; Brown v. Webb, 1 Watts, 411.

<sup>64</sup> Taylor v. Gaughan, 4 Lack. Jur. 66.

<sup>65</sup> Compher v. Anawalt, 2 Watts, 490.

<sup>66</sup> Chambers v. Carson, 2 Wharton, 9, 365; Warder v. Tainter, 4 Watts, 270; Hartman v. Ogborn, 54 Pa. 120; Taylor v. Young, 71 Pa. 81.

<sup>1</sup> Meinweiser v. Hains, 110 Pa. 468; Campbell's Est. (No. 2), 22 Supr. C. 432.

<sup>2</sup> Lichty v. Hochstelter, 91 Pa. 444; Kirby v. Cash, 93 Pa. 505; Porter v. Hitchcock, 98 Pa. 625.

<sup>3</sup> Howes v. Dolan, 9 Supr. C. 586; act Mar. 23, 1877, P. L. 34; Seminary v. Bethlehem, 153 Pa. 583.

<sup>4</sup> Holliday v. Bruner, 153 Pa. 262.

<sup>5</sup> Carson v. Ford, 6 Supr. C. 17, distinguishing Stanton v. White, 32 Pa. 358; Dean's Ap., 35 Pa. 405; McMurray v. Hopper, 43 Pa. 468.

becomes a new judgment, which is *quod recuperet*, here, not a new award of execution as elsewhere.<sup>6</sup> Each revival constitutes a new judgment upon which interest is calculable.<sup>7</sup> The plaintiff may have an action of debt or a *scire facias* on his judgment, either before or after execution. A defendant who has obtained a judgment against a plaintiff for a debt may have a *scire facias* and the statute of limitations does not run against either to *scire facias* or an action on the judgment.<sup>8</sup>

#### o. Defenses to *sci. fa.*

The only defense that can be made to the *sci. fa.* is one that has arisen since the judgment was entered;<sup>9</sup> that is satisfaction or extinction of its existence.<sup>9a</sup>

On a plea of *nul tiel* record and payment with leave, etc., interpleaders on the record will be presumed to have been made by the clerk in correction of mistakes.<sup>10</sup>

An affidavit of defense which avers matters prior to or contemporaneous with the judgment will be insufficient.<sup>11</sup>

#### i. Effect of judgment of revival.

The effect of a judgment of revival where the lien subsisted when the *sci. fa.* issued is to continue the lien for five years more from the date; but where the lien was lost, the judgment of revival as to the dates only from the day on which judgment is entered or a new judgment is rendered.<sup>12</sup> It will be presumed that interest was em-  
ended to the date of a revival.<sup>13</sup>

#### j. Lien as to attachment execution, etc.

In a long line of cases it has been held that an attachment execution may issue without first issuing a *scire facias*, because the defendant may appear and become a party and it serves the same purpose as a *scire facias* would.<sup>1</sup> It is not such an execution as is required by the act of May 19, 1887, P. L. 132,<sup>2</sup> which relates only to personal property as to which an execution may issue after five years without a *sci. fa.* previously issued, but issued with the *fi. fa.* However, the judgment is more than twenty years old, the presumption of payment has arisen and a *sci. fa.* must issue to revive it.<sup>3</sup> The failure to revive within five years does not relieve

Ch. J. Gibson in *Shaeffer v. Child*, 7 Watts, 84.

*Stewart v. Peterson's Exs.*, 63 Pa. 230, Sharswood, J.

*Stewart v. Peterson's Exs.*, 63 Pa. 230.

*Phila. v. Peyton*, 25 Supr. C. 350.

*Huppert v. Huppert*, 5 Schuylkill Co. 29; *Curry v. Morrison*, 40 Supr. C. 101.

*Specht v. Sipe*, 15 Supr. C. 207.

*Kinney v. Watson*, 52 Pitts. L. J. 372; 2 C. R. A., col. 2889.

*Ramsey v. Schreiner*, 13 D. R. 641.

*McKenna v. Baldwin*, 52 Pitts. L. J. 372.

*Ogelsby v. Lee*, 7 W. & S. 444.

*Bohan v. Reap*, 7 Supr. C. 167; *Gemmill v. Butler*, 4 Pa. 232; *Swanger v. Snyder*, 50 Pa. 218.

*Wheelen v. Phillips*, 140 Pa. 33; *Smith v. Schoenberger*, 176 Pa. 95;

*Gemmill v. Lilly*, 188 Pa. 463.

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the surety, although he died within the five years after revival.<sup>4</sup>

Whilst it is the duty of the judgment plaintiff to prosecute his *sci. fa.* to judgment, a delay of two years has been held not to be equivalent to a discontinuance;<sup>5</sup> and if judgment is obtained within five years it is sufficient.<sup>6</sup>

But if the *sci. fa.* is defective in not properly describing the original judgment it cannot be amended with leave of court after the five years.<sup>7</sup>

An attachment execution on which there has been a verdict and judgment does not relate back and revive the judgment on which it was issued and therefore it has no priority over intervening liens.<sup>8</sup>

A *sci. fa.* naming the *terre-tenant* but making a mistake in the second initial of his name is not notice.<sup>9</sup>

### 73. Revival before due.

The 3d section of the act of March 26, 1827, *supra*, authorizes amicable or adverse revival before the payments have become due. But no proceedings will excuse the judgment plaintiff from waiting until after the five years have expired, such as opening the judgment,<sup>10</sup> or a rule tying up the proceedings. It may issue at any stage necessary to protect the rights of the plaintiff, even pending an appeal.<sup>11</sup> If by an error in the *præcipe* and *sci. fa.* a lien is lost and other judgments have supplanted it, no amendment will restore it to its place.<sup>12</sup>

### 74. Lien by *sci. fa.* and *fi. fa.*

A judgment having lost its lien by failure to revive within five years, when a *sci. fa.* and *fi. fa.* are issued simultaneously and on the same day as the verdict on the *sci. fa.* a mortgage from defendant is entered—the two will take *pro rata*.<sup>13</sup> As to after-acquired real estate the first *fi. fa.* levied upon it will take priority of lien independently of the lien of the judgment, there being no other prior liens. In such case the levy must appear of record in order to be notice under section 3 of the act of April 22, 1856, P. L. 532.<sup>14</sup>

### 75. Lien of award.

The lien of an award of arbitrators expires in five years unless revived. But if there is an appeal from the award and judgment entered on the appeal within five years from the date of the original award,

<sup>4</sup> Searight's Est., 163 Pa. 210; Winton v. Little, 94 Pa. 64; Kindt's Ap., 102 Pa. 441.

<sup>5</sup> Davis v. Jones, 12 S. & R. 60.

<sup>6</sup> Kirby v. Cash, 93 Pa. 505.

<sup>7</sup> Arrison v. Comth., 1 Watts, 374.

<sup>8</sup> Cake's Est., 186 Pa. 412.

<sup>9</sup> Massey v. Noon, 1 Supr. C. 198.

<sup>10</sup> Fricker's Ap., 1 Watts, 393; Cope's Ap., 96 Pa. 294; Styer's Ap., 21 Pa. 86.

<sup>11</sup> Building Assn. v. Byrne, 6 W. N. C. 253; Merchants' Ins. Co. v. De Wolf, 33 Pa. 45.

<sup>12</sup> Duffey v. Houtz, 105 Pa. 96.

<sup>13</sup> Ramsey v. Shreiner, 13 D. R. 641.

<sup>14</sup> Ross' Ap., 106 Pa. 82; Sherrard v. Johnston, 193 Pa. 166.



holds its place without revival. The judgment has the same effect as if it had been a judgment of revival.<sup>15</sup> The mere issuing of a *sci. fa.* on an award does not revive, there must be a judgment of revival within five years under the act of April 21, 1840, *supra*.<sup>16</sup>

#### 6. Lien of judgment transferred to another county.

While a verdict is a lien from the date of its rendition under the act of 1877, *supra*, and must be revived within five years from its rendition,<sup>17</sup> it cannot be transferred for lien to another county under the act of April 16, 1840, P. L. 410, *supra*, for only complete judgments can be so transferred.<sup>18</sup> The act covers judgments of justices of the peace entered in the Common Pleas; and it is not a prerequisite that there be a return of *nulla bona* where the amount exceeds \$100.<sup>19</sup> If the plaintiff dies, his legal representatives may be suggested and substituted before the judgment is transferred.<sup>20</sup> This exemplification must embrace the whole record, fragments or "docket entries" being insufficient.<sup>21</sup> The court to which certified has no power over the judgment itself, except for purposes of execution and satisfaction.<sup>22</sup> The judgment for all other purposes remains in the original county;<sup>23</sup> so a *testatum sci. fa.* cannot be issued in the second county to the first;<sup>24</sup> nor can it be exemplified therefrom to a third.<sup>25</sup>

If the right to issue execution has been lost on the original it also goes on the ancillary one, unless a *scire facias* has been issued in the court to which transferred.<sup>26</sup> The court may set aside execution improvidently issued, without affecting the judgment.<sup>27</sup> *Sci. fa.* and *fi. fa.* may issue simultaneously. A judgment which has lost its lien on realty in another county was exemplified to Philadelphia, entered of record, damages assessed, judgment entered *fi. fa.* and *sci. fa.* issued all on the same day. Held valid.<sup>28</sup> It was held that the lien of the transferred judgment continued five years in the second county, independently of whether it was renewed any more in the first county, which was dissented from by Long and Woodward.<sup>29</sup> But the loss of lien in the first county is a defense to revival in the second.<sup>30</sup> The court in the original

First Natl. Bank of Northumberland's Ap., 100 Pa. 418.

Hagenman v. Fichthorn, 1 Woodward, 442.

Fuellhart v. Thompson, 11 Supr. C. 273.

Bailey v. Eder, 90 Pa. 446.

Mougenot v. Vernon, 23 Supr. C. 165.

Watt's Admr. v. Swinehart, 8 Pa. 97.

Bank, Etc., v. Olwine, 3 Clark, 507; Updegraff v. Perry, 4 Pa. 291.

King Nimick, 34 Pa. 297; Gordon's Est., 9 Phila. 350.

Brandt's Ap., 16 Pa. 343; Wilkinson v. Conrad, 10 W. N. C. 22;

Wyn v. Belles, 6 Kulp, 15.

Nelson v. Guffey, 131 Pa. 273.

Mellon v. Guthrie, 51 Pa. 116.

Beck v. Church, 113 Pa. 200.

Cockley v. Rehr, 2 D. R. 61.

Homburger v. Whitely, 12 C. C. 10.

Knauss' Ap., 49 Pa. 419; Hay's Ap., 8 Pa. 182. (But see Beck v. Church, 113 Pa. 200.)

Kendig v. North, 7 Del. Co. 574; Lowrie's Est., 5 Lanc. L. R. 295.

county cannot stay execution in the ancillary county,<sup>31</sup> nor interfere with such process in any way.<sup>32</sup>

#### 77. Judgment docket and entry of liens.

Under section 3 of the act of March 29, 1827, *supra*, the judgment docket is to be made up from the appearance and continuance dockets and if the prothonotary make such an error or is so negligent that a prior lien creditor shall sustain a loss the prothonotary must make good for it.<sup>33</sup> A subsequent purchaser or incumbrancer is not obliged to look beyond the judgment index.<sup>34</sup> In counties where there is a D. S. B. docket judgments on notes, bonds or other instruments of writing in which judgment is confessed, or containing a warrant to confess may be entered at once on the judgment docket, but the entries shall be as full as if said judgments were entered on the appearance or continuance docket.<sup>35</sup>

In order that a report of county auditors may be a lien as to subsequent incumbrancers it must be entered on the index to the judgment docket.<sup>36</sup> Section 9 of the act of April 20, 1853, P. L. 610, provides:

"That all executions issued in the city and county of Philadelphia levied upon real estate acquired subsequently to a judgment against the owner thereof, may on application of the execution creditor, be certified by the officer making such levy to the office of the court from which such execution issued; it shall then be docketed on the judgment index, and thenceforth bind such real estate for five years like any other judgment, and unless such levy be so certified and indexed, it shall be no lien on such real estate."

#### 78. Opening judgment — payment into court.

By act of June 20, 1873 (P. L. 1874, p. 331), it is provided:

"Section 1. That in all cases where judgment has been or shall be hereafter obtained and entered of record in any court of this commonwealth, by confession, default or otherwise, and proceedings concerning the same are pending to open or annul the same, and are not finally disposed of, it shall be lawful for the defendant or defendants therein, or any of them, with leave of said court, in which said proceedings are pending, to pay into said court such amount as shall be deemed by said court sufficient to cover the amount of said judgment, with interest and probable costs, to abide the final determination of the rights of the said parties to the proceedings pending as aforesaid; the said money to be subject to the order of said court, and placed at interest, if practicable, for the benefit of the interested parties."

"Section 2. And whatever amount, if any, shall be finally adjudged due the parties plaintiff in said suit, with costs, shall be

<sup>31</sup> Baker v. King, 2 Grant, 254; Nelson v. Guffey, 131 Pa. 273.

<sup>32</sup> Kittanning Ins. Co. v. Scott, 13 W. N. C. 54.

<sup>33</sup> Bear v. Patterson, 3 W. & S. 237; Updegraff v. Perry, 4 Pa. 295; Mann's Ap., 1 Pa. 24; Speakman v. Knight, 3 Phila. 25.

<sup>34</sup> Barry's Est., 3 Luz. L. R. 141.

<sup>35</sup> Hence D. S. B. *Debit sans breve*.

<sup>36</sup> Snyder County's Ap., 3 Grant, 38.

paid to them by order of said court out of the sum of money, with its accumulations, thus paid into court; and any balance, after the payment of costs due by said defendant, remaining in said court, and after any such payment as aforesaid, shall be returned to said defendant."

"Section 3. And upon the payment of such amount as the court shall direct, into court as aforesaid, all the real estate of said defendant or defendants making said payments into court as aforesaid, shall be freed and forever discharged from the lien, effect and operation of said judgment, and of and from all and all manner of process or execution issued or to be issued thereon, in any manner or wise affecting the same."

"Section 4. And it shall be the duty of the prothonotary or clerk of said court, upon such payment into court as aforesaid, to mark upon the judgment docket of said court, lien discharged."

A judgment which does not give the year of its entry will be set aside.<sup>37</sup>

If promptly applied for and a supplemental affidavit is filed to disclose a good defense a judgment will be opened<sup>37a</sup>. If judgment be entered on a note it will be opened on the presentation of a petition showing good grounds.<sup>37b</sup>

#### 79. Petition to open judgment on a lease.

One who signs a lease of a piano agreeing to pay monthly rentals and when a specified sum is paid, on the further payment of one dollar the lessor to give title, which lease contains a warrant to confess judgment, is not bound to keep the instrument insured, unless he expressly agrees to do so; and if the same is lost by fire the lessor can not enforce payment of future rentals by entering judgment. The court, on petition will open the judgment and let the defendant into a defense.<sup>37c</sup>

#### 80. Form of petition.

C. Dallas Shobert	} In the court of Common Pleas of Luzerne County.	
v.		
C. B. Johnson.	} No. 194.	October Term, 1907.

To the Honorable the judges of said court:

The petition of C. Byron Johnson, above named defendant, respectfully represents that on June 27, 1907, to the above number and term, judgment was entered against him on a sealed lease, for two hundred and sixty (\$260) dollars, with interest from said date; that said lease was for "one Stultz and Bauer piano, style B. mahg. No. 25452," which was delivered to your petitioner by said plaintiff, on the execution of said lease; that under the terms and

<sup>37</sup> Bend v. Komperdor, 18 D. R. 867.

<sup>37a</sup> Union, Etc., Bank v. Nichter, 224 Pa. 227.

<sup>37b</sup> Little v. Jeffers, 42 Supr. C. 519.

<sup>37c</sup> Shobert v. Johnson, 194 Oct. T. 1907, Luz. County, Garman, J., Sheasley v. Callahan, 27 C. C. 456, distinguished. In Pauksztis v. Raeder, 212 Pa. 403, it was held reversible error to rule out evidence of an agreement to insure, and the custom of bookbinders to insure the property left in their care as bailees, to be finished.



conditions of said lease it was not the duty of your petitioner to insure said piano against loss or damage by fire for the benefit of plaintiff's lessor and your petitioner did not have the same insured. On June 15, 1907, said piano was totally destroyed by fire in the residence of your petitioner in Wilkesbarre City, and for the origin of which your petitioner was in no wise to blame, the fire having originated in a building adjoining, owned and occupied by Daniel M. Kline; that your petitioner on July 5, 1907, paid said C. B. Johnson, plaintiff, one hundred dollars, intending the same to be in full satisfaction of any alleged claim that said Johnson might have against him by reason of said lease, but that said Johnson has now signified his intention of collecting the balance of said judgment. That your petitioner is informed and verily believes that he is not liable on said judgment, for the reason that the article leased has been destroyed by act of God.

Wherefore he prays that said judgment be opened and that he be let into a defense, etc.

Affidavit appended.

[Signed]

C. Alfred Valentine, atty. for defendant.

#### 81. Judgment non obstante veredicto.

Prior to the act of April 22, 1905, P. L. 286, there could be no judgment *non obstante veredicto* where the trial judge declined a point requesting binding instructions to the jury. It was only where he reserved the questions of law submitted.<sup>38</sup> The act of 1905, which altered the practice some, is as follows:

"That whenever, upon the trial of any issue a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial<sup>39</sup> or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto*, upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

#### 82. Effect of the act of 1905.

The act of 1905 does not authorize the court to enter judgment notwithstanding the verdict, though the point was declined, where there was a conflict of testimony or some other reason why binding instructions were not proper.<sup>40</sup> This act was not intended to in-

<sup>38</sup> The old practice on this subject is gone into in Bierly on Juries and Jury Trials, p. 284.

<sup>39</sup> Four days.

<sup>40</sup> Dalmas v. Kemble, 215 Pa. 410; Ackley v. Bradford Twp., 32 Supr. Supr. C. 487.

made the province of the jury.<sup>41</sup> Where no question is reserved or declined and no motion is put on the record to have the evidence certified there is nothing for the Appellate Court to enter a judgment upon for the plaintiff.<sup>42</sup> Where the court overrules binding instructions for the plaintiff he may afterwards move for judgment on the whole record, *n. o. v.* without a prior reservation of a question of law, as was necessary under the old practice.<sup>43</sup> The refusal of a motion for judgment *n. o. v.* which gives a wrong reason, but is in fact correct, will not be reversed.<sup>44</sup> Without an exception to the order discharging a rule for judgment *n. o. v.* the appeal will be quashed.<sup>45</sup> This judgment may be entered where it appears that the cause of action had not ripened when the writ issued;<sup>46</sup> or where binding instructions were requested but were declined.<sup>47</sup>

Where a judgment for defendants *n. o. v.* is reversed and the record remitted, and thereafter a judgment against the defendants is entered, the defendants' right of appeal dates from the entry of the judgment against them.<sup>48</sup> Where no point was presented at the trial the court cannot be held to have erred in refusing judgment *n. o. v.*<sup>49</sup>

In entering judgment *n. o. v.* it is the duty of the court to file an opinion and in it point out the evidence which justifies it in setting aside a verdict.<sup>50</sup>

### 83. Judgment on verdict — rule in Philadelphia.

Section 2 of rule 23, Philadelphia, is as follows:

"Judgment shall not be entered on any verdict without the special order of the court, until the sum of four dollars, required by the act of assembly of March 29, 1805, shall be paid by the party for whom the verdict shall be given, and the judgment shall be dated on the day it shall be entered."

But the verdict is nathless a lien from the date of its rendition.

### 84. Rule to open judgment.

A proceeding to open a judgment is an appeal to the equity powers of the court; the judge who exercises the power of a chancellor is vested with the discretion to pass upon the weight of evidence and the credibility of the witnesses and to dispose of the question on equitable principles. The action of the court below will be reversed only in cases where the abuse of judicial discretion is apparent.<sup>51</sup> So where the plaintiff and defendant stand oath against

<sup>41</sup> *Bond v. Penna. R. Co.*, 218 Pa. 34; *Shannon v. McHenry*, 219 Pa. 76; *Lightcap v. Nicola*, 34 Supr. C. 189.

<sup>42</sup> *Chatham Natl. Bank v. Gardner*, 31 Supr. C. 135.

<sup>43</sup> *Murphey v. Greybill*, 34 Supr. C. 339.

<sup>44</sup> *Clegg v. Seaboard, Etc., Co.*, 34 Supr. C. 63.

<sup>45</sup> *Intl., Etc., Co. v. Printz*, 37 Supr. C. 134; *Lewis v. Penna. R. Co.*, 220 Pa. 317; *Rothacker v. Phila.*, 42 Supr. C. 208.

<sup>46</sup> *U. S., Etc., Co. v. Maryland, Etc., Co.*, 220 Pa. 42.

<sup>47</sup> *Am. Car, Etc., Co. v. Water Co.*, 221 Pa. 529.

<sup>48</sup> *McGeehan v. Hughes*, 223 Pa. 524.

<sup>49</sup> *Haley v. Am., Etc., Co.*, 224 Pa. 316.

<sup>50</sup> *Hunt v. P. & R. R. Co.*, No. 1, 224 Pa. 604.

<sup>51</sup> *Ilyus v. Buck*, 34 Supr. C. 43; *Shroyer v. Smeltzer*, 38 Supr. C. 400.

oath on a question of fraud the judgment will not be opened.<sup>52</sup> Where the judgment is opened on an allegation of forgery it will not be reversed.<sup>53</sup> The rule to open judgment is an appeal for equitable relief and the rules of equity must govern.<sup>54</sup>

On a rule to show cause why judgment should not be opened and the defendant let into a defense, the prothonotary will place the motion on the argument list and either or both sides may take depositions to be read on the argument.

The respondent to the rule may file an answer and thereupon an issue may be framed to be tried by a jury.

If the rule to open judgment is made absolute the plaintiff may immediately rule the defendant to plead to issue.

Upon a rule to open judgment where there is insufficient evidence of fraud or mutual mistake the rule is that all preliminary negotiations are merged or superseded in the deed.<sup>55</sup> Where the contract is executed by a deed and bond, or other security taken for the unpaid purchase money the rule is not to open a contract so far executed to allow for a deficiency of quantity nor can there be a recovery for an excess.<sup>56</sup> Chief Justice Gibson excepts imposition and fraud.<sup>57</sup>

No court has jurisdiction to open a regular judgment without some evidence of a valid defense. Unless there is evidence that a judgment was confessed to children without consideration to defraud the widow of her dower, it is binding as to all claiming under the defendant, though void as to creditors.<sup>58</sup> It will be opened, however, if given to defraud his wife of her statutory rights as his widow.<sup>59</sup> But the fraudulent intent must be clearly made out.<sup>60</sup> An instrument under seal imports a consideration and in the absence of evidence of fraud or mistake will not be set aside or a judgment entered upon it opened.<sup>61</sup> A judgment on a *sci. fa. sur* mortgage against a guardian *ad litem* of a minor will not be opened solely on the ground that notice of the appointment was not given to the guardian or next of kin.<sup>62</sup> Nor will a judgment be opened on an allegation of fraud unless the evidence to sustain

<sup>52</sup> Huppert v. Huppert, 224 Pa. 374; Citizen's Natl. Bank v. Marks, 34 Supr. C. 310.

<sup>53</sup> Shroyer v. Smeltzer, 38 Supr. C. 400. (See authorities cited in opinion in this case.)

<sup>54</sup> O'Hara v. Baum, 82 Pa. 416; Jenkintown Natl. Bank's Ap., 124 Pa. 337; Kaier Co. v. O'Brien, 202 Pa. 153; Kneedler's Ap., 92 Pa. 428.

<sup>55</sup> Wilson v. McNeal, 10 Watts, 422; Madore's Ap., 129 Pa. 15; Baker v. Barley, 34 Supr. C. 169.

<sup>56</sup> Coughenour's Admrs. v. Stauff, 77 Pa. 191; Kreiter v. Bomberger, 82 Pa. 59; Landreth v. Howell, 24 Supr. C. 210.

<sup>57</sup> Farmers', Etc., Bank v. Galbraith, 10 Pa. 490, citing Bailey v. Snyder, 13 S. & R. 160.

<sup>58</sup> Dillen v. Dillen, 221 Pa. 435, citing Candor & Henderson's Ap., 27 Pa. 119; Hummel's Est., 161 Pa. 215; Cosgrove v. Cummings, 195 Pa. 497.

<sup>59</sup> Young's Est., 202 Pa. 431; Lonsdale's Est., 29 Pa. 407.

<sup>60</sup> Pringle v. Pringle, 59 Pa. 281; Dickerson's Ap., 115 Pa. 198.

<sup>61</sup> Cosgrove v. Cummings, 195 Pa. 497; 190 Pa. 525; Anderson v. Best, 176 Pa. 498.

<sup>62</sup> Manayunk Trust Co. v. Platt, 221 Pa. 248.

it is clear, precise and indubitable.<sup>63</sup> If the petition for a rule to open judgment is demurred to and the court sustains the demurrer, it must assign reasons for so doing.<sup>64</sup> A petition is not demurrable which alleges failure of consideration, age, infirmity and weak mind of the maker, that he did not understand the force of it and that it was a fraud upon him, without setting up the facts specifically.<sup>65</sup>

In the absence of fraud or undue influence mere weakness of intellect from sickness or old age is no ground for avoiding a deed.<sup>66</sup> Upon opening a judgment and awarding an issue it is proper for the court to frame it to meet the allegations of the petition and the denials of the answer.<sup>67</sup> Where a judgment is entered on a note signed by a married woman ostensibly a contract for the payment of money but really as security for her husband's debt it will be opened.<sup>68</sup> A judgment confessed by a husband to his wife for a greater sum than is due does not of itself vitiate or nullify it as to creditors;<sup>69</sup> and on an interpleader on an execution she may recover all that was justly due her.<sup>70</sup>

A judgment against a *terre-tenant* for want of an appearance on a *sci. fa. sur* mortgage, will not be opened on appeal where the record shows that it was taken after two returns of *nihil* and there is nothing to indicate that the court erred in discharging the rule to open.<sup>71</sup>

Where a fraud has been committed upon a party by her attorney, and another person who knows nothing of it relies upon it, the latter shall not suffer the loss.<sup>72</sup>

Where a rule is granted on the allegation of forgery, the unsupported evidence of the defendant opposed by that of the plaintiff is insufficient.<sup>73</sup> If judgment be entered for want of an affidavit of defense and the defendant comes with his belated affidavit on a rule to open judgment and give leave to file it, the court will examine it more critically and may require further evidence of the facts averred.<sup>74</sup>

In making an order to open a judgment and let the defendant into a defense it is the right and duty of the court to impose terms which are just and equitable.<sup>75</sup>

<sup>63</sup> People's Bank, Etc., v. Stroud, 223 Pa. 33; Cloud v. Markle, 186 Pa. 614; Black v. Black, 14 D. R. 143. (See P. & L. Dig., vol. 10. "Judgments" for all the cases; also 2 C. R. A.)

<sup>64</sup> Hanbouser v. P. & N. E. R. Co., 222 Pa. 240.

<sup>65</sup> Weber v. Roland, 39 Supr. C. 611.

<sup>66</sup> Moorhead v. Scovel, 210 Pa. 446.

<sup>67</sup> Jenkintown Natl. Bank's Ap., 124 Pa. 337; Weber v. Roland, 39 Supr. C. 611.

<sup>68</sup> Keystone Brewing Co. v. Varzaly, 39 Supr. C. 155.

<sup>69</sup> Meckley's Ap., 102 Pa. 536; Hawley v. Griffith, 187 Pa. 306; Howard Watch Co. v. Bedillion, 131 Pa. 385; Hauer's Ap., 5 W. & S. 473.

<sup>70</sup> Jenkins v. Courtright, 39 Supr. C. 232.

<sup>71</sup> Mulherin v. Roach, 39 Supr. C. 316.

<sup>72</sup> Stevenson v. Henning, 34 Supr. C. 184.

<sup>73</sup> Shannon v. Castner, 21 Supr. C. 294. (See this case for numerous points of practice.)

<sup>74</sup> Hunter v. Forsythe, 205 Pa. 466.

<sup>75</sup> Ensly v. Wright, 3 Pa. 501; Gilliland v. Bredin, 63 Pa. 393; Germania Ins. Co. v. Corbion, 1 W. N. C. 251; P. & L. Dig., vol. 10, cols. 16011-2.

### 85. Motion to strike off a judgment.

The rule and motion to strike off a judgment must be directed to matters apparent on the face of the record which challenge the legality of its entry and the regularity of it.<sup>1</sup> A judgment entered wholly without authority, as where it was for a municipal obligation, not approved by the burgess, may be stricken off.<sup>2</sup>

When the Supreme Court has declared a judgment void and of no effect, it is the duty of the court below to strike it off immediately.<sup>3</sup> Where want of jurisdiction is apparent or an irregularity affecting the validity of the judgment a rule to strike off is the proper procedure.<sup>4</sup> If the judgment is regular on its face and the court has jurisdiction it cannot be stricken off.<sup>5</sup>

In determining a rule to strike off the court will consider, in connection with the record, the undisputed facts presented by the parties and if such facts clearly establish that the court was without jurisdiction, or that the judgment was erroneous as a matter of law, or that it was entered on a void power of attorney, it will be stricken off.<sup>6</sup>

A judgment may be irregular and voidable but not void, and in such case the rule is not to strike off but to open.<sup>7</sup> Under the old practice it was by *audita querela* or writ of error *coram nobis*,<sup>8</sup> now obsolete.

A judgment, order or decree on its face improvidently entered may be stricken off on motion or rule without affidavit.<sup>9</sup>

The Common Pleas sitting as a court of equity cannot reach over on the law side and decree a judgment therein invalid, though it may enjoin execution in a proper case.<sup>10</sup> The power of the court at common law ends with the term; thereafter it is equitable power,<sup>11</sup> under which, so to speak, the court may strike off a judgment entered in favor of the wrong party;<sup>12</sup> or to correct its own error due to an oversight;<sup>13</sup> or an order made without jurisdiction;<sup>14</sup> or where the condition of a verdict is impossible of performance, though

<sup>1</sup> O'Hara v. Baum, 82 Pa. 416; Davidson v. Miller, 204 Pa. 223; Comth. v. Bangs, 22 Supr. C. 403; Knox v. Flack, 22 Pa. 337; Comth. v. Hoffman, 74 Pa. 105; Post v. Wallace, 110 Pa. 121; Phila. v. Jenkins, 162 Pa. 451.

<sup>2</sup> Long v. Lemoyne Boro', 222 Pa. 311.

<sup>3</sup> Mutual, Etc., Co. v. Tenan, 204 Pa. 332.

<sup>4</sup> France v. Ruddiman, 126 Pa. 257; Althouse v. Hunsberger, 6 Supr. C. 160; Adams v. Grey, 154 Pa. 258; Horner v. Horner, 39 Pa. 126; King v. Brooks, 72 Pa. 363; Reynolds v. Barnes, 76 Pa. 427.

<sup>5</sup> Hall v. West Chester Pubg. Co., 180 Pa. 561. (See cases, *supra*, n. 4.)

<sup>6</sup> Stevenson v. Virtue, 13 Supr. C. 103; Martin v. Rex, 6 S. & R. 296; Baker v. Singer Mfg Co., 122 Pa. 363; Bryn Mawr Natl. Bank v. James, 152 Pa. 364.

<sup>7</sup> Sweigert v. Conrad, 12 Supr. C. 108; Swartz v. Morgan, 163 Pa. 195.

<sup>8</sup> Yaple v. Titus, 41 Pa. 195.

<sup>9</sup> Newcomer's Ap., 43 Pa. 43; Allen v. Krips, 119 Pa. 1; 125 Pa. 504.

<sup>10</sup> Given's Ap., 121 Pa. 260.

<sup>11</sup> Fisher v. Hestonville, Etc., R. Co., 158 Pa. 602; Lewis v. Linton, 24 C. C. 188; Dean v. Munhall, 11 Supr. C. 69.

<sup>12</sup> Law v. Kennedy, 2 Walker, 497.

<sup>13</sup> Comth. v. Krause, 198 Pa. 391 (9 D. R. 230.)

<sup>14</sup> Hull v. Hull, 8 D. R. 420.



x years elapse after verdict.<sup>15</sup> For matters *dehors* the record the court will not grant a rule to strike off.<sup>16</sup>

### 86. Satisfaction of judgments.

Section 14 of the act of April 13, 1791, 3 Sm. L. 32, provides:

"That \* \* \* each and every person, having received satisfaction for his or their debt or damages, recovered by judgment in any court of record within this commonwealth, shall, at the request of the defendant or defendants in the action, or of his, her, or their legal representatives, or other persons concerned in interest therein, on payment of the costs of suit, and on tender of his reasonable charges and the costs of office for entering satisfaction, within eighty days after such request made, enter satisfaction of the judgment in the office of the prothonotary of the court where such judgment was or shall be entered, which shall forever thereafter discharge, defeat and release the same; and if such person, having received such satisfaction, as aforesaid, by himself or his attorney, shall not within eighty days after request and payment of the costs of suit, and tender of charges as aforesaid, repair to the said office and there enter satisfaction, as aforesaid, he, she or they, refusing or neglecting so to do, shall forfeit and pay unto the party or parties aggrieved any sum of money, not exceeding one-half of the debt or damages so adjudged and recovered, to be sued for and demanded by the defendant, or persons damnified, in like manner as other debts are now recoverable by law in this commonwealth."

If payment is made before judgment, it was held not to come within this act,<sup>1</sup> for the purpose of recovering the penalty. A judgment on a *sci. fa. sur* mortgage comes within it.<sup>2</sup> But if the land sells for less than the amount of the mortgage, satisfaction cannot be enforced.<sup>3</sup> Where the sheriff's return is "money made," the creditor is not liable for failing to enter satisfaction.<sup>4</sup>

If an entry is made of "ended and debt and costs paid" it is compliance with the act;<sup>5</sup> also "settled by agreement filed," which cannot be contradicted afterwards.<sup>6</sup> The plaintiff should appear in the office of the court and direct the prothonotary to enter satisfaction on the docket.<sup>7</sup>

Under the act, *supra*, the court can neither strike off nor order satisfied a regularly entered judgment, in a summary way. On a duly verified petition showing a *prima facie* case, an issue will be awarded to try the question of payment and right of satisfaction.<sup>8</sup>

<sup>15</sup> *Smaltz v. Hancock*, 118 Pa. 550.

<sup>16</sup> *Germantown Brewing Co. v. Booth*, 162 Pa. 100; *Heist v. Tobias*, 182 Pa. 442; *Lawrence v. Smith*, 215 Pa. 534.

<sup>1</sup> *Braddee v. Brownfield*, 4 Watts, 474.

<sup>2</sup> *Henry v. Sims*, 1 Wharton, 186.

<sup>3</sup> *Pierce v. Potter*, 7 Watts, 475.

<sup>4</sup> *Bratton v. Leyrer*, 2 D. R. 457; *Allen v. Conrad*, 51 Pa. 487; distinguished.

<sup>5</sup> *Phillips v. Israel*, 10 S. & R. 391.

<sup>6</sup> *Berks, Etc., Co. v. Hendel*, 11 S. & R. 123.

<sup>7</sup> *Raub v. Pearson*, No. 1, 3 Lack. L. N. 324.

<sup>8</sup> *Horner v. Horner*, 39 Pa. 126; *Reynolds v. Barnes*, 76 Pa. 427; *Salsberg v. Bartikoski*, 6 Kulp, 235.

The remedy by this act is exclusive.<sup>9</sup> The demand for entry of satisfaction must be made on the party himself and not his attorney, to hold him for the penalty.<sup>10</sup> If there is an honest dispute as to whether or not plaintiff received satisfaction, the penalty does not accrue.<sup>11</sup> When there is a special agreement to satisfy, the defendant may recover his actual damages, without restriction by the penalty.<sup>12</sup> Actual damage need, however, not be proved, to sustain a suit for the penalty;<sup>13</sup> whereof a justice of the peace has not jurisdiction.<sup>14</sup>

Upon showing that satisfaction has been wrongfully entered, the court will grant a rule to show cause why satisfaction should not be stricken off, and when this rule is made absolute an appeal from such order has the effect of a writ of *certiorari*.<sup>15</sup>

### 87. Special provisions in Philadelphia.

Section 2 of the act of April 14, 1851, P. L. 612, provides as follows:

"Whereas it often happens that judgments and decrees for the payment of money are obtained in the city and county of Philadelphia against persons who subsequently pay the same in full, or settle the same by the payment of less sums which are received in full satisfaction, or by the transfer of property, rights or credits received as full payment, settlement or satisfaction by the plaintiffs, but satisfaction has not been entered on the records thereof, and great inconvenience, trouble and injustice has been occasioned thereby to children, heirs and purchasers;

*Therefore*, When it shall be made known by petition to any court in the said city and county in which any judgment or decree for the payment of money has been obtained, that more than ten years have elapsed since the rendition of said judgment, or making of said decree, and that the same has been paid by the defendant or defendants, person or persons against whom the same has been rendered or made, or by some other person, or has been settled or compromised by the payment of a less sum than the amount of such judgment or decree, or by the transfer of property, rights or credits received in full thereof, or in settlement or satisfaction thereof, it shall be the duty of the said court to examine into the facts set forth in such petition, and upon being satisfied of the truth thereof, to direct the prothonotary of said court, upon the payment of the costs, if any, due to him upon such judgment or decree, to enter satisfaction upon the record thereof; which entry of satisfaction shall have the same effect as if made by the plaintiff or plaintiffs in such judgment, or the person or persons entitled to the benefit of the same, or by the complainant or complainants, or persons entitled to the benefit of such decree."

<sup>9</sup> Oberholzer v. Hunsberger, 1 Mona. 543.

<sup>10</sup> Marston v. Tryon, 108 Pa. 270.

<sup>11</sup> Shotzberger v. Bassler, 26 C. C. 523.

<sup>12</sup> Chamberlain v. Sloan, 3 W. N. C. 518.

<sup>13</sup> Henry v. Sims, 1 Wharton, 187.

<sup>14</sup> Zeigler v. Gram, 13 S. & R. 102; Seitzinger v. Steinberger, 12 Pa. 379.

<sup>15</sup> Shoup v. Shoup, 205 Pa. 22.

**38. Notice to be given.**

Section 3 of the same act provides:

"It shall be the duty of the court to which any such petition shall be so as aforesaid presented, to direct notice of the presenting of the same to be given to the attorney-at-law by whom the action, suit, bill or proceeding in which said judgment or decree has been obtained, was brought or instituted, and if he be dead, then to the plaintiff or plaintiffs, complainant or complainants, or to his or their executors or administrators, if any there be; or if he, she or they cannot be found in the county where said judgment or decree has been obtained, and the fact shall be so returned by the sheriff of said county, notice to all parties interested in said judgment or decree shall be directed by said court to be published in one or more newspapers published in said county; or in any other place or places in addition thereto so often as shall be deemed proper."

**39. Issue or appointment of an auditor.**

Section 4 of the same act, *supra*, provides:

"It may be lawful for the court to which any such petition shall be so as aforesaid presented, in its discretion, to refer the same, and any answer or plea to it which may be filed, to an auditor to take the testimony and report as to the truth of the facts set forth herein; [or] may direct an issue to ascertain the truth thereof by the verdict of a jury; which issue shall be subject to all the laws made on the subject of feigned issues."

*Rule in Philadelphia as to entry of satisfaction.*

Section 2 of rule 32, Philadelphia, is as follows:

"The entry of satisfaction, settlement, marking to use or discontinuance, may be made by the party or his attorney of record; but such entry shall always be attested by the prothonotary, or one of his clerks, with the date of the entry. In no other case shall any attorney be allowed to make any entry upon the dockets or other records of the court."

**40. When prothonotary may enter satisfaction.**

It was provided by the act of April 11, 1856, P. L. 304, that:

"In all cases where the amount due on any mortgage or judgment entered of record, together with interest and cost, shall have been paid to the legal holder or holders thereof, and the judgment bond or note, or mortgage, together with the accompanying bonds, if any, duly indorsed in the presence of two witnesses, that the same are satisfied and discharged, shall be produced to the prothonotary, or recorder having charge of the records of such mortgage and judgments respectively, it shall be the duty of such officer, for the fee of seventy-five cents in the case of a mortgage, and twenty-five cents in the case of a judgment, to enter satisfaction on the record of such liens, and to file among the papers in their respective offices, the judgment notes, bills, mortgages and bonds respectively, which shall remain filed thereafter, for the benefit of all parties interested therein: *Provided*, That no such satisfaction shall be entered, until after a certificate from the president judge or the district judge of the proper county allowing the same, which certificate shall also be produced and filed with the papers as aforesaid."



The certificate of the judge is essential to authorize the entry.<sup>16</sup> The act expressly extends to mortgages.<sup>17</sup>

**91 Satisfaction by process of law, entry of.**

The act of March 27, 1865, P. L. 52, provides as follows:

"In all cases where a judgment has, or judgments have been, or may be hereafter entered in any court of record in this commonwealth, whether originally or by transfer from any other court, and it shall appear, by the production of the record, that the same has or have been fully paid, under or by virtue of an execution or executions issued thereon, and satisfaction has not been entered upon the judgment index or judgment docket, of said court, it shall be the duty of the court, in which such judgment or judgments has or have been entered, at the instance of any party interested, upon the payment of a fee of twenty-five cents to the prothonotary, to direct said prothonotary to enter satisfaction upon the judgment index or judgment docket and the record thereof."

This act does not enlarge the power of the prothonotary. He can only satisfy the record as the court shall direct,<sup>18</sup> and the record must show satisfaction by execution as the basis.<sup>19</sup> If the judgment was without consideration it must be opened, not satisfied.<sup>20</sup> An unaccepted conveyance of property is not satisfaction.<sup>21</sup>

**92. Satisfaction on petition and hearing.**

Section 1 of the act of March 14, 1876, P. L. 7, provides:

"In all cases where a judgment has been or may hereafter be entered in any court of record in this commonwealth, whether originally or by transfer from any other court, the court having jurisdiction shall, upon application by the defendant or defendants in said judgment, or of his, her or their legal representatives, or other person or persons concerned in interest therein, setting forth, under oath, that the same, with all legal costs accrued thereon, has been fully paid, grant a rule, on the plaintiff or plaintiffs to show cause why the said judgment should not be marked satisfied of record, at his, her or their costs; and upon the hearing of such rule, should it appear to the satisfaction of the court that said judgment has been fully paid, as set forth in the application of the defendant or defendants, the said court shall then direct the prothonotary to mark such judgment satisfied of record, and shall also enter a decree requiring the plaintiff or plaintiffs to pay all costs incurred in the premises."

The person concerned in interest in such judgment must be directly interested, in order to petition. Neither a subsequent judgment creditor,<sup>22</sup> nor a mortgage creditor is such person.<sup>23</sup>

<sup>16</sup> *Raub v. Pearson* (No. 1), 3 Lack. L. N. 324.

<sup>17</sup> *Allendike's Pet.*, 9 D. R. 95.

<sup>18</sup> *Coyne v. Souther*, 61 Pa. 455; *Bratton v. Leyrer*, 12 C. C. 651.

<sup>19</sup> *Reynolds v. Barnes*, 76 Pa. 427; *Whitney v. Chandler*, 2 Leg. Rec. 270.

<sup>20</sup> *Martin v. Pulte*, 2 W. N. C. 184.

<sup>21</sup> *Good Hope B. Assn. v. Amweg* (No. 2), 22 Supr. C. 145.

<sup>22</sup> *Heidelbaugh v. Thomas*, 1 Penny. 19.

<sup>23</sup> *Cowden v. McClelland*, 4 Montg. 135.

The petition should aver such interest and also that the judgment with all legal costs has been fully paid.<sup>24</sup> Unless the petition itself avers a case under the act, the court will not be justified in appointing a commissioner to take testimony.<sup>25</sup> It must be a judgment—mechanic's claim filed as a lien is not within the act;<sup>26</sup> and it must appear that it has been actually paid<sup>27</sup> or that defendant is entitled to satisfaction by operation of law.<sup>28</sup>

Where the defendant's petition is met with a denial, and there is a substantial issue as to payment the act does not apply.<sup>29</sup> The proper practice in such case is to discharge the rule and relegate the defendant to his rule to open the judgment, but the court may in the first rule order that the judgment be opened and award an issue.<sup>30</sup> This act does not repeal or supply the acts, *supra*. It is particularly directed to cases of actual payment.<sup>31</sup>

To warrant an order to satisfy requires clear proof of payment.<sup>32</sup> A decree or finding in the Orphans' Court that a judgment was paid is sufficient.<sup>33</sup> But collateral questions cannot be invoked to confer jurisdiction.<sup>34</sup> Nor where there is an allegation of part payment only.<sup>35</sup> The refusal to direct satisfaction is not appealable.<sup>36</sup> An appeal from an order striking off satisfaction has the effect of a *certiorari*.<sup>37</sup>

### 93. Satisfaction to be marked on all the dockets.

The act of June 8, 1891, P. L. 244, provides:

"Hereafter, when any judgment or judgments shall or may be entered in any court of Common Pleas in this commonwealth, and when said judgment or judgments are marked satisfied, it shall be the duty of the prothonotary of said court to make entry of such satisfaction and the date thereof in all books, dockets and indexes on the margin opposite the record of said judgment wherever and whenever such judgment or judgments may be entered or indexed, with but one fee for entering satisfaction."

<sup>24</sup> Heidelberg v. Thomas, 11 Lanc. Bar, 49.

<sup>25</sup> Riddle's Ap., 104 Pa. 171.

<sup>26</sup> Stoke v. McCullough, 107 Pa. 39.

<sup>27</sup> Felt v. Cook, 95 Pa. 247; Riddle's Ap., 104 Pa. 171; Melan v. Smith, 134 Pa. 649.

<sup>28</sup> Atkinson v. Harrison, 153 Pa. 472.

<sup>29</sup> Third Natl. Bank, Etc., v. Hunsicker, 8 C. C. 635; Riley v. Harris, 2 D. R. 231.

<sup>30</sup> Hottenstein v. Haverly, 185 Pa. 385.

<sup>31</sup> Atkinson v. Harrison, 153 Pa. 472; Anderson v. Best, 176 Pa. 498; Shaylor v. Parsons, 1 Supr. C. 281.

<sup>32</sup> Hawk v. Spade, 6 Luz. L. R. 151; Morgan v. Klitch, 3 Kulp, 15; Horton v. Hopf, 4 W. N. C. 381; Melan v. Smith, 134 Pa. 649.

<sup>33</sup> People's Natl. Bank v. Dunlap, 21 Lanc. L. R. 35.

<sup>34</sup> Bickel v. Phila., Etc., Co., 2 Walker, 446.

<sup>35</sup> Unruh v. Longstreth, 6 Montg. 33.

<sup>36</sup> Bickel v. Phila., Etc., Co., 2 Walker, 446.

<sup>37</sup> Shoup v. Shoup, 205 Pa. 22. (See Turrell v. Ball, 26 C. C. 36.)

**94. Form of petition to open judgment averred to be fraudulent.**

William F. Weber for the use of	}	Court of Common Pleas of Berks County. No. 103, February Term, 1901, J. D.
Sallie A. Roland		
v.		
Emma C. Roland, Executrix of Anna E. Roland, decd.		

To the Hon. G. A. Endlich, judge of said court:

Your petitioner respectfully represents:

1. That Anna E. Roland on December 8, 1898, signed and delivered a judgment note in favor of William F. Weber for \$775, payable one day after date; that this judgment note was entered March 9, 1901, to No. 103, February Term, 1901, J. D., which judgment was assigned December 14, 1903, to Sallie A. Roland, wife of Frederick Roland.

2. That at the time the said Anna E. Roland signed and delivered said note, she was old, infirm and weak-minded and did not understand the import of said judgment note, nor did she receive any consideration for it, and that the same was a fraud upon her.

3. That the petitioner signed as a witness to the signature but she did not know that it was a judgment note and learned the import, nature and character thereof for the first time on Saturday, November 18, 1905, and that no money was paid to Anna E. Roland.

4. That Anna E. Roland died April 19, 1901, and letters were issued to the petitioner, on her will, and that no demand for payment of the note was made.

She therefore prays that an order be made opening said judgment and letting the defendant into a defense, etc.

Verified by affidavit.

[Signed.]

Emma C. Roland.

**95. Form of order granting rule to show cause.**

"And now, November 21, 1905, the within petition having been presented and read, whereupon the court, on motion of D. N. Schaeffer, attorney for the petitioner, grant a rule on William F. Weber and Sallie A. Roland to show cause why the judgment against Anna Eliza Roland, entered to No. 103, February Term, 1901, J. D., should not be opened, and Emma C. Roland, executrix of Anna Eliza, decd., be allowed to make defense thereto.

Returnable after ten days' service.

By the court,  
G. A. Endlich,  
Judge.

**96. Answer.**

The answer denies the sufficiency of the petition and also every allegation in detail and sets up a consideration.

**97. Form of petition for issue.**

Same	}	Same.
v.		
Same.		

To the Honorable the judges of said court:

Emma C. Roland, executrix of Anna E. Roland, deceased, the defendant above named, having presented her petition to your Hon-

orable Court, that the above judgment No. 103, February Term, 1901, J. D., be opened and that she be let into a defense, and the rule on William F. Weber and Sallie A. Roland, plaintiffs above named, granted by your Honorable Court on said petition having been made absolute on May 7, 1906, the said Emma C. Roland, executrix of Anna E. Roland, deceased, by D. N. Schaeffer, Esq., her attorney, respectfully prays that the following issue to be decided by a jury be awarded between the said William F. Weber, for the use of Sallie A. Roland, plaintiffs, and the said Emma C. Roland, executrix of Anna E. Roland, deceased, as defendant, viz.:

1. Was Anna E. Roland so old, infirm and weak-minded when she executed the note for \$775, dated Dec. 8, 1898, to the order of William F. Weber, on which judgment was entered on March 9, 1901, to No. 103. February term, 1901, J. D., that she did not understand the import of the transaction.

2. Did she receive full consideration for said note? and

3. Did she sign said note without any fraud or undue influence having been exercised upon her?"

D. N. Schaeffer, Atty., etc.

**98. Form of order awarding issue.**

"And now, to-wit, September 12, 1906, the above petition having been duly considered, the issue prayed for in said petition is awarded between William F. Weber for the use of Sallie A. Roland, as plaintiffs, and Emma C. Roland, executrix, of Anna E. Roland, deceased, as defendant, to be decided by a jury without further pleadings.

By the court.

G. A. Endlich, Judge.

**99. Form of order for judgment on the verdict.**

William F. Weber,	}	Court of Common Pleas of Berks County.	No. 103	Feb'y T., 1901, J. D.
for the use of				
Sallie A. Roland,				
v.				
Emma C. Roland, Executrix				
of Anna E. Roland, decd.				

"And now February 4, 1907, on motion of D. Nicholas Schaeffer and Isaac Hiester, attorneys for the defendant, it is ordered that judgment be entered on the verdict in the above stated case against the plaintiff and in favor of the defendant, with costs of suit, and that judgment No. 103, February Term, 1901, J. D., be vacated and set aside.

By the court.

G. A. Endlich, Judge."

**100. Form of judgment on the verdict.**

"February 4, 1907, judgment entered on the verdict in the above stated case against the plaintiff and in favor of the defendant, with costs of suit, and that judgment No. 103, Feb'y Term, 1901, J. D., be vacated and set aside."

(Reversed 39 Supr. C. 611.)

## 101. Form of præcipe for judgment.

Louise Kleckner } In the Court of Common Pleas of Clinton  
v. } County.  
Ammon Stover. } No. — Term, —, 19—.

To — —, Esq.,

Prothonotary.

Enter judgment, *sec. leg.* in above entitled case for plaintiff and against the defendant for the sum of \$ — and costs of suit, for want of an appearance [plea or affidavit of defense as the case may be].

A. F. Ryon, P. Q.

Date —, —.



## CHAPTER XII.

### EXECUTION — NATURE — LIMITATION — STAY — ISSUANCE OF WRIT, ETC.

- Time limit.
- On what judgments it may issue.
- On judgments of justices entered on transcript.
- Premature issue.
- Preliminary requirements.
- Necessity for revival by *sci. fa.*
- Præcipe and incidents — form.
- Form of *fi. fa.*
- The return day.
- Levati facias* — nature of.
- Execution must follow judgment.
- Practice on death of plaintiff.
- Irregularities — objections by defendant.
- Interests in land which may be sold.
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- Choses in action and other things not leviable.
- Stay of execution — plea of freehold — form.
- Stay by entry of bail.
- Special bail for thirty days.
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- Liability of bail.
- 23. Stay by the court and by agreement.
- 24. Stay in amicable actions.
- 25. Stay on special verdict, demurrer or case stated.
- 26. Bail absolute in double the amount.
- 27. No stay on judgment for wages.
- 28. Proceedings after expiration of stay.
- 29. Waiver of stay.
- 30. No stay against commonwealth, etc.
- 31. Practice on petition for stay.
- 32. Stay on transferred judgment.
- 33. Effect of opening judgment.
- 34. Effect of stay on other writs.
- 35. Effect of stay on costs.
- 36. Suggestion of freehold — rule in Allegheny county.
- 37. Justifying bail, Allegheny county.
- 38. Docket entries and certificate of stay.
- 39. Affidavit of sufficiency — Allegheny county.
- 40. Notice of change of bail, etc., Allegheny county.

#### r. Time limit.

Execution is a general term embracing various forms of process to enforce a judgment or decree of some court. If a judgment be set aside it will not sustain an execution.<sup>1</sup>

Section 4 of the act of April 16, 1845, P. L. 538, amends the 1st section of the act of June 16, 1836, P. L. 761, so that an execution may be had at any time within five years<sup>2</sup> if the judgment has been revived within five years, which as has been said, can be done by issuing a *sci. fa.* within the five years.

Section two of the act of 1836, *supra*, is as follows:

"After the expiration of the period aforesaid, no execution shall

<sup>1</sup> Caldwell v. Walters, 18 Pa. 79; Gates v. Sawyer, 29 C. C. 433.

<sup>2</sup> By act of 1836, "a year and a day."

be issued upon any judgment, unless the party against whom it shall have been rendered, his heirs, executors or administrators, shall be first warned by a writ of *scire facias* to show cause, if any he or they have, why an execution should not issue upon such judgment."

Under the act of May 19, 1887, P. L. 132, execution may issue against personalty alone without revival, up to twenty years.

## 2. On what judgments it may issue.

Execution can issue only upon legal judgments, and if a stay is allowed by law after the expiration of such stay; or, if by agreement, when the time agreed upon has run out.<sup>3</sup> Where the defendant alleges an agreement to stay and the plaintiff denies it, the execution will not be stricken off.<sup>4</sup> Execution having issued and the lien attached, upon an order to open the judgment and stay the writ, the court will provide that the lien remain.<sup>5</sup>

The act of May 3, 1889, P. L. 176, provides:

"Execution process may be issued to enforce all orders of court, either final or interlocutory, for the payment of costs made in any of the courts of this commonwealth, the same as on a judgment in the courts of Common Pleas, and shall be executed in the same manner."

Upon an execution for costs under this act the defendant is entitled to his exemptions.<sup>6</sup>

## 3. On judgments of justices entered on transcript.

The act of May 9, 1889, P. L. 176, provides:

"Where a judgment has been obtained before a justice of the peace of this commonwealth to the amount of one hundred dollars and upwards, it shall and may be lawful for the plaintiff in such judgment, upon filing a transcript thereof in the Court of Common Pleas of the county in which the judgment was obtained, to have execution thereof in said court, without first having an execution issued by the justice and a return of *nulla bona* by a constable: *Provided, however,* That nothing herein contained shall be construed to affect the right of the defendant in such judgment to supersede the same by the entry of bail, an appeal or certiorari, as provided by existing laws."

As to sums under \$100 the return of *nulla bona* before the justice must appear in the transcript.

Under this act, the necessity of revival of the judgment every five years before the justice as provided by act of May 5, 1854, P. L. 581, as long as it remains there, is not dispensed with.<sup>7</sup>

An attachment execution can issue on a transcript from a justice without its appearing that an execution had been issued and re-

<sup>3</sup> Dunlop v. Speer, 3 Binney, 169.

<sup>4</sup> Amspacher v. Thompson, 17 York, 153.

<sup>5</sup> Van Cott v. Webb Miller, 25 Supr. C. 51.

<sup>6</sup> Taylor Minor's Est., 27 W. N. C. 316.

<sup>7</sup> Smith v. Wehrly, 157 Pa. 407; Inq. Pub'g Co. v. Wehrly, 157 Pa. 415; Vosburg v. Miller, 5 Lack. Jur. 64.

turned;<sup>8</sup> and so of an exemplification of a justice's transcript from another county.<sup>9</sup>

#### 4. Premature issue.

If an execution issues upon a judgment confessed under a warrant on a bond, before the time when it becomes due by the bond, it will be premature and set aside on the motion of the defendant.<sup>10</sup> It cannot issue legally until the day after the one on which it becomes due.<sup>11</sup> But the defendant alone may take advantage of the irregularity in the issuance thereof,<sup>12</sup> and he must do so promptly, for his right will be held waived.<sup>13</sup> The parties may waive a premature issue provided it does not conflict with the rights of other creditors.<sup>14</sup> Where a defendant has waived his rights he cannot afterwards object.<sup>15</sup> It seems an attaching creditor may contest the irregularity.<sup>16</sup>

Where an execution is issuable upon breach of a condition any breach thereof completed is warrant for its issuance,<sup>17</sup> and this may be done without proof of default, though the better practice is to file an affidavit of condition broken with the præcipe for the writ. Where a judgment is given as indemnity execution may issue as soon as the holder becomes legally liable.<sup>18</sup>

He is also limited to the amount for which he becomes liable.<sup>19</sup> If a judgment is opened as to one of several joint defendants execution against the others is suspended.<sup>20</sup>

It was formerly held that where there was a plea of payment and also *nul tiel* record and the judgment was entered on the former only an execution was prematurely issued.<sup>21</sup>

Section six of the act of March 11, 1809, P. L. 38, which provides that where judgment is entered on a special verdict, demurrer or case stated no execution shall issue within three weeks from the day of judgment, except with leave of court, does not apply to

<sup>8</sup> *Hartman v. Weitmeyer*, 8 D. R. 223; *Haddock v. Loeb*, 18 Lanc. L. R. 75; *Vanzant v. Moore*, 27 C. C. 391.

<sup>9</sup> *Mougenot v. Vernon*, 23 Supr. C. 165.

<sup>10</sup> *Shoemaker v. Shirliffe*, 1 Dallas, 133.

<sup>11</sup> *Zearfoss v. Lynn*, 3 Northam. 328; *Taylor v. Jacoby*, 2 Pa. 495; P. & L. Dig. Dec., vol. 7, col. 10549.

<sup>12</sup> *Kamony's Ap.*, 1 Am. L. J. 78; *Stewart v. Stocker*, 13 S. & R. 199; *Janika's Est.*, 138 Pa. 330.

<sup>13</sup> *Morrison v. Baker*, 9 Supr. C. 637.

<sup>14</sup> *Seip v. Seip*, 16 York, 180.

<sup>15</sup> *Roemer v. Denig*, 18 Pa. 482.

<sup>16</sup> *De Frain v. Longaker*, 2 Chester Co. 382. (See *Alexander v. Alexander*, 2 Chester Co. 401.)

<sup>17</sup> *Collins v. Webster*, 38 Pa. 150; *Gorman v. Richardson*, 6 S. & R. 163; P. & L. Dig. of Dec., vol. 7, col. 10550.

<sup>18</sup> *Miller v. Howry*, 3 P. & W. 374; *Balph v. Rynd*, 25 Pitts. L. J. 45; P. & L. Dig. of Dec., vol. 7, cols. 10551-2.

<sup>19</sup> *Borland's Ap.*, 66 Pa. 470.

<sup>20</sup> *Struthers v. Lloyd*, 14 Pa. 216.

<sup>21</sup> *Beale v. Buchanan*, 9 Pa. 123.

<sup>22</sup> *O'Hara v. United, Etc., Assn.*, 134 Pa. 417



judgments on general verdicts,<sup>22</sup> nor by default for want of an affidavit of defense.<sup>23</sup>

##### 5. Preliminary requirements.

Under the English statute of 8 and 9 William III, C. 11, an execution cannot issue upon a judgment on a penal bond (except where there is a warrant to confess), payable at time of suit or in installments, either upon demurrer or *cognovit actionem*, or by default, without first issuing a *sci. fa.* or having a writ of inquiry.<sup>24</sup> This statute is in force in Pennsylvania but does not apply where the bond contains a warrant of attorney to confess judgment.<sup>25</sup> Where there are installments or the time is not definite, leave of court should be obtained,<sup>26</sup> although in the former case this has been held unnecessary.<sup>27</sup>

A writ of inquiry has been held to be necessary where the breach of condition cannot be determined from the record;<sup>28</sup> as where the bond is for fine and costs.<sup>29</sup> Where an execution issues on a judgment entered on a warrant over ten years old, without complying with the rule as to affidavit and leave, the execution will be set aside on motion of a subsequent execution creditor, but the plaintiff will be given leave to file his affidavit *nunc pro tunc*.<sup>30</sup>

Where a judgment is to be released on certain conditions, after a reasonable time an execution may issue without leave.<sup>31</sup> But in trespass where some defendants plead and others do not, it is erroneous to issue execution against all without a writ of inquiry.<sup>32</sup> On a judgment by default and on a *sci. fa.* a writ of inquiry is not necessary.<sup>33</sup>

##### 6. Necessity for revival by *sci. fa.*

An execution against real estate on a judgment after five years without a *sci. fa.* to revive is irregular and will be set aside.<sup>34</sup> Defendant's grantee may object to a levy made without authority of law.<sup>35</sup>

On an order of maintenance in the Quarter Sessions a revival is unnecessary.<sup>36</sup>

Under the act of 1887, *supra*, an execution may issue against

<sup>22</sup> Oswego, Etc., Co. v. Delaware, Etc., Co., 10 C. C. 312.

<sup>24</sup> Reynolds v. Lowry, 6 Pa. 465; Longstreth v. Gray, 1 Watts, 60.

<sup>25</sup> McCann v. Farley, 26 Pa. 173; Jones v. Dilworth, 63 Pa. 447; Cochlin v. Comth., 11 W. N. C. 460.

<sup>26</sup> Chambers v. Harger, 18 Pa. 15.

<sup>27</sup> Skidmore v. Bradford, 4 Pa. 296; P. & L. Dig., vol. 7, col. 10558.

<sup>28</sup> Trively v. Krouse, 2 C. P. R. 254.

<sup>29</sup> Holden v. Bull, 1 P. & W. 460; Harger v. Washington Co. Comrs., 12 Pa. 251.

<sup>30</sup> Woods v. Woods, 126 Pa. 396.

<sup>31</sup> Miller v. Milford, 2 S. & R. 35.

<sup>32</sup> Cridland v. Floyd, 6 S. & R. 412.

<sup>33</sup> Lewis v. Smith, 2 S. & R. 142; Gray v. Coulter, 4 Pa. 188.

<sup>34</sup> Sherrard v. Johnston, 193 Pa. 166; P. & L. Dig., vol. 7, cols. 10563-4; Bucher v. Pringle, 16 Mont'g Co. 106.

<sup>35</sup> Hibberd v. Terry, 14 D. R. 599; Pierce v. Wunder, 25 W. N. C. 466.

<sup>36</sup> Comth. v. Snyder, 4 C. C. 261.

personalty without revival, if a *sci. fa.* issues with it and the proceedings to assess damages are in the county where the execution issued.<sup>37</sup> This act does away with the practice of keeping a judgment alive by issuing executions.<sup>38</sup>

A *fi. fa.* issued without revival is *prima facie* valid and regular, and the objection may be waived by delay.<sup>39</sup> If the levy on land is invalid, it will be set aside but the execution be permitted to stand as to personalty.<sup>40</sup>

### 7. Præcipe and incidents — forms.

The plaintiff's attorney files his præcipe with the prothonotary, and if the case is urgent, does not depend on the writ clerk for delivery to the sheriff, but sees that the writ is properly issued and placed in the hands of the sheriff, to whom he may give personal directions as to the property to be seized, its location and nature. The form is as follows:

Rayne Murray	}	In the Court of Common Pleas of Clearfield
v.		County.
Er Lotos.	}	No. ——— Term, 19—.

Issue *fi. fa.* in above stated case returnable next term.

Geo. R. Bigler,  
Attorney for Plaintiff.  
Date ———

Esq.

Prothy.

When the prothonotary has accepted a præcipe and issued the writ the sheriff is bound to execute it according to its exigency and none but the defendant will be heard to object because the attorney who filed the præcipe was not admitted to practice in that county.<sup>41</sup> Where a prothonotary receives a judgment note and a præcipe for a *fi. fa.* on Sunday and enters and issues on Monday morning, it will not be invalidated, since he acts only as agent for the plaintiff in receiving it on Sunday.<sup>42</sup> A *vend. ex.* issued under seal of the court but not signed by the prothonotary may be corrected as a clerical omission.<sup>43</sup> If the writ as issued calls for anything but lawful money it is irregular.<sup>44</sup>

As execution which directed a levy on goods, chattels, etc., but not lands and tenements was early held to be an error of form and not sufficient to overthrow a sheriff's sale of lands.<sup>45</sup> The indorse-

<sup>37</sup> *Homberger v. Whitely*, 12 C. C. 10. (See *Keech Co. v. O'Herron*, 41 *supr.* C. 108.)

<sup>38</sup> *Sweeting v. Wanamaker*, 4 D. R. 246; *Sloan v. McMullen*, 5 D. R. 430. For the old practice, see P. & L. Dig. of Dec., vol. 7, col. 10567.)

<sup>39</sup> *Blair v. Greenway*, 1 *Browne*, 218; *Bailey v. Wagoner*, 17 S. & R. 27; *Vastine v. Fury*, 2 S. & R. 426.

<sup>40</sup> *Miller v. Miller*, 147 Pa. 545.

<sup>41</sup> *Holshue v. Morgan*, 170 Pa. 217.

<sup>42</sup> *Kauffman's Ap.*, 70 Pa. 261.

<sup>43</sup> *McCormick v. Meason*, 1 S. & R. 92.

<sup>44</sup> *Shoenberger v. Watts*, 5 *Phila.* 51.

<sup>45</sup> *Andrew v. Fleming*, 2 *Dallas*, 93.

ment of the amount to be levied on the outside of the writ is the act of the prothonotary and the sheriff is bound thereby;<sup>46</sup> but if in excess it will not prejudice the plaintiff as to the true amount due.<sup>46a</sup>

*Præcipe to levy stock in defendant's name.*

Willard James } In the Court of Common Pleas of Venango  
v. } County.  
Willis Reed. } No. ——— Term, 1910.

See judgment docket, etc., date ———

Debt \$800, interest from Jan'y 1, 1909. Costs, etc.

Issue process in the nature of an attachment, against defendant above named, to levy upon 100 shares of the capital stock of the Franklin Cycle Company, held in the name of said Willis Reed, defendant.

Robt. F. Glenn, P. Q.

May 7, 1910.

To ———, Esq.,  
Prothonotary.

#### 8. Form of *fi. fa.*

Following is the usual form of a *fi. fa.*

Centre County, ss:

The Commonwealth of Pennsylvania, to the Sheriff of said County,  
Greeting:

We command you, that of the goods and chattels, lands and tenements, of ———, late of your county, yeoman, in your bailiwick, you cause to be levied and made as well a certain debt of ——— Dollars, lawful money of the United States, with interest from ——— and an Attorney's Commission of ——— per cent. on said principal sum, viz.: \$ ——— for collection thereof, which ———, late in our County Court of Common Pleas, before our Judges at Bellefonte, recovered against ——— as also ——— dollars, like money, which to the Plaintiff, in our said Court were in like manner adjudged for ——— damages, which ——— sustained by the occasion of the detention of that debt, whereof the said Defendant ——— convict, as appears to us of record, &c. And have you that money before our Judges, at Bellefonte, at our County Court of Common Pleas, there to be held for Centre County, on the ——— Monday of ——— next to render to the said Plaintiff for debt and damages. And have you then and there this writ.

Witness, the Hon. Ellis L. Orvis, President Judge of our said Court, at Bellefonte, Pa., the ——— day of ———, A. D., one thousand nine hundred and ———

———,  
Prothonotary.

#### 9. The return day.

The *præcipe* should mention the return day. If the writ does not follow the *præcipe*, leave of court may be moved to amend it.<sup>47</sup>

<sup>46</sup> Comth. v. McCoy, 8 Watts, 153; Griffith v. Lyle, 7 Phila. 244.

<sup>46a</sup> Haassel v. Krantz, 23 Lanc. L. R. 353.

The act of June 11, 1879, P. L. 122, is enlarging and curtails no right. So, a *fi. fa.* or an alias may be made returnable to the second term, even if it is issued more than seven days before the next or first term.<sup>48</sup>

### Return of Writs Issued Within Seven Days of Following Term.

The act of June 11, 1879, P. L. 122, provides:

"Hereafter any writs of *feri facias*, hereafter issued within seven days of the next term of court next succeeding the issue thereof, may, at the option of the plaintiff in said writ, be made returnable to the second term after the date of the issuing thereof; and the sheriff of any county may proceed to levy and sell any personal property, and levy upon real estate and hold inquisition on the same, by virtue of such writ, without any further or alias writ."

#### 10. *Levari facias* — nature of.

The writ of *levari facias* is not strictly confined to process on mortgages, mechanics' and municipal liens, but it is a proper form of execution to enforce a judgment *de terris*; for example, such as a reservation under a will and in a deed, in favor of the testator's wife.<sup>1</sup> Where specific lands are to be sold as under a mortgage, a *fi. fa.* is not the proper writ. It is a *levari facias*.<sup>2</sup>

#### 11. Execution must follow judgment.

An execution will be irregular if it does not follow the judgment. If there are several defendants joined in the judgment, it must issue against all.<sup>3</sup> If the judgment is only against one, it must issue against him alone.<sup>4</sup> If the clerk makes an error the writ may be amended to conform with the *præcipe*.<sup>5</sup> A judgment cannot be divided by assigning a part so as to enable the assignee to have execution for such part.<sup>6</sup> If execution issues for a larger amount than is due it may be reduced on distribution;<sup>7</sup> or if endorsed for the whole bond when only an installment is due the court may correct it.<sup>8</sup> But in such case the costs incident to the error and correction will fall on the plaintiff.<sup>9</sup> Where the surety pays a judgment and is subrogated, it is not error to issue against the principal defendant alone, for the surety becomes execution

<sup>47</sup> Berthon v. Keeley, 4 Yeates, 205; Shoemaker v. Knorr, 1 Dallas, 197.

<sup>48</sup> Thorpe v. Ellithorpe, 21 C. C. 216; P. & L. Dig., vol. 7, col. 10574.

<sup>1</sup> Stewart v. Miller, 2 Pearson, 358.

<sup>2</sup> McClelland v. Devilbiss, 1 C. C. 613.

<sup>3</sup> Gibbs v. Atkinson, 1 Clark, 476; P. & L. Dig., vol. 7, col. 10575.

<sup>4</sup> Kimmel v. Kimmel, 5 S. & R. 294; Breidenthal v. McKenna, 14 Pa.

60.

<sup>5</sup> Shaffer v. Watkins, 7 W. & S. 219.

<sup>6</sup> Hopkins v. Stockdale, 117 Pa. 365.

<sup>7</sup> Coleman v. Mansfield, 1 Miles, 57.

<sup>8</sup> Cashen v. Martin, 2 Leg. Gaz. 12.

<sup>9</sup> Scott v. Scott, 8 York, 93.

plaintiff.<sup>10</sup> Where the indorsement is correct but the body refers to a different case, the error is amendable and the writ will not be set aside.<sup>11</sup> So also where the execution is for the amount actually due which differs from the amount in the judgment which was greater;<sup>12</sup> or where the execution should have been *de bonis testatoris*, but was against defendants as executors<sup>13</sup> or against a party for costs, in divorce under her own name and an alias.<sup>14</sup>

Where the execution recited the original number and term in which there was a return of *nihil habet* and the judgment was on the alias, there was no irregularity.<sup>15</sup>

### 12. Practice on death of plaintiff.

Where the plaintiff dies, after judgment, the fact should be suggested and his legal representative be substituted on the record; but if this has not been done it may be allowed *nunc pro tunc*.<sup>16</sup> The legal representative may issue execution without a *scire facias* for the purpose.<sup>17</sup>

Where one of two joint plaintiffs dies the survivor may not issue without substitution for the deceased co-plaintiff.<sup>18</sup> Such substitution may be made on a judgment transferred to another county.<sup>19</sup>

### 13. Irregularities — objections by defendant.

Irregularities in the writ or its time and manner of issuance or execution must be objected to by the defendant directly. Others cannot object nor can the matter be made an issue collaterally.<sup>20</sup> Even the defendant may be estopped by delay.<sup>21</sup> The objection must be made in the court out of which the writ issued for that court alone has control of the process.<sup>22</sup> A *fi. fa.* will not be set aside where the proper amount is endorsed on the writ, although the prothonotary omitted to sign the assessment of damages.<sup>23</sup>

### 14. Interests in land which may be sold.

Every kind of interest in land may be levied upon and sold under a *fi. fa.* whether it be legal or equitable; as, for example a lease-

<sup>10</sup> Duffield v. Cooper, 87 Pa. 443.

<sup>11</sup> Owen v. Simpson, 3 Watts, 87; Reigel's Ap., 1 Walker, 72.

<sup>12</sup> Black v. Wistar, 4 Dallas, 267; P. & L. Dig., vol. 7, col. 10578.

<sup>13</sup> M'Cormick v. Meason, 1 S. & R. 92.

<sup>14</sup> Brinckle v. Brinckle, 6 W. N. C. 205.

<sup>15</sup> Shaw v. Kenath, 10 Phila. 444; Griffin v. Davis, 6 Supr. C. 481; P. & L. Dig., vol. 7, col. 10578.

<sup>16</sup> Stevens v. Tickhill, 30 C. C. 462; Loomis v. Ross, 12 Supr. C. 95; Darlington v. Speakman, 9 W. & S. 182.

<sup>17</sup> Deiser v. Sterling, 10 S. & R. 119.

<sup>18</sup> Freiler v. Freiler, 1 C. C. 265.

<sup>19</sup> Walt v. Swinehart, 8 Pa. 97. (See act April 16, 1840, P. L. 410; and act April 16, 1845, P. L. 538, section 11.)

<sup>20</sup> Wilkinson's Ap., 65 Pa. 189; Levan v. Milholland, 114 Pa. 49; P. & L. Dig., vol. 7, col. 10581.

<sup>21</sup> Chillas v. Snyder, 1 Phila. 289.

<sup>22</sup> Duncan v. Harris, 17 S. & R. 436.

<sup>23</sup> People's Sup. Co. v. Goff, 10 D. R. 637.



ld; <sup>24</sup> an executory devise during the continuance of the primary estate; <sup>25</sup> a contingent estate; <sup>26</sup> a devise conditional on a valuation; <sup>27</sup> or sale with the consent of all the heirs; <sup>28</sup> rent reserved in a conveyance in fee, with clauses of distress and re-entry. <sup>29</sup> But a prospective interest of an heir apparent has been held not leviable. <sup>30</sup>

A tenancy at will may pass by sale under a *vend. ex.* and a *hab. poss.* for the possession is sustainable. <sup>31</sup> This must be understood to mean that only such estate or interest as the defendant has, will pass. <sup>32</sup>

A widow's interest in her husband's lands after partition, may be sold on and sold for her debts, <sup>33</sup> although charged on the land and secured by recognizance; <sup>34</sup> or whether it passes by devise or under the intestate laws. It is placed on the same footing as a mortgage on estate of a tenant by the curtesy initiate. <sup>35</sup>

A mortgage was long since decided to be only a security on specific land although in form of a deed and it is not leviable under an execution against the mortgagee. <sup>36</sup> A right acquired by settlement and improvement was held subject to levy and sale; <sup>37</sup> but an unexecuted warrant in the hands of the deputy surveyor is not. <sup>38</sup> An equity of redemption is leviable until the time to redeem has expired but not after. <sup>39</sup>

#### 15. Chattel interests liable to levy.

A lease for a term of years is not such an interest in land as is subject to the lien of a judgment. It is a chattel subject to seizure and sale by a constable under an execution from a justice of the peace. <sup>40</sup> It may be sold without inquisition and condemnation. <sup>41</sup> As a general thing any chattel or item of personal property that may be seized and reduced to possession is subject to a *fi. fa.*; as for example, an envelope containing a secret formula for the manu-

<sup>24</sup> *Lefever v. Armstrong*, 15 Supr. C. 565; *Gerhart v. Miller*, 25 Montg. C. 175.

<sup>25</sup> *De Haas v. Bunn*, 2 Pa. 335.

<sup>26</sup> *Drake v. Brown*, 68 Pa. 223; *Kenyon v. Davis*, 219 Pa. 585.

<sup>27</sup> *Hart v. Homiller*, 20 Pa. 248.

<sup>28</sup> *Lentz v. Lamplugh*, 12 Pa. 344.

<sup>29</sup> *McKissick v. Pickle*, 16 Pa. 140.

<sup>30</sup> *Sayler v. Sanner*, 2 Leg. Op. 14.

<sup>31</sup> *Gerber v. Hartwig*, 11 W. N. C. 197, under act May 13, 1871, P. L. 10, as to Schuylkill Co.

<sup>32</sup> *Mitchell v. Hamilton*, 8 Pa. 486.

<sup>33</sup> *Kunselman v. Stine*, 183 Pa. 1.

<sup>34</sup> *Shaupe v. Shaupe*, 12 S. & R. 9.

<sup>35</sup> *Thomas v. Simpson*, 3 Pa. 60.

<sup>36</sup> *Asay v. Hoover*, 5 Pa. 21.

<sup>37</sup> *Myers v. Myers*, 8 Watts, 430.

<sup>38</sup> *Heath v. Knapp*, 10 Watts, 405; *Kinter v. Jenks*, 43 Pa. 445.

<sup>39</sup> *Church v. Riddle*, 6 W. & S. 509.

<sup>40</sup> *Bismarck, Etc., Assn. v. Bolster*, 92 Pa. 123; *Lerew v. Rinehart*, 3 C. 50.

<sup>41</sup> *Dalzell v. Lynch*, 4 W. & S. 255; *Kile v. Geibner*, 114 Pa. 381; P. & L. g., vol. 7, cols. 10591-2.

facture of gas;<sup>42</sup> trade dollars deposited in bank specially;<sup>43</sup> money in the hands of the sheriff realized on an execution adverse to the debtor but not required to satisfy such execution.<sup>44</sup> But the plaintiff may not lure the defendant within the jurisdiction with intent to levy on his goods.<sup>45</sup>

Goods in the hands of a bailee or pledgee cannot in general be levied upon.<sup>46</sup> But goods pledged for a debt may be sold subject to the interest of the holder.<sup>47</sup> If the bailor does not give notice of his title at the sale he may be estopped.<sup>48</sup>

Valuables in the safe of a deposit company, garnishee, may be sold under a *fi. fa.* although neither the sheriff nor the company has authority to open the safe.<sup>49</sup> Property in custody of the law is not subject to levy;<sup>50</sup> as where it is taken by municipal authority,<sup>51</sup> or under an attachment by an officer,<sup>52</sup> but not under the act of July 12, 1842, P. L. 339, and its amendment of March 22, 1850, P. L. 233, as the lien of the attachment follows the fund in such case.<sup>53</sup> If the sheriff removes property from his bailiwick into another county, it is liable to be levied upon in that county.<sup>54</sup> A *fi. fa.* on a judgment taken after a sheriff's sale binds the funds in the sheriff's hands after satisfying prior writs.<sup>55</sup> But a landlord's rent is not subject to levy in the sheriff's hands.<sup>56</sup>

When the sheriff has levied on defendant's real estate, he cannot afterwards seize money paid to him voluntarily by defendant for another and a junior creditor and apply it to the writ.<sup>57</sup>

#### 16. Choses in action and other things not leviable.

While choses in action are attachable, they are not liable to levy under a *fi. fa.*;<sup>58</sup> nor a bond delivered, as collateral security;<sup>59</sup> nor a patent right,<sup>60</sup> nor a license to sell liquor,<sup>61</sup> nor pension money under act of Congress of March 3, 1873, section 4747, Rev. Stat.; but property in possession of the pensioner, although bought with

<sup>42</sup> Hanley v. Fidelity, Etc., Co., 8 D. R. 207.

<sup>43</sup> Klinefelter v. Whann, 2 Chester Co. 376.

<sup>44</sup> Herron's Ap., 29 Pa. 240; Comth. v. Gabriel, 14 D. R. 862.

<sup>45</sup> Williams v. Steenrod, 11 D. R. 22.

<sup>46</sup> Srodes v. Caven, 3 Watts, 258; Crist v. Kleber, 79 Pa. 290.

<sup>47</sup> Waverly, Etc., Co. v. McKennan, 110 Pa. 599; Meyers v. Prentzell, 53 Pa. 482.

<sup>48</sup> Greenhoe v. College, 144 Pa. 131.

<sup>49</sup> Klett v. Craig, 1 W. N. C. 28.

<sup>50</sup> Winegardner v. Hafer, 15 Pa. 144; Van Valzal v. Croman, 1 D. R. 190.

<sup>51</sup> Moore v. Barrett, 6 Phila. 204.

<sup>52</sup> Bradley's Ap., 89 Pa. 514.

<sup>53</sup> Spencer v. McCloskey, 7 Supr. C. 578.

<sup>54</sup> Rees v. Chantler, 9 Supr. C. 272.

<sup>55</sup> Sullivan v. Tinker, 140 Pa. 35; Young v. Levy, 6 Supr. C. 23.

<sup>56</sup> Hooke v. Freeman, 2 D. R. 779.

<sup>57</sup> Rudy v. Comth., 35 Pa. 166.

<sup>58</sup> Tradesman's, Etc., Assn. v. Maher, 9 Supr. C. 340.

<sup>59</sup> Rhoads v. Megonigal, 2 Pa. 39.

<sup>60</sup> Rutter's Ap., 8 Atl. 170; P. & L. Dig., vol. 7, cols. 10600-1.

<sup>61</sup> Ulrich's License, 6 D. R. 408.

pension money is liable to levy and sale.<sup>62</sup> If, however, the pensioner endorses his pension checks to his wife and she buys property in her own name, it is not liable for her husband's prior debts.<sup>63</sup> But otherwise if he draws the money and buys the property in her name.<sup>64</sup>

#### 17. Stay of execution — plea of freehold — form.

Section 3 of the act of June 16, 1836, P. L. 755, provides:

"In all actions instituted by writ for the recovery of money by contract, or of damages arising from a breach of contract, except actions of debt and *scire facias* upon judgments, and actions of *scire facias* upon mortgages, if the defendant shall be possessed of an estate in fee simple, within the respective county, worth, in the opinion of the court, the amount of the judgment recovered therein, or the sum for which the plaintiff may be entitled to have execution by virtue thereof, clear of all incumbrances, he shall be entitled to a stay of execution upon such judgment, to be computed from (the return day of the writ by which such action was commenced, under act April 3, 1873, P. L. 60), as follows, to-wit:

1. If the amount or sum aforesaid shall not exceed two hundred dollars, six months.

2. If such amount or sum shall exceed two hundred dollars and be less than five hundred dollars, nine months.

3. If such amount or sum shall exceed five hundred dollars, twelve months."

A defendant is not entitled to this plea unless his real estate lies in the county where the judgment is entered,<sup>1</sup> which fact must be averred in his plea;<sup>2</sup> and a plea in one county does not stay execution in another county to which the judgment has been transferred.<sup>3</sup> The form of this plea is as follows:

Helus Clemmer v. Helus Ball.	}	In Court of Common Pleas of Clearfield County. No. ____ Term, 19___.
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Now, to-wit: April 4, 1910, comes Helus Ball, the defendant above named, and, by virtue of the act of June 16, 1836, pleads in support of stay of execution that he is possessed of an estate in fee simple, situate within the county of Clearfield, free of all incumbrance, and of greater value than the judgment in this case.

Helus Ball.

Sworn to, etc.

This plea being entered, an execution should not issue. If the plaintiff challenges it, he may rule the defendant to appear and justify.<sup>4</sup> If the defendant fails to do so the plea will be stricken

<sup>62</sup> Hadsall v. Clark, 2 Chester Co. 492; Sommers v. Howey, 17 C. C. 171; Supr. C. 318; Aubrey v. McIntosh, 10 Supr. C. 275; affirmed, 185 U. S.

<sup>63</sup> Holmes v. Tallada, 125 Pa. 133.

<sup>64</sup> Burtch v. Burtch, 14 C. C. 482.

Comth. v. Meredith, 5 Binney, 432.

First Natl. Bank, Etc., v. Fine, 2 Northam. 10.

Baker v. King, 2 Grant, 254; P. & L. Dig., vol. 7, col. 10641.

Wilson v. Serrill, 2 W. N. C. 488.

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off.<sup>5</sup> Where the objection is to the sufficiency of the freehold, the burden is on the plaintiff to show it. If an execution issues despite the plea, the plaintiff does so at his peril.<sup>6</sup> If required to justify it must appear that the estate is unincumbered,<sup>7</sup> it being insufficient to show that it is of greater value<sup>8</sup> than the combined judgments.<sup>9</sup> A fee simple, with a ground rent reserved, is sufficient under the act of March 21, 1806, 4 Sm. L. 326—but if there are arrears of ground rent, it is not.<sup>10</sup> It is the duty of the court to judge of the sufficiency<sup>11</sup> and it may hear evidence and inspect title papers to that end.<sup>12</sup> This judgment will not be reviewed in the appellate court.<sup>13</sup>

The act, *supra*, gives the right to a stay without filing a plea, but having done so and the judgment is subsequently opened, the defendant will not be prejudiced by his plea, for that is the only safe way of getting it on the record of the case.<sup>14</sup>

This plea may be entered on an award of referees in a case begun before a justice of the peace<sup>15</sup> or where judgment is taken by default for want of a sufficient affidavit,<sup>16</sup> or on an administration bond;<sup>17</sup> and where there are several defendants, one who pleads freehold is entitled to the stay, though the others are not. It is a matter of right given for security and not of privilege.<sup>18</sup>

The plea cannot be entered by a township;<sup>19</sup> nor on a judgment under a *sci. fa. sur* mechanic's lien;<sup>20</sup> or recognizance for stay of execution,<sup>21</sup> for the act excepts "actions of debt and *scire facias* upon judgments." It cannot be entered by a *terre-tenant* in an action on a ground rent deed.<sup>22</sup>

### 18. Stay by entry of bail.

Section 4 of the act of June 16, 1836, P. L. 755, is as follows:

"Every defendant in any judgment obtained as aforesaid may, upon entering security, in the nature of special bail, have a stay of execution thereon, during thirty days from the rendition of such judgment, and if during that period he shall give security, to be approved of by the court, or by a judge thereof for the sum recovered, together with interest and costs, he shall be entitled to the

<sup>5</sup> *Williams v. Cadwallader*, 12 W. N. C. 304.

<sup>6</sup> *Marseilles v. Garrigues*, 2 Miles, 347; P. & L. Dig. of Dec., vol. 7, col. 10640.

<sup>7</sup> *Girard v. Heyl*, 6 Binney, 253; P. & L. Dig., vol. 7, col. 10642.

<sup>8</sup> *Thornton v. Knapp*, 3 Luz. L. R. 23; *Jenks v. Grace*, 1 W. N. C. 20.

<sup>9</sup> *Penn Bank v. Crawford*, 2 W. N. C. 371.

<sup>10</sup> *Farmers', Etc., Bank v. Schreiner*, 1 Miles, 291.

<sup>11</sup> *Harrison v. Hyneman*, 1 Phila. 204.

<sup>12</sup> *Hill v. Ramsey*, 2 Miles, 342.

<sup>13</sup> *Robinson v. Narber*, 65 Pa. 85.

<sup>14</sup> *Riegel v. Wilson*, 60 Pa. 388.

<sup>15</sup> *Woods v. Connor*, 6 Pa. 430.

<sup>16</sup> *Farmers', Etc., Bank v. Schreiner*, 1 Miles, 291.

<sup>17</sup> *Allinson v. P. R. R. Co.*, 5 C. C. 344; *Comth. v. Rigg*, 3 Leg. Op. 57.

<sup>18</sup> *Robinson v. Narber*, 65 Pa. 85.

<sup>19</sup> *Morgan v. Moyamensing, Etc.*, 2 Miles, 397.

<sup>20</sup> *Haughton v. Otterson*, 2 W. N. C. 490.

<sup>21</sup> *Gorgas v. Zeop*, 2 Miles, 101.

<sup>22</sup> *Williams v. Cadwalader*, 12 W. N. C. 304.

of execution hereinbefore provided in the case of a person owning real estate."

Under this section, which supplies the act of March 21, 1806, 4 P. L. 326, bail may be given in such cases as follow: Judgment appeal from an alderman;<sup>23</sup> municipal claim;<sup>24</sup> plaintiff in levain;<sup>25</sup> mechanic's lien;<sup>26</sup> administration bond;<sup>27</sup> defendant in an amicable action.<sup>28</sup> But a defendant in a judgment confessed to a warrant of attorney can not, unless he reserves the right;<sup>29</sup> or a garnishee in an attachment in execution.<sup>30</sup> Under the act of April 25, 1850, P. L. 569 (section 28), no stay is allowed in a judgment on a recognizance for a stay of execution. A corporation defendant may enter bail for stay.<sup>31</sup> However, the act was held not to apply to damages under eminent domain.<sup>32</sup> A *terre-tenant* who makes affidavit of ownership may enter bail.<sup>33</sup> But a married woman cannot become bail for her husband.<sup>34</sup> A defendant cannot have a stay where he appealed and judgment is affirmed, after seven months from the entry of judgment.<sup>35</sup> If having been entered, although the surety dies, the security holds.<sup>36</sup>

Bail for stay under section 33, act of July 12, 1842, P. L. 339, are not released by a sale of defendant's property under a later writ.<sup>37</sup> Judgment on a *sci. fa.* against bail for want of an affidavit of defense does not cover costs.<sup>38</sup>

#### 19. Special bail for thirty days.

A defendant who enters bail under section 4, of the act of 1836, *pra.*, before an execution issues stands clear as to his property and may do what he will with it. But if the execution issues promptly before bail it acquires a lien which can only be divested by an order of court setting it aside.<sup>39</sup> If the bail surrenders, a *fi. fa.* may issue within thirty days.<sup>40</sup> The entry of special bail at the commencement of an action does not answer for bail for stay.<sup>41</sup> Since the act of July 12, 1842, P. L. 339, the cases where special

<sup>23</sup> *Server v. Mfg Co.*, 4 W. N. C. 381.

<sup>24</sup> *Northern Liberties v. Pennock*, 1 T. & H. Pr., section 1039.

<sup>25</sup> *Roe v. McCrea*, 1 Ashmead, 16.

<sup>26</sup> *Shelly v. Bruner*, 1 W. N. C. 8.

<sup>27</sup> *Comth. v. Rigg*, 2 Leg. Op. 57.

<sup>28</sup> *Moss v. Biddle*, 2 Miles, 175.

<sup>29</sup> *Slone v. King*, 35 Pa. 270.

<sup>30</sup> *Woolston v. Adler*, 1 Phila. 284.

<sup>31</sup> *Allinson v. P. & R. R. Co.*, 5 C. C. 344.

<sup>32</sup> *Harrisburg, Etc., R. Co. v. Pepper*, 84 Pa. 295.

<sup>33</sup> *Ellis v. Cadwallader*, 14 W. N. C. 400.

<sup>34</sup> *Bennett v. Smith*, 4 Clark, 456; acts April 11, 1848; P. L. 536, and June 8, 1893, P. L. 344.

<sup>35</sup> *Sweigard v. Consumers', Etc., Co.*, 198 Pa. 252.

<sup>36</sup> *Wriggins v. Stevens*, 2 Miles, 427. (See act Mar. 23, 1876, P. L. 8.)

<sup>37</sup> *Lerch v. Stichter*, 13 Pa. 86.

<sup>38</sup> *Renschler v. Harres*, *Brightly on Costs*, 184.

<sup>39</sup> *Picard v. Prescott*, 1 Clark, 1.

<sup>40</sup> *Shove v. Edgell*, 2 Miles, 174; P. & L. Dig., vol. 7, col. 10649.

<sup>41</sup> *Perlasca v. Spargella*, 3 Binney, 427.

bail may be entered are limited.<sup>42</sup> If execution issues within the thirty days and before the bail is entered the costs will be taxed against the defendant.<sup>43</sup> But under section 8, rule 10, Philadelphia, the plaintiff is liable if the execution issues within seven days from the judgment.<sup>44</sup> Under section 10 of rule 10, Philadelphia, a surety must make affidavit specifying the incumbrances, if any, on his land and that there are no others.<sup>45</sup>

A mistake made by the prothonotary in the time, may be corrected without prejudice to the plaintiff.<sup>46</sup> If the recognizance was properly taken but not filed, it may be filed *nunc pro tunc* by order of court.<sup>47</sup> But the amount cannot be changed without consent of the surety.<sup>48</sup>

## 20. Form of recognizance.

The act prescribes no form of recognizance and the courts have been required to pass upon a variety of forms in which the surety has been held to the intent to be bound to the plaintiff, without naming him or the commonwealth, for the payment of debt, interest and costs, on condition that defendant does not pay at or before the expiration of the stay.<sup>49</sup> Under the act of March 20, 1845, P. L. 188, bail must be absolute in double the amount of debt, damages, interest and costs recovered. In strict practice a cognizor should appear before the officer and acknowledge his indebtedness before him, which should be entered of record. If the bail only sends a written promise to be security he cannot be held to the strictness of a recognizance.<sup>50</sup> Mere offer is not a recognizance.<sup>51</sup> It is not necessary that the defendant should sign.<sup>52</sup> The recognizance must be approved by the court or a judge thereof<sup>53</sup> and entered of record.<sup>54</sup> The prothonotary may take it in the first instance and the court may subsequently approve it.<sup>55</sup> If the creditor is satisfied with the recognizance without such formality the defendant and his surety cannot complain.<sup>56</sup>

<sup>42</sup> Beers v. West Branch Bank, 7 W. & S. 365; Remely v. Kuntz, 10 Pa. 180; P. & L. Dig., vol. 7, cols. 10651-2-3.

<sup>43</sup> Enterprise, Etc., Co. v. Waltman, 6 Luz. L. R. 131.

<sup>44</sup> Sites v. Coulston, 12 W. N. C. 533. (See, also, P. & L. Dig., vol. 7, col. 10654.)

<sup>45</sup> Showaker v. Kelly, 2 W. N. C. 95.

<sup>46</sup> Welsh v. Brown, 2 Miles, 108; Burnside's Case, 2 Pitts. 254.

<sup>47</sup> Stettler v. Schmoyer, 3 Walker, 356.

<sup>48</sup> Crutcher v. Comth., 6 Wharton, 340.

<sup>49</sup> Comth. v. Finney, 17 S. & R. 282; Bank of Penna. v. Reed, 1 W. & S. 101; Walker v. Nester, 6 W. N. C. 541.

<sup>50</sup> Snyder v. Liebengood, 4 Pa. 305.

<sup>51</sup> Bieber v. Beck, 6 Pa. 198.

<sup>52</sup> Walker v. Nester, 6 W. N. C. 541.

<sup>53</sup> Eichman v. Belvidere Bank, 3 Wharton, 68.

<sup>54</sup> Hoagland, Etc., v. Johnson, 7 Pitts. L. J. 140.

<sup>55</sup> Stroop v. Gross, 1 W. & S. 139.

<sup>56</sup> Comth. v. Finney, 17 S. & R. 282; Stroop v. Gross, 1 W. & S. 139.

*Form of recognizance for stay of execution.*

Florine Nageotte } In the Court of Common Pleas of Crawford  
v. } County.  
Mark Mercer. } No. ———— Term, 1910.

May 6, 1910, judgment against the defendant for \$600.

Crawford County, ss:

George A. Dodd acknowledges himself to be indebted to Florine Nageotte, the above named plaintiff, in the sum of twelve hundred dollars, lawful money of the United States, to be levied of his goods and chattels, lands and tenements, and to be void on condition that he, the said George A. Dodd, shall pay the amount of the above judgment, together with the interest and costs, in the event that the said Mark Mercer, defendant above named, shall fail to pay the same at the expiration of twelve months from ———, the first day of the term to which the said action was commenced.

George A. Dodd.

Taken and acknowledged before me May 6th, 1910.

\_\_\_\_\_,  
Prothonotary.

May 6, 1910, I approve the above security for stay of execution on the above stated judgment.

Thos. J. Prather, P. J.

**21. Insolvency of surety — new security.**

It is provided by act of March 23, 1876, that whenever it shall be found that a person has failed to appear

That any person entered as bail as aforesaid is like to prove insolvent, it shall be lawful for said court or judge to require such person and the defendant to appear on a day certain before said court or judge and, upon a hearing of the matter, the said court or judge may require the defendant to enter such other or further security as said court or judge may think reasonable, and on default of entering the security so required, the plaintiff shall be entitled to execution in the same manner as if the time limit for stay had expired."

This is done by petition showing interest and setting forth the facts — and asking for a rule to show cause.

**22. Liability of bail.**

The recognizance fixes an absolute liability of the surety, and he cannot avail himself of any defense to the original suit.<sup>57</sup> It creates a new and distinct obligation of record unaffected by the questions concerning the judgment;<sup>58</sup> or incidents growing out of it.<sup>59</sup> But where an appeal is taken which operates as a supersedeas, the liability of surety will be suspended until the appeal is determined.<sup>60</sup> The surety may be discharged from liability by the laches of the plaintiff; as, where the latter neglects to seize and sell property of

<sup>57</sup> Winsor v. Farmers', Etc., Bank, 81 \* Pa. 304.

<sup>58</sup> Jones v. Bomberger, 97 Pa. 432; P. & L. Dig., vol. 7, cols. 10663-4.

<sup>59</sup> Jones v. Raiguel, 97 Pa. 437.

<sup>60</sup> Upland Boro' v. Delaware, Etc., Co., 4 Del. Co. 475.



defendant at the expiration of the stay;<sup>61</sup> and where the proceeds of land valued in the Orphans' Court were misapplied;<sup>62</sup> but not by a mere stay of a writ before levy and lien.<sup>63</sup>

On a *sci. fa. sur* recognizance a plea of *nul tiel* record will not be sustained by proof that it was taken for less than double the amount, etc., as the defendant and surety were not prejudiced thereby — nor is the surety released by a gratuitous extension by the constable without knowledge or consent of the surety.<sup>63a</sup>

### 23. Stay by the court and by agreement.

Upon cause shown the Common Pleas may stay a writ on such terms as seem equitable and the appellate court will not review it;<sup>64</sup> unless there is a manifest abuse of discretion which deprives the plaintiff of some legal right.<sup>65</sup> An appeal will not lie from an order refusing to stay a writ, where the application is based on facts *dehors* the record.<sup>66</sup> After final judgment, unappealed from, a refusal to stay a *fi. fa.* is not appealable.<sup>67</sup> The court will not stay a writ unless the defendant in his application makes out a good case satisfying the court that there is justice and merit in it.<sup>68</sup> It will not interpose a stay upon defects only;<sup>69</sup> nor on petition of the minor son, where execution issued within a year from the disappearance of defendant under circumstances which suggest death;<sup>70</sup> nor on petition of the wife of defendant alleging that the purpose of the judgment is to defraud her of her dower right; for in such case the sheriff's sale would pass no title.<sup>71</sup> An execution by executors against a legatee will not be stayed unless it be shown that the legacy will be paid out of the estate.<sup>72</sup> Where judgment is entered on a bond sealed, the consideration will not be inquired into on an application to stay.<sup>73</sup>

The court may stay a writ, until the new matter set up can be inquired into and determined,<sup>74</sup> as in case of ejectment against a railroad company, to give it an opportunity to proceed under the privilege of eminent domain;<sup>75</sup> or upon a recognizance of appeal, to await the final determination of the original suit;<sup>76</sup>

<sup>61</sup> Reid v. Lindsey, 104 Pa. 156.

<sup>62</sup> Finney v. Comth., 1 P. & W. 240.

<sup>63</sup> Morrison v. Hartman, 14 Pa. 55. (For other cases see P. & L. Dig., vol. 7, col. 10668.)

<sup>63a</sup> Vogts v. Thomas, 8 Lack. Jur. 94.

<sup>64</sup> Cake v. Cake, 192 Pa. 550.

<sup>65</sup> Patterson v. Patterson, 27 Pa. 40.

<sup>66</sup> Hanscom v. Chapin, 27 Supr. C. 546.

<sup>67</sup> Loomis v. Ross, 12 Supr. C. 95.

<sup>68</sup> Pearce v. Affleck, 4 Binney, 344; Arnold v. Mitzel, 19 York, 153; Smith v. McKay, 13 Luz. L. R. 212.

<sup>69</sup> Coaler v. Schlecht, 3 W. N. C. 242.

<sup>70</sup> Cramer v. Cramer, 13 D. R. 579.

<sup>71</sup> Tombaugh v. Tombaugh, 24 C. C. 140.

<sup>72</sup> Dunn v. Am. Phil. Soc., 2 Pa. 75.

<sup>73</sup> Snowdon v. Hemming, 1 Dallas, 83.

<sup>74</sup> Irons v. McQuewan, 27 Pa. 196; P. & L. Dig., vol. 7, col. 10633;

Kline v. Blaine, 14 Luz. L. R. 151.

<sup>75</sup> Richards v. Buffalo, Etc., R. Co., 137 Pa. 524.

<sup>76</sup> Adams v. Mortland, 13 W. N. C. 221.

or against an executor as garnishee, to await distribution in the Orphans' Court.<sup>77</sup>

But the matter must be connected with the cause in which execution issued and not a foreign suit.<sup>78</sup>

Where the execution is against real estate it only affects the interest of the defendant therein and it will not be stayed because the lien has expired,<sup>79</sup> or that the title or easement is in another,<sup>80</sup> or that there has been an assignment for creditors, whose validity is denied by the creditor.<sup>81</sup>

Where the parties themselves have agreed to a stay of execution the agreement will be enforced,<sup>82</sup> unless induced by fraud.<sup>83</sup> If such agreement is not in writing it must be proved by evidence, clear, precise and indubitable;<sup>84</sup> especially where the power to confess has the phrase "without stay of execution."<sup>85</sup> Where the parties do not fix a time, the court will hold them to a reasonable time.<sup>86</sup>

Such agreement is one of forbearance and does not bind as between the debtor and his creditors;<sup>87</sup> and an execution issued will be valid but inure to the benefit of all the creditors.<sup>88</sup>

Execution will be stayed until bankruptcy proceedings are determined, under certain circumstances.<sup>88a</sup>

Under rules of court, if no answer is filed to the petition in due time, the petition will be taken as true and the writ stayed.<sup>88b</sup>

#### 24. Stay in amicable actions.

Section 5 of the act of 1836, *supra*, provides:

"In amicable actions the defendant shall be entitled to like stay of execution, if he possess an estate in fee simple, or give security as aforesaid, and in such cases the stay shall be computed from the date of their agreement, unless it be otherwise provided therein by the parties."

#### 25. Stay on special verdict, demurrer or case stated.

Section 6 of the act of March 11, 1809. 5 Sm. L. 15 is as follows:

" . . . No execution shall issue upon any judgment, on any special verdict, demurrer or case stated, unless by leave of the court in special cases, for security of the demand, within three weeks, from the day on which such judgment shall be pronounced."

<sup>77</sup> Adams v. Harland, 7 W. N. C. 129.

<sup>78</sup> Dunlop v. Speer, 3 Binney, 169; P. & L. Dig., vol. 7, col. 10634.

<sup>79</sup> Gritman v. Fiske, 1 Lack. L. R. 490.

<sup>80</sup> Jarrett v. Tomlinson, 3 W. & S. 114; P. & L. Dig., vol. 7, col. 10635.

<sup>81</sup> Neel v. Bank, Etc., 11 Pa. 17.

<sup>82</sup> Feagley v. Norbeck, 127 Pa. 238; Miller v. Klopp, 141 Pa. 375.

<sup>83</sup> Holmes v. Delabourdine, 1 Browne, 130.

<sup>84</sup> Spangler v. Sheffer, 69 Pa. 255; P. & L. Dig., vol. 7, col. 10625.

<sup>85</sup> Roemer v. Denig, 18 Pa. 482; P. & L. Dig., vol. 7, cols. 10626-7.

<sup>86</sup> Miller v. Milford, 2 S. & R. 35; P. & L. Dig., vol. 7, col. 10627.

<sup>87</sup> Henry v. Patterson, 57 Pa. 346.

<sup>88</sup> Loucheim's Ap., 67 Pa. 49; P. & L. Dig., vol. 7, col. 10629.

<sup>88a</sup> Weidman v. Moyer, 26 Lanc. L. R. 351.

<sup>88b</sup> Williams v. Water Co., 10 Lack. Jur. 233.

**26. Bail absolute in double the amount.**

The act of March 20, 1845, P. L. 188, provides:

"The bail in all cases where bail is now required for the stay of execution, shall be bail absolute, with one or more sufficient sureties, in double the amount of the debt or damages, interest and costs recovered, conditioned for the payment thereof in the event that the defendant fail to pay the same at the expiration of the stay of execution."

**27. No stay on judgment for wages.**

The act of May 14, 1874, P. L. 145, provides:

"No stay of execution shall be allowed on any judgment for one hundred dollars and less, when the same has been recovered for wages of manual labor."

This act has been held to apply to a judgment on a note given for wages.<sup>80</sup>

**28. Proceedings after expiration of stay.**

When the stay has expired the plaintiff may pursue his remedy against both defendant and surety or either. He cannot be ruled to elect between the two, though he is entitled to but one satisfaction.<sup>1</sup> Where the *sci. fa.* on the recognizance recites it and alleges expiration of stay and default this is a sufficient statement to require the defendant to plead;<sup>2</sup> also under the rules of court in Schuylkill County the filing of a copy of the recognizance, without a copy of the entire record of the judgment was held sufficient.<sup>3</sup> The recognizance being itself a record the plaintiff is confined to it and cannot import matters outside.<sup>4</sup> Where a judgment is a first lien for purchase money it will not lose its priority because a recognizance for stay of execution is given.<sup>5</sup> But it has been held that a surety who afterwards pays the judgment cannot be subrogated so as to take priority over later judgment creditors.<sup>6</sup> If the surety purchases the judgment from the plaintiff he succeeds to his rights therein.<sup>7</sup> Where the bail for stay becomes such at the solicitation of the principal and not the surety he cannot be subrogated as against the surety.<sup>8</sup>

The bail for stay on a judgment against the maker of a note is not entitled to be subrogated to the rights of the plaintiff, against the endorser<sup>9</sup> without the latter's consent;<sup>10</sup> nor is the bail on a judgment for a debt secured by mortgage entitled to subrogation against the *terre-tenant*.<sup>11</sup>

<sup>80</sup> *Jung v. Roth*, 1 W. N. C. 510.

<sup>1</sup> *Patterson v. Swan*, 9 S. & R. 16.

<sup>2</sup> *Comth. v. Griffith*, 9 Lanc. L. R. 139.

<sup>3</sup> *Jones v. Raiguel*, 97 Pa. 437.

<sup>4</sup> *Waithers v. Livezey*, 1 W. & S. 433.

<sup>5</sup> *Carneghan v. Brewster*, 2 Pa. 41.

<sup>6</sup> *Armstrong's Ap.*, 5 W. & S. 352; *Lathrop's Ap.*, 1 Pa. 512.

<sup>7</sup> *Hartman's Ap.*, 6 Pa. 76; *Bank v. Harper*, 8 Pa. 249.

<sup>8</sup> *Keller v. Roop*, 2 W. N. C. 207; *P. & L. Dig.*, vol. 7, cols. 10671-2.

<sup>9</sup> *Allegheny Val. R. Co. v. Dickey*, 131 Pa. 86.

<sup>10</sup> *Yeager's Ap.*, 19 W. N. C. 151.

<sup>11</sup> *McCurdy v. Connor*, 1 Walker, 155.

A surety who is compelled to pay the debt is entitled to subrogation against his principal's bail for stay;<sup>12</sup> although the judgment was joint if the surety did not consent to the entry.<sup>13</sup> If the relation of the surety is not apparent on the record — it must be shown that the bail had notice.<sup>14</sup> An indorser stands in the relation of a surety as to the maker of a note and has a right to the benefit of a recognizance for stay.<sup>15</sup> But when the indorser of an accommodation note for whose benefit it is drawn pays it, the bail is discharged.<sup>16</sup>

The entry of bail for stay is not a waiver of a right to appeal;<sup>17</sup> but this has been held not to apply to an award of arbitrators.<sup>18</sup>

### 29. Waiver of stay.

A contract to waive the stay of execution is legal and a subsequent law will not affect it.<sup>19</sup> It binds the assignee under act of June 4, 1901, P. L. 404, when made prior thereto.<sup>20</sup> The same principles apply to a mortgage.<sup>21</sup> The waiver will not be implied, it must be express.<sup>22</sup>

### 30. No stay against commonwealth, etc.

There is no stay of execution as against the commonwealth's judgment unless the law expressly mentions it.<sup>23</sup>

Section 85 of the act of 1836, *supra*, provides:

"Whenever any goods or chattels liable to the payment of rent as aforesaid shall be seized in execution, the proceedings upon such execution shall not be stayed by the plaintiff therein without the consent of the person entitled to such rent, in writing first had and obtained."

Under this act, the sheriff, after notice of a claim of rent due the landlord, may not return the writ stayed without the consent of the landlord in writing, which he should attach to his return.<sup>24</sup> This notice can be served on the sheriff at any time before the return day, but not after.<sup>25</sup>

The priority given wage claimants under the act of April 9, 1872, P. L. 47, confers no lien and such claimants cannot object to staying of the writ in the same manner as the landlord,<sup>26</sup> and their wages

<sup>12</sup> Burns v. Huntingdon Bank, 1 P. & W. 395.

<sup>13</sup> Schnitzel's Ap., 49 Pa. 23; P. & L. Dig., vol. 7, col. 10674.

<sup>14</sup> Wolff v. Stover, 107 Pa. 206.

<sup>15</sup> Shaw v. McClellan, 1 Clark, 384.

<sup>16</sup> Marsh v. Consolidated Bank, 48 Pa. 510.

<sup>17</sup> Ranck v. Becker, 12 S. & R. 412.

<sup>18</sup> Upland Boro' v. New Chester Water Co., 4 Del. Co. 241.

<sup>19</sup> Billmeyer v. Evans, 40 Pa. 324; P. & L. Dig., vol. 7, cols. 10605-6.

<sup>20</sup> Weist v. Wuller, 210 Pa. 143.

<sup>21</sup> Allison v. Bradley, 4 W. N. C. 150.

<sup>22</sup> Drexel v. Miller, 49 Pa. 246; Huntzinger v. Brock, 3 Grant, 243.

<sup>23</sup> Comth. v. Rigg, 2 Leg. Op. 57; Comth. v. Markert, 12 Lanc. L. R. 281.

<sup>24</sup> Borlin v. Comth., 110 Pa. 454; Turrell v. Ball, 26 C. C. 36. (See Leonard v. Curley, 16 D. R. 21, which limits it to the goods of the defendant.)

<sup>25</sup> Work's Ap., 92 Pa. 258.

<sup>26</sup> Mettfett v. Mohn, 171 Pa. 395.



must be due when the writ issues.<sup>27</sup> When so due they are entitled to preference over the landlord's claim for rent.<sup>28</sup>

### 31. Practice on petition for stay.

The proper practice on an application for stay of execution is by petition to the court or judge which should concisely set forth all the facts relied upon and pray for relief, and be verified. Thereupon the court will grant a rule on the plaintiff to show cause and fix a time for hearing when the rule is made returnable.<sup>29</sup> The plaintiff should file an answer admitting or denying some or all of the allegations, from which an issue may be framed if the court deems just. The petition should be as specific as an affidavit of defense.<sup>30</sup> An appearance has been held to be a waiver of formal notice under the rule of court.<sup>31</sup>

A rule will issue on the petition of one of several defendants,<sup>32</sup> but where an act of assembly, as in case of soldiers<sup>33</sup> stays process, it will be limited to the persons designated.<sup>34</sup> Where some defendants are not entitled to a stay the proper practice is to issue execution against them and the question can be raised on a motion to quash the writ.<sup>35</sup>

### 32. Stay on transferred judgment.

Where a suit is brought upon a judgment in another state a stay of execution cannot be entertained here,<sup>36</sup> unless a rule to open the judgment is pending in that state.<sup>37</sup>

Where a judgment is transferred to another county the court in the latter county may stay the writ on proof that the money was paid into court in the first county, on order.<sup>38</sup> But a stay in the first county will not of necessity stay the writ in the second county.<sup>39</sup> A writ may be stayed by a judge at chambers.<sup>40</sup>

A rule to stay execution alone admits the legality of the judgment. If the defendant would attack the judgment his rule should be to open the judgment and let him into a defense, the writ to be stayed.<sup>41</sup>

### 33. Effect of opening judgment.

Judgment being opened the defendant may avail himself of any legal defense.<sup>42</sup>

<sup>27</sup> *Schwartz v. Banks*, 13 Phila. 540.

<sup>28</sup> *Yeager v. Tool*, 1 Dauphin Co. 120.

<sup>29</sup> *Comth. v. Magee*, 8 Pa. 240.

<sup>30</sup> *Lewis v. Linton*, 207 Pa. 320; also 204 Pa. 234.

<sup>31</sup> *Gass v. Schuylkill Iron Co.*, 2 Foster, 241.

<sup>32</sup> *Robinson v. Narber*, 65 Pa. 85.

<sup>33</sup> April 18, 1861, P. L. 408.

<sup>34</sup> *Sheetz v. Wynkoop*, 74 Pa. 198.

<sup>35</sup> *Banking Co. v. Wolleston*, 1 W. N. C. 27.

<sup>36</sup> *Sloat v. Prentice*, 2 Am. L. R. 446.

<sup>37</sup> *Belding v. Lowe*, 1 W. N. C. 313.

<sup>38</sup> *King v. Nimick*, 34 Pa. 297.

<sup>39</sup> *Baker v. King*, 2 Grant, 254.

<sup>40</sup> *Reid v. Lindsey*, 104 Pa. 156.

<sup>41</sup> *Anderson v. Woodworth*, 1 Lack. L. N. 264; *Lehman v. Tammany*, 7 Kulp, 235.

<sup>42</sup> *Riegel v. Wilson*, 60 Pa. 388.

The granting of a rule to show cause alone does not stay proceedings. The order should be that all proceedings in the meantime be stayed and if a levy has been made, that the lien of the same remain. The sheriff can only take notice of an order to stay proceedings on the execution<sup>43</sup> and his return will be "this writ stayed by order of court," or "writ stayed and ordered returned with the writ on it," as the case may be.

Pending a rule for a new trial an execution issued will be premature, notwithstanding the rule is soon after discharged.<sup>44</sup>

### 34. Effect of stay on other writs.

Where a second *fi. fa.* comes into the hands of the sheriff, and the writ notes thereon the levy on the former writ, the second is not affected adversely by a stay of the first. A *vend. ex.* issued on the writ, under which a sale is made, quiets the title.<sup>45</sup>

Where the stay is temporary, pending a rule, the court will couple with the order, preservation of the lien,<sup>46</sup> but the omission of it will not impair a lien given by law.<sup>47</sup> The lien is not discharged by an order requiring defendant to give a bond of indemnity to the sheriff for possession of the goods.<sup>48</sup> If no levy is made before the return day of the writ, its lien expires,<sup>49</sup> and the plaintiff has no claim upon the sheriff.<sup>50</sup> An execution issued during the stay is not void but voidable,<sup>51</sup> and cannot be attacked collaterally.<sup>52</sup> The defendant may by laches lose his right to object.<sup>53</sup>

### 35. Effect of stay on costs.

Where an execution is stayed by order of court the plaintiff may have his costs out of the fund arising from a subsequent partition or assignee's sale,<sup>54</sup> although not reached in distribution, but such costs will not include the judgment fee.<sup>55</sup> Where he voluntarily pays the writ and pays the costs he cannot recover them on distribution.<sup>56</sup> After long delay a stay will not be vacated to enable an attorney to collect his commissions.<sup>57</sup>

### 36. Suggestion of freehold — rule in Allegheny county.

Rule 51, Allegheny County (D. R. C. 48), provides:

"Suggestion of freehold for stay of execution shall be effectual for that purpose, only when the same is in writing and has attached

<sup>43</sup> Spang v. Comth., 12 Pa. 358.

<sup>44</sup> Windsor v. Tillottson, 135 Pa. 208.

<sup>45</sup> Miller v. Westerhoff, 14 Supr. C. 604.

<sup>46</sup> Irons v. McQuewan, 27 Pa. 196.

<sup>47</sup> Batdorff v. Focht, 44 Pa. 195; P. & L. Dig., vol. 7, col. 10619.

<sup>48</sup> Slutter v. Kirkendall, 100 Pa. 307; Reid v. Lindsey, 104 Pa. 156.

<sup>49</sup> Sturges' Ap., 86 Pa. 413.

<sup>50</sup> Comth. v. Magee, 8 Pa. 240.

<sup>51</sup> Brooks v. Barbour, 1 W. N. C. 7.

<sup>52</sup> Stewart v. Stocker, 13 S. & R. 199; Wilkinson's Ap., 65 Pa. 189.

<sup>53</sup> Kelly v. Cover, 1 W. N. C. 467.

<sup>54</sup> Woodward's Est., 1 Chester County, 402.

<sup>55</sup> McDannel's Est., 1 Chester Co. 494.

<sup>56</sup> Myers v. Harris, 8 Luz. L. R. 240.

<sup>57</sup> Davis v. Shryock, 25 C. C. 649.

thereto a description of the premises, with a reference to the title and the record thereof (if any), under which defendant holds, with an affidavit by him, his agent or attorney, that he is possessed thereof in fee simple; that the same is within the county, worth at least the amount of the judgment or the sum for which the plaintiff may be entitled to have execution thereof, clear of all encumbrances. And upon being filed the same shall be governed by the rules in relation to bail for stay of execution relative to notice, exceptions, etc., so far as the same may be applicable."

**37. Justifying bail, Allegheny County.**

Rule 52, Allegheny County, provides as follows:

"Bail for stay of execution shall be effectual for that purpose, when the plaintiff or his attorney is present at the entry thereof and departs without filing exceptions; or, when notice of such entry is given to the plaintiff or his attorney and no exceptions are filed within twenty-four hours thereafter. If exceptions are filed, the defendant shall, within ten days thereafter, justify the security before the commissioner of bail, giving the plaintiff or his attorney twenty-four hours' notice thereof."

(Compare your rules of court.)

**38. Docket entries and certificate of stay.**

Rule 53, Allegheny County, is as follows:

"The presence of the plaintiff or his attorney at the entry of the bail, or the proof of notice to him that it has been entered, as the case may be, shall be noted on the record, and as soon as the time for filing exceptions has elapsed, or the exceptions, if any, have been disposed of, the prothonotary shall enter an order that the execution be stayed and give a certificate thereof."

**39. Affidavit of sufficiency — Allegheny county.**

Rule 55, Allegheny County, provides:

"Bonds presented for approval shall have endorsed thereon or attached thereto, an affidavit or affidavits showing the sufficiency of the bail or security for the amount of the penalty, exclusive of all liabilities and exemptions."

**40. Notice of change of bail, etc.— Allegheny county.**

Rule 56, Allegheny County, provides:

"Twenty-four hours' notice shall be given to the plaintiff or his attorney of any intended addition, substitution or justification of bail; or when the defendant, having been committed to prison, proposes to enter bail."

## CHAPTER XIII

### EXECUTION — LIEN AND LEVY.

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|--|--|
| 1. Time when writ binds.                               | 15. Effect of death or abandonment.              |
| 2. Endorsement by sheriff.                             | 16. Levy on land — lien — docketing.             |
| 3. Lien of <i>testatum fi. fa.</i>                     | 17. Return to writ of <i>fi. fa.</i>             |
| 4. Execution of writ.                                  | 18. Amendment of return.                         |
| 5. Order of liability.                                 | 19. Forthcoming bond.                            |
| 6. Right of plaintiff to elect.                        | 20. <i>Alias</i> and <i>pluries</i> writs.       |
| 7. Execution against prisoners.                        | 21. Synchronous executions.                      |
| 8. No money to be levied on the person.                | 22. Limit upon <i>capias ad satisfaciendum</i> . |
| 9. Schedule of property.                               | 23. Satisfaction under <i>capias</i> .           |
| 10. Levy on real estate.                               | 24. Levy on stocks, deposits, etc.               |
| 11. Time of levy.                                      | 25. Sale of stocks, etc.                         |
| 12. Effect of levy as satisfaction.                    | 26. Sale of goods pledged or demised.            |
| 13. Effect of plaintiff's order to stay.               | 27. Levy upon coin or currency.                  |
| 14. Delay and leaving goods in defendant's possession. |  |

#### 1. Time when writ binds.

Section 39 of the act of 1836, *supra*, provides:

"No writ of *fi. facias*, or other writ of execution, shall bind the property or the goods of the person against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the sheriff, under sheriff, or coroner to be executed."

From the time the *fi. fa.* comes into the hands of the officer it binds as a lien all the personal property of the defendant in the bailiwick,<sup>1</sup> whether levied or not,<sup>2</sup> if a levy be made before the return day. So the order of time is important to the sheriff and he must note on each writ the hour and minute of the day, for the first writ takes priority,<sup>3</sup> even as to personalty acquired by defendant subsequently.<sup>4</sup> The receipt of a second *fi. fa.* is a re-seizure on all the writs;<sup>5</sup> and the officer then sells on all and returns the money into court for distribution.<sup>6</sup> Where under a second writ he is directed to sell the property as that of another defendant he can only sell the right title and interest of the defendant under the second — and will deliver possession to the purchaser under the first writ.<sup>7</sup> If the writ is delivered at the sheriff's office or at the

<sup>1</sup> *Duncan v. McCumber*, 10 Watts, 212; *Earl's Ap.*, 13 Pa. 483; *Sturges' Ap.*, 86 Pa. 413; *P. & L. Dig.*, vol. 7, col. 10707.

<sup>2</sup> *Wilson's Ap.*, 13 Pa. 426; *Schuylkill County's Ap.*, 30 Pa. 358.

<sup>3</sup> *Ulrich v. Dreyer*, 2 Watts, 303.

<sup>4</sup> *Shafner v. Gilmore*, 3 W. & S. 438.

<sup>5</sup> *Watmough v. Francis*, 7 Pa. 206.

<sup>6</sup> *McDonald v. Todd*, 1 Grant, 17.

<sup>7</sup> *Vandyke v. Bennett*, 1 T. & H. Pr., section 1038.



place where he usually transacts his business, it is a sufficient delivery to him.<sup>8</sup>

Where the defendant dies after the writ comes into the sheriff's hands and before actual seizure the sheriff is still entitled to make the money on it, as against the estate and the administrator.<sup>9</sup>

A judicial order staying a *fi. fa.* does not postpone the lien as to subsequent executions, though it was not provided in the order that the lien remain, as is the usual practice;<sup>10</sup> but a return of the writ and the issuance of an alias, without having a levy made and docketed, is equivalent to an abandonment of the lien. The proper form is to issue a *vend. ex.* on a return with a levy.<sup>11</sup>

Executions from the state courts turned over to the U. S. marshal who has already levied under a writ from the U. S. Circuit Court will be entitled to the surplus.<sup>11a</sup>

Goods levied upon are in *custodia legis*.<sup>11b</sup> But where the claim is liquidated by check the defendant has the right to transfer it.<sup>11c</sup>

### 2. Endorsement by sheriff.

Section 40 of the act of 1836, *supra*, provides:

"Every sheriff and coroner, their deputies and agents upon receiving any writ of *fi. fa.*, or other writ of execution, shall, without fee for doing the same, endorse thereon the day of the month, the year and the hour of the day whereon he or they received the same."

If the sheriff fails to so note the time, it may be proved by parol and a subsequent writ will not be given priority.<sup>12</sup> His endorsement, however, is conclusive.<sup>13</sup>

An assignment for the benefit of creditors on the same day made prior to the receipt of the writ by the sheriff takes priority;<sup>14</sup> but not if the writ comes into his hands before the deed of assignment is delivered to the assignee.<sup>15</sup> In such cases the law takes note of the fraction of a day. So the lien of the *fi. fa.* takes priority over an attachment execution though there is no levy until after service on the garnishee.<sup>16</sup> As to real estate the *fi. fa.* binds only from the actual levy.<sup>17</sup>

### 3. Lien of testatum *fi. fa.*

Under the act of June 16, 1836, P. L. 755, a *testatum fi. fa.* becomes a lien in the second county from the date of its entry, which

<sup>8</sup> Miffin v. Will, 2 Yeates, 177.

<sup>9</sup> Avery's Est., 1 C. P. R. 151.

<sup>10</sup> Batdorff v. Focht, 44 Pa. 195.

<sup>11</sup> Missimer v. Ebersole, 87 Pa. 109.

<sup>11a</sup> Bayard v. Bayard, 3 Clark, 261 (\* p. 160).

<sup>11b</sup> Reinheimer v. Hemingway, 35 Pa. 432.

<sup>11c</sup> Robinson v. Hart, 23 Supr. C. 299.

<sup>12</sup> Hale's Ap., 44 Pa. 438.

<sup>13</sup> Person's Ap., 78 Pa. 145.

<sup>14</sup> Hodenpuhl v. Hines, 160 Pa. 466.

<sup>15</sup> Braden's Est., 165 Pa. 184.

<sup>16</sup> Comth. v. Ruske, 26 Pitts. L. J. 121.

<sup>17</sup> Wilson's Ap., 90 Pa. 370; Henderson v. Henderson, 133 Pa. 399; P. & L. Dig. Dec., vol. 7, col. 10713.

en continues therein for five years, whether the lien expires before that in the original county, or whether it is there revived. It stands wholly unaffected by proceedings in the original county unless paid. The act of May 19, 1887, P. L. 132, as to personalty does not affect it.<sup>18</sup>

#### 4. Execution of writ.

Section 41 of the act of 1836, *supra*, provides:

"The officer to whom any such writ may be directed shall, if the defendant therein refuse or neglect to pay the debt and costs, proceed to levy and sell so much of the defendant's personal estate as shall be sufficient for that purpose, and make return of his proceedings to the court, according to the command of such writ."

It was formerly held that in order to a valid levy there must be an actual seizure of the property.<sup>19</sup> But this has been so far modified that when the property is within the view and power of the officer, it is sufficient.<sup>20</sup> The sheriff should make a schedule or list of the various items, sufficiently definite to give notice to other creditors of what property is seized by such levy.<sup>21</sup> If he does not levy before the return day, a subsequent execution upon which a levy is made will take the proceeds.<sup>22</sup> In such case, if the neglect of the officer causes the postponement, he is liable to the execution creditor whose claim has been postponed.<sup>23</sup> The continuance of the levy for the purpose of lien and not *bona fide* to make the money a fraud upon other creditors, and a subsequent execution pressed with diligence will be entitled to the proceeds of sale.<sup>24</sup>

It is a question of good faith in using the process only to make the money.<sup>25</sup> If there is an agreement to hold the writ, by the plaintiff, to give defendant time, it lets in a junior execution.<sup>26</sup> And where successive writs are issued and returned stayed, subsequent writs will displace those so issued for lien only;<sup>27</sup> though this wholesome rule has at times been transgressed by a too friendly judge,<sup>28</sup> and such practice is pernicious.

#### 5. Order of liability.

Section 19 of the act of 1836, *supra*, provides as follows:

"The plaintiff in every judgment which shall be obtained in any court of this commonwealth, for the recovery of money, may have execution thereof, subject to the restrictions and qualifications herein

<sup>18</sup> *Sylvester v. De Witt*, 34 Supr. C. 205.

<sup>19</sup> *Trovillo v. Tilford*, 6 Watts, 468.

<sup>20</sup> *Linton v. Comth.*, 46 Pa. 294; *Carey v. Bright*, 58 Pa. 70; *Dixon White, Etc., Co.*, 128 Pa. 397; P. & L. Dig., vol. 7, col. 10682; *Duncan's Ap.*, 37 Pa. 500; *Samuel v. Knight*, 9 Supr. C. 352.

<sup>21</sup> *Earl's Ap.*, 13 Pa. 483; *Wilson's Ap.*, 13 Pa. 426.

<sup>22</sup> *Duncan's Ap.*, 37 Pa. 500.

<sup>23</sup> *Dorrance Admrs. v. Comth.*, 13 Pa. 160; *Linton v. Comth.*, 46 Pa. 294.

<sup>24</sup> *Earl's Ap.*, 13 Pa. 483.

<sup>25</sup> *Gibbs v. Neely*, 7 Watts, 305; *Smith's Ap.*, 2 Pa. 331; *Miller v. Getz*, 5 Pa. 558.

<sup>26</sup> *Sweet v. Williams*, 162 Pa. 94.

<sup>27</sup> *Hall v. Vanderpool*, 156 Pa. 152.

<sup>28</sup> *King Brewing Co. v. Mosher*, 23 C. C. 265 (Clinton County).

provided, against the person and estate of the defendant, in the following order, to-wit:

- I. Upon the personal estate of the defendant.
  - II. Upon his real estate.
  - III. If he have neither personal nor real estate liable to execution, then upon the person of the defendant."
- The latter clause is modified by the act of 1842, which restricts arrest and imprisonment to certain forms of action (see "Capias," Vol. I).

#### 6. Right of plaintiff to elect.

Section 20 of the act of 1836, *supra*, provides:

"It shall be lawful for the plaintiff to have execution against the real estate of the defendant, \* \* \* or, at his election, he may proceed to obtain the satisfaction of his judgment out of such personal estate as is by this act now first made liable to execution."

*Fi. fa.*, *capias* and attachment execution may issue simultaneously.<sup>29</sup> The defendant alone may compel the plaintiff to elect between his various writs.<sup>30</sup>

However, if the plaintiff has levied on real estate he cannot also have an attachment,<sup>31</sup> if it is inconsistent with the former.<sup>32</sup> An attachment execution can be issued only on a personal judgment.<sup>33</sup>

#### 7. Execution against prisoners.

Section 21 of the act of 1836, *supra*, provides:

"If any person, against whom a judgment in any civil action or proceeding shall have been rendered, shall be charged, committed to prison, or convicted of any crime, it shall be lawful for the plaintiff in such judgment to have execution thereof against the real and personal estate of such person, in like manner, as in other cases."

#### 8. No money to be levied on the person.

Section 25 of the act of 1836, *supra*, provides:

"Such officer shall not take any coin or bills as aforesaid from the person of the defendant, nor shall he take or retain any money, which shall have been levied by him, at the suit or instance of the defendant, upon any other execution."

#### 9. Schedule of property.

Where the sheriff has two or more executions against the same defendant in his hands, as a matter of practice he need not list the articles levied upon on each writ. He can enter the same fully upon one and on the others he can refer to the number and term E. D. on which the list is given. In specifying the articles, if he does not include generally all the goods and chattels of the defendant, he will be restricted in his sale to the articles enumerated.<sup>34</sup>

<sup>29</sup> *Davies v. Scott*, 2 Miles, 52.

<sup>30</sup> *Phila. Loan Co. v. Amies*, 2 Miles, 292.

<sup>31</sup> *Hollowell v. McClay*, 3 Phila. 261.

<sup>32</sup> *Heath v. Page*, 63 Pa. 108.

<sup>33</sup> *Heerman's Exs. v. Griffin's Exs.*, 3 Luz. L. R. 223.

<sup>34</sup> *Miller v. Westerhoff*, 14 Supr. C. 604.

levy upon a part of the goods in a house "in the name of the le" has been held to be good.<sup>35</sup> But the levy after enumerating chief articles should add in general terms: "And all other ds, etc., of the defendant on or about the premises."<sup>36</sup> Where rit is stayed "lien of levy to remain," a general return of the iff is sufficient.<sup>37</sup>

#### o. Levy on real estate.

levy upon real estate does not require as particular a descrip- as a deed. It is enough if the particular property is identified t.<sup>38</sup> It may be described as so many acres "more or less" sit- d in a certain locality within the county and it will pass the re tract;<sup>39</sup> also where described in several parcels instead of a whole.<sup>40</sup> The sheriff cannot divide a tract and is bound by directions of the plaintiff as to a specific tract.<sup>41</sup> The plaintiff g the purchaser he is bound by the description, since it is in power to furnish the sheriff an exact description before he es.<sup>42</sup> Section 43 of the act of 1836, *supra*, following preceding forbids the levy upon less than the entire tract, and where the ndant bought adjoining land and used it with his tract as a levy in general terms will include it all.<sup>43</sup> A separate sale be set aside.<sup>44</sup> The sheriff's levy limits the quantity of land h he may sell and pass by his deed.<sup>45</sup> The levy governs in case variance,<sup>46</sup> unless defendant misrepresents and misleads the pur- er.<sup>47</sup>

#### i. Time of levy.

levy must be made before the return day of the writ,<sup>48</sup> otherwise le will pass no title.<sup>49</sup> If the levy be made before the return the sale may be made later, in due time and without fraud.<sup>50</sup>

#### 2. Effect of levy as satisfaction.

s between the parties a levy is satisfaction of the debt only so as it reaches after payment of legal costs.<sup>51</sup> There is no pre-

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- Lewis v. Smith, 2 S. & R. 142.  
 Wilson's Ap., 13 Pa. 426; Weidensaul v. Reynolds, 49 Pa. 73; Simp-  
 v. Snyder, 4 D. R. 641.  
 Kightlinger's Ap., 101 Pa. 540; Braden's Est., 165 Pa. 184.  
 Inman v. Kutz, 10 Watts, 90.  
 Swartz v. Moore, 5 S. & R. 257; P. & L. Dig., vol. 7, col. 10690.  
 Donaldson v. Bank of Danville, 20 Pa. 245.  
 Maybury v. Jones, 4 Yeates, 21. (See act of 1840, where tract is  
 led by a county line, *infra*.)  
 Spang v. Schneider, 10 Pa. 193.  
 Buckholder v. Sigler, 7 W. & S. 154.  
 Clark v. Chambers, 1 Pitts. 222; P. & L. Dig., vol. 7, col. 10692.  
 Hoffman v. Danner, 14 Pa. 25; P. & L. Dig., vol. 7, col. 10693.  
 Grubb v. Guilford, 4 Watts, 223.  
 Buchanan v. Moore, 13 S. & R. 304.  
 Braden's Est., 165 Pa. 184; P. & L. Dig., vol. 7, col. 10695.  
 Boyer v. Miller, 200 Pa. 589; Enterline v. Miller, 27 Supr. C. 463.  
 Dorrance v. Comth., 13 Pa. 160; P. & L. Dig., vol. 7, col. 10696;  
 th's Est., 13 D. R. 80.  
 Lytle v. Mehaffey, 8 Watts, 267; P. & L. Dig., vol. 7, col. 10699.



sumption in favor of the defendant.<sup>52</sup> The debt which is due the plaintiff is still attachable up to the time of sale.<sup>53</sup>

A judgment creditor is not precluded by a return of a levy upon lands,<sup>54</sup> but as to personalty it is satisfaction *pro tanto*,<sup>55</sup> unless he withdraws from the levy<sup>56</sup> or abandons his attachment execution and falls back on the land.<sup>57</sup> Under the old interpleader law, the levy was not considered satisfaction.<sup>58</sup> When the sheriff levies before the return day it relates back to the minute when the writ came into his hands.<sup>59</sup> A levy does not divest the property right of the defendant and he may sell it and give valid title, subject to the payment of the execution and costs levied.<sup>60</sup>

### 13. Effect of plaintiff's order to stay.

Where an execution is issued and held in order to hinder, delay and defraud other creditors and this intent is manifest it will be postponed to other executions.<sup>61</sup> Orders to the sheriff to hold furnish such proof,<sup>62</sup> unless it be shown in rebuttal that it was delayed *bona fide* to realize most on the property.<sup>63</sup>

The statute of 13 Elizabeth, C. 5, A. D. 1570,<sup>63a</sup> which is in force in Pennsylvania, prohibits feigned, fraudulent and covinous conveyances, leases and alienations, and specifies "feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors or others of their just and lawful actions, etc."

### 14. Delay and leaving goods in defendant's possession.

If the plaintiff or his attorney gives no directions to the sheriff to hold, he is in no wise affected by the sheriff's delay;<sup>64</sup> and if the sheriff's delay is due to a reasonable belief that the defendant will raise the money, a junior execution will not be preferred;<sup>65</sup> nor, in case a few days' time be given defendant to raise the money, though the plaintiff assents thereto.<sup>66</sup> The custom, long-established,

<sup>52</sup> *Davids v. Harris*, 9 Pa. 501.

<sup>53</sup> *Bauer v. Williams*, 2 Luz. L. R. 137; *Winternitz's Ap.*, 40 Pa. 490.

<sup>54</sup> *Taylor's Ap.*, 1 Pa. 390.

<sup>55</sup> *Lyon v. Hampton*, 20 Pa. 46; P. & L. Dig., vol. 7, col. 10701.

<sup>56</sup> *Cathcart's Ap.*, 13 Pa. 416; *Burk, Etc.*, Ap., 89 Pa. 398, modifying and distinguishing *Hunt v. Breeding*, *supra*.

<sup>57</sup> *Campbell, Etc.*, Ap., 32 Pa. 88.

<sup>58</sup> *Rice v. Groff*, 58 Pa. 116; P. & L. Dig., vol. 7, cols. 10704-5.

<sup>59</sup> *Spicks v. Prospect Brewing Co.*, 19 Supr. C. 399.

<sup>60</sup> *Robinson v. Hart*, 23 Supr. C. 299.

<sup>61</sup> *Snyder v. Kunkleman*, 3 P. & W. 487.

<sup>62</sup> *Hickman v. Caldwell*, 4 Rawle, 376; *McClure v. Ege*, 7 Watts, 74; P. & L. Dig., vol. 7, cols. 10720-1.

<sup>63</sup> *Bush's Ap.*, 65 Pa. 363.

<sup>63a</sup> *Roberts' Dig.*, p. 295.

<sup>64</sup> *Gillespie v. Keating*, 180 Pa. 150; P. & L. Dig., vol. 7, col. 10723; *Swick v. McLaughlin*, 4 Lack. L. N. 240.

<sup>65</sup> *Platt-Barber Co. v. Groves*, 193 Pa. 475; reversing 7 Supr. C. 599; *Wadas v. Sharp*, 27 Supr. C. 233.

<sup>66</sup> *Smith v. Nicola*, 193 Pa. 562; *Daugherty v. Daugherty*, 13 D. R. 531; 28 Supr. C. 327; *Schwartz v. Gabler*, 8 Supr. C. 227.

leaving the goods levied upon in possession of the defendant, of self, furnishes no evidence of collusion;<sup>67</sup> but it has been restricted somewhat to such goods as defendant is not likely to dispose of,<sup>68</sup> and was held not to apply to bricks in a kiln;<sup>69</sup> or merchandise in store.<sup>70</sup> Still by delay, term after term, the plaintiff may lose preference.<sup>71</sup> The older cases tolerating delay were based upon general conditions of common honesty which prevailed among men. At this time, the rule of toleration is exceedingly dangerous and locks and watchmen have become the sheriff's only safety.<sup>72</sup> Where the defendant is permitted to continue business and make sales from the stock levied upon, the plaintiff may be postponed.<sup>73</sup> Execution creditors may agree with an assignee to release their claims, permit him to sell and accept the proceeds, without being postponed.<sup>74</sup>

##### §5. Effect of death or abandonment.

A valid levy is not affected by the death of the defendant, even if some time was given to raise the money;<sup>1</sup> but where the defendant dies and no levy has been made before the return day, the property passes to the legal representatives and an alias will be set aside.<sup>2</sup> To hold the lien of the levy the original *fi. fa.* must be depended upon in succeeding proceedings, or intervening process will take priority.<sup>3</sup> But this does not apply to one whose writ was not satisfied by the sale of personalty, and who issues an alias against real estate;<sup>4</sup> nor to an alias after successful termination of an interpleader.<sup>5</sup>

The withdrawal of the sheriff from the possession of the goods has been held to work an abandonment.<sup>6</sup> Where a constable has executed and subsequently the sheriff and the constable delivers his execution to the sheriff, who returns sale subject to the constable's writ, it is not an abandonment by the constable.<sup>7</sup> The plaintiff will lose the priority of his writ where he grants reasonable delay to the sheriff to execute it, or to the defendant to raise the money, if done in good faith and with the sole purpose of getting satisfaction.<sup>8</sup>

<sup>1</sup> *Cox v. McDougal*, 2 Yeates, 434; P. & L. Dig., vol. 7, cols. 10724-5.  
<sup>2</sup> *Chancellor v. Phillips*, 4 Dallas, 213; *Howell v. Alkyn*, 2 Rawle, 282.  
<sup>3</sup> *Chancellor v. Phillips*, *supra*.  
<sup>4</sup> *Knox v. Summers*, 4 Yeates, 477.  
<sup>5</sup> *Corlies v. Stanbridge*, 5 Rawle, 286.  
<sup>6</sup> *Comth. v. Stremback*, 3 Rawle, 341, is prophetic in this regard.  
<sup>7</sup> *Keyser's Ap.*, 13 Pa. 409; *Mulligan v. Barnes*, 171 Pa. 53; *Dunham v. Middle*, 4 Supr. C. 174; *Truitt v. Ludwig*, 25 Pa. 145; P. & L. Dig., vol. 7, cols. 10731-2.  
<sup>8</sup> *Mathews' Est.*, 144 Pa. 139; *Leidich's Est.*, 161 Pa. 451; *Broadhead v. Cornman*, 171 Pa. 322.  
<sup>9</sup> *Connell v. O'Neil*, 154 Pa. 582.  
<sup>10</sup> *Knolly v. Bachert*, 13 D. R. 135.  
<sup>11</sup> *Missimer v. Ebersole*, 87 Pa. 109.  
<sup>12</sup> *Mathews' Est.*, 144 Pa. 139.  
<sup>13</sup> *Menge v. Wiley*, 100 Pa. 617.  
<sup>14</sup> *Comth. v. Contner*, 18 Pa. 439.  
<sup>15</sup> *Miller v. Getz*, 135 Pa. 558.  
<sup>16</sup> *Landis v. Evans*, 113 Pa. 332; *Stroudsburg Bank's Ap.*, 126 Pa. 523; P. & L. Dig., vol. 7, col. 10743.

A notice to the sheriff on a *testatum* writ that he would be furnished a description of the property does not postpone the writ.<sup>9</sup> Where the claim of the first execution creditor is fraudulent and the second execution creditor induces him to abandon it — the latter is not postponed to later executions.<sup>10</sup> One who has lost his priority by directions to the sheriff to stay or hold must show affirmatively that he ordered the sheriff to proceed, before another writ came into his hands against the defendant,<sup>11</sup> and such order to proceed, given on a Sunday will not avail if another writ is executed Monday morning.<sup>12</sup>

Where no other creditors' rights are concerned, it has been held, that though a writ was stayed after levy on land, and returned, the plaintiff may have a copy certified to the sheriff and proceed to a sale which will confer a valid title.<sup>13</sup>

### 16. Levy on land — lien — docketing.

Section 3 of the act of April 22, 1856, P. L. 532, is as follows:

"The lien of no judgment, recognizance, execution levied on real estate in the same or another county, or of writs of *scire facias* to revive or have execution of judgments, shall commence or be continued, as against any purchaser or mortgagee, unless the same be indexed in the county where the real estate is situated, in a book to be called the judgment index, and it shall be the duty of the prothonotary or clerk, forthwith, to index the same according to priority of date, and the plaintiff shall furnish the proper information to enable him to perform said duty."

In order that a levy upon real estate may become a lien, as above, it must be docketed. It is not enough that the *fi. fa.* is docketed. Where a *fi. fa.* and *sci. fa.* are issued together on a judgment more than five years old the lien dates from the day of the verdict on the *sci. fa.* and a mortgage entered on that day will take *pro rata*.<sup>14</sup> Where a *sci. fa.* issues within five years, and an affidavit of defense is filed, a *fi. fa.* cannot issue on the original judgment, after the five years, before a judgment of revival.<sup>15</sup> There is no lien on land independently of the judgment since the act of March 26, 1827, which can only be continued by revival<sup>16</sup> except where the lands of a decedent are levied upon and condemned<sup>17</sup> and where a levy is made upon after-acquired lands of the defendant, but in such case the levy itself must be put on the record under the act of 1856, *supra*,<sup>18</sup> as to purchasers and mortgagees. As to other judgment creditors it has been held unnecessary.<sup>19</sup>

<sup>9</sup> Snyder v. Kelly, 4 Supr. C. 636.

<sup>10</sup> Kelchner's Est., 11 Supr. C. 595; P. & L. Dig., vol. 7, cols. 10744-5.

<sup>11</sup> Freeburger's Ap., 40 Pa. 244.

<sup>12</sup> Stern's Ap., 64 Pa. 447.

<sup>13</sup> McLaughlin v. McLaughlin, 85 Pa. 317.

<sup>14</sup> Ramsey v. Shreiner, 13 D. R. 641.

<sup>15</sup> City, Etc., v. Nickey, 21 C. C. 226.

<sup>16</sup> Davis v. Ehrman, 20 Pa. 256; P. & L. Dig., vol. 7, col. 10748.

<sup>17</sup> Shearer v. Brinley, 76 Pa. 300. (But see the act of 1901, "Judgments.")

<sup>18</sup> Ross' Ap., 106 Pa. 82; Packer's Ap., 6 Pa. 277; P. & L. Dig., vol. 7, col. 10750.

<sup>19</sup> Myers v. Hildebrand, 3 Walker, 327.



Where neither of two judgments is a lien on land, the first levy makes the fund although it be on a later judgment.<sup>20</sup> It has been held that no lien is gained by a levy on land under a judgment over five years old, without a *sci. fa.* to revive.<sup>21</sup> Having levied upon after-acquired real estate, the writ holds it long enough to permit issuing a *vend. ex.* to sell.<sup>22</sup> But if the creditor does not proceed with diligence, his delay may be construed as an intent to abandon, and a later execution will be preferred.<sup>23</sup>

A levy upon an equitable interest is sufficient to bind the legal interest when it accrues, without a new writ.<sup>24</sup>

*Lien on After-acquired Realty in Philadelphia.*

Section 9 of the act of April 20, 1853, P. L. 610, provides:

"All executions issued in the city and county of Philadelphia, levied upon real estate acquired subsequently to a judgment against the owner thereof, may, on application of the execution creditor, be certified by the officer making such levy, to the office of the court, from which such execution issued; it shall then be docketed on the judgment index, and thenceforth bind such real estate for five years, like any other judgment, and unless such levy be so certified and indexed, it shall be no lien on such real estate."

#### 17. Return to writ of *fi. fa.*

The sheriff's return to his writ should show how he has executed and should be made by himself and not his deputy, though if so made and there is no application to set it aside, it will stand as evidence against his sureties.<sup>25</sup> A formal return in his name, per his authorized deputy, is sufficient.<sup>26</sup>

The sheriff has control over his return even after the return day and as long as the writ is not returned and filed in court, but long delay may deprive the sheriff of the presumption in favor of its regularity. If the goods levied upon are claimed by another he may either abandon the levy or restrict it to the interest of the defendant and change his return accordingly.<sup>27</sup> While his return is evidence for him it will be construed most strongly against him; hence he should be particular about it.<sup>28</sup>

Where a paper has been lost which is an important part of the return, such as a list of stocks, its contents may be shown by parol evidence.<sup>29</sup> Where the sheriff has several writs and the property is exhausted by a prior one a return of *nulla bona* has been held unnecessary on the latter—though it might be well for the sheriff to make it.<sup>30</sup> In an action of replevin by the sheriff for goods sold

<sup>20</sup> *Sherrard v. Johnston*, 193 Pa. 166.

<sup>21</sup> *Carner's Seminary v. Young*, 30 C. C. 170.

<sup>22</sup> *Torrence v. Torrence*, 24 C. C. 408.

<sup>23</sup> *Corey's Est.*, 6 Lack. Jur. 73; *Beekman's Ap.*, 38 Pa. 385; *Abbott v. Wilmington*, 4 Phila. 34.

<sup>24</sup> *Robisson v. Miller*, 158 Pa. 177.

<sup>25</sup> *Beale v. Comth.*, 7 Watts, 183.

<sup>26</sup> *Emley v. Drum*, 36 Pa. 123.

<sup>27</sup> *Dixon v. White Sewing Machine Co.*, 128 Pa. 397.

<sup>28</sup> *Smith v. Emerson*, 43 Pa. 456.

<sup>29</sup> *Braden's Est.*, 165 Pa. 184.

<sup>30</sup> *Watmough v. Francis*, 7 Pa. 206.

to a stranger, his return to the *fi. fa.* is not evidence of the levy.<sup>31</sup>

But the general rule is that the sheriff's return is conclusive upon the parties to the writ and parol evidence is inadmissible to vary or contradict it, except in cases of fraud or ambiguity.<sup>32</sup> The same rule applies to the sheriff himself.<sup>33</sup> A sheriff's return that he has levied is conclusive in like manner.<sup>34</sup> But if admitted mistakes appear in the return they may be corrected by parol;<sup>35</sup> so also, where doubtful or ambiguous language is used;<sup>36</sup> the construction will be in favor of the presumption of regularity.<sup>37</sup> But by long delay in making the return it may lose its conclusive character.<sup>38</sup> The return of "stayed" does not preclude evidence of a levy<sup>39</sup> nor is a return of a levy on real estate as of the date of instructions to levy, conclusive upon the auditor.<sup>40</sup> A return of a levy as to property both as partnership and as belonging to the several partners is ambiguous and not conclusive.<sup>41</sup> Although a return of levy is conclusive as to an execution creditor, it is not as to another who fraudulently procured it.<sup>42</sup> Notice of sale as required by section 42 of the act of 1836, *supra*, will be implied in the return, though this may be rebutted where the execution creditor is the only bidder.<sup>43</sup> On a collateral issue of creditors on distribution of the fund the return is only *prima facie* evidence. Said Gibson, C. J.: "Of facts legitimately set forth in a sheriff's return it is conclusive only in the cause in which it is made; of facts incidentally in question in a contest with a third party, it is *prima facie* evidence; and of facts introduced into it by amendment, without leave, it is no evidence at all."<sup>44</sup>

#### 18. Amendment of return.

The sheriff may have leave to amend his return according to the facts known to the parties, if promptly done.<sup>45</sup>

This is a matter within the discretion of the court.<sup>46</sup> Only a party to the proceedings can challenge it.<sup>47</sup> A sheriff, out of office cannot amend a return, when an action of trespass is pending against him for his execution of the writ.<sup>48</sup> Where the title to the goods

<sup>31</sup> Snyder v. Beam, 1 Browne, 366; P. & L. Dig., vol. 7, col. 10752.

<sup>32</sup> Bogues' Ap., 83 Pa. 101; Heimbaugh v. Powell, 13 C. C. 360; McClenahan v. Humes, 25 Pa. 85; P. & L. Dig., vol. 7, cols. 10755-6-7.

<sup>33</sup> Freeman v. Apple, 99 Pa. 261; McClelland v. Slingluff, 7 W. & S. 134.

<sup>34</sup> Brownfield v. Comth., 13 S. & R. 265; Smith's Est., 13 D. R. 80.

<sup>35</sup> Torrence v. Torrence, 24 C. C. 408.

<sup>36</sup> Wildasin v. Bare, 171 Pa. 387; P. & L. Dig., vol. 7, cols. 10758-9.

<sup>37</sup> Phillips v. Kuhn, 7 Phila. 146.

<sup>38</sup> Weidman v. Weitzel, 13 S. & R. 96; Williams v. Carr, 1 Rawle, 420.

<sup>39</sup> Farmers', Etc., Bank v. Fordyce, 1 Pa. 454.

<sup>40</sup> Henderson v. Henderson, 133 Pa. 399.

<sup>41</sup> Vandike's Ap., 17 Pa. 271.

<sup>42</sup> Evans v. Matson, 51 Pa. 366.

<sup>43</sup> Conniff v. Doyle, 2 Luz. L. R. 107.

<sup>44</sup> Lowry v. Coulter, 9 Pa. 349.

<sup>45</sup> Whitman v. Higby, 10 D. R. 39.

<sup>46</sup> Prather v. Chase, 3 Brewster, 206; P. & L. Dig., vol. 7, col. 10763.

<sup>47</sup> Hamilton v. Seitz, 25 Pa. 226.

<sup>48</sup> McElrath v. Kintzing, 5 Pa. 336.

is in dispute, the court will enlarge the time for return, to enable the sheriff to take indemnity.<sup>49</sup>

### 19. Forthcoming bond.

Where the sheriff levies and leaves the property in the hands of the defendant, to protect himself he may take a forthcoming bond, which does not dissolve the levy nor release the lien.<sup>50</sup>

The condition of such bond is that the defendant shall have all of the property forthcoming on the day of the sale specified or when lawfully demanded, to answer the purposes of the execution levied thereon, otherwise the bond to be forfeited. The taking of such bond puts the sheriff out of possession of the goods technically, for the time being, so that he cannot maintain trespass for their wrongful removal.<sup>51</sup> But the removal of the goods in custody of the sheriff and their secretion is larceny<sup>52</sup> and the sheriff may manucapare or replevy. The liability of the surety is not discharged by partial payment of the defendant to the plaintiff;<sup>53</sup> nor where they were seized on a subsequent writ.<sup>54</sup> A condition to produce the goods when lawfully required is broken on failure to produce on demand by the successor in office.<sup>55</sup>

The stipulation of a sum to be paid in the bond fixes the value of the property and the amount of the liability on default.<sup>56</sup> The payment of a levy is not a part of the condition and does not affect the liability of the surety.<sup>57</sup> Where a constable took a bond which failed to comply with the form prescribed by section 18, act of March 1, 1810, 5 Sm. L. 101, it was held that there was a common law liability.<sup>58</sup> Where the creditor grants a stay of execution to which neither the sheriff nor the surety assents, the liability of both is discharged thereby;<sup>59</sup> or where he consents to payment of the proceeds to another creditor.<sup>60</sup> There is no liability, even for costs, where an execution was issued by a justice, after satisfaction.<sup>61</sup> In a suit upon a forthcoming bond the defendant is estopped from showing that the property levied upon belonged to another.<sup>62</sup>

### 20. Alias and pluries writs.

An alias or *pluries* writ should recite the preceding writ or writs, but an omission is not necessarily fatal.<sup>63</sup> Where a *fi. fa.* is returned with a levy on it and an alias is immediately issued under local

<sup>49</sup> *Keffer v. Britt*, 1 T. & H. Pr., section 1088.

<sup>50</sup> *Hastings v. Quigley*, 2 Clark, 431; *Lantz v. Worthington*, 4 Pa. 153.

<sup>51</sup> *Lewis v. Carsaw*, 15 Pa. 31.

<sup>52</sup> *Comth. v. Shertzer*, 14 Lanc. L. R. 70.

<sup>53</sup> *Case v. Johnson*, 19 Pa. 174.

<sup>54</sup> *Coar v. Green*, 5 Luz. L. R. 77.

<sup>55</sup> *Stocker v. Dech*, 167 Pa. 212.

<sup>56</sup> *Slutter v. Kirkendall*, 100 Pa. 307.

<sup>57</sup> *Evans v. Matson*, 51 Pa. 366.

<sup>58</sup> *Claasen v. Shaw*, 5 Watts, 468.

<sup>59</sup> *Blaine v. Hubbard*, 4 Pa. 183.

<sup>60</sup> *Slutter v. Kirkendall*, 100 Pa. 307.

<sup>61</sup> *Mewhorter v. Jamison*, 7 Watts, 353.

<sup>62</sup> *Ingram v. Harris*, 9 Supr. C. 301.

<sup>63</sup> *Coleman v. Mansfield*, 1 Miles, 57.

rules of court (as in Clearfield County) the levy is not thereby abandoned, although the better practice is to issue a *vend. ex. personal* to sell.<sup>64</sup> The form has been held to be less important than a prompt proceeding to realize the money.<sup>65</sup>

Under general rules of Philadelphia relating to dockets there is this (p. 5):

"Alias and *pluries* writs, executions, attachments and issues arising thereon, writs of *scire facias* to revive judgments, writs of *scire facias* on mechanics' and municipal claims and against garnishees and all other writs, actions or proceedings of every kind which are founded upon and ancillary to some original action or proceeding, shall not be regarded in the enumeration of cases, but shall be assigned to the court in which the original action or proceeding may be pending, and shall be entitled as of the same term and number as said original."

An alias issued after the return day of the *fi. fa.* will not be set aside because the original had not yet been returned;<sup>66</sup> but they cannot be made returnable on the same return day;<sup>67</sup> nor where a writ of *testatum fi. fa.* is unreturned, can an alias issue.<sup>68</sup> Where a levy is made on a *fi. fa.* it is irregular to issue an alias, though if the same land is levied upon the writ will not be set aside but the defendant will be relieved of unnecessary costs.<sup>69</sup> Only the defendant may object.<sup>70</sup> After a levy on land and an extent the plaintiff cannot discontinue and issue an alias without leave of court.<sup>71</sup> Where the first *fi. fa.* is set aside an alias will be sustained, although the levy on the first was not mentioned in the order. The court rectified this *nunc pro tunc* on a rule to set aside the alias.<sup>72</sup> Where an interpleader is demanded and granted an alias will not issue;<sup>73</sup> but if the claimant fails to give bond, it is held otherwise.<sup>74</sup> On a rule to set aside an execution, without an order to stay proceedings meanwhile, an alias may issue;<sup>75</sup> also on abandonment filed by the plaintiff.<sup>76</sup>

An alias will not be set aside because the costs on the one set aside are still unpaid.<sup>77</sup> Where an alias issued contrary to the agreement of the parties, it will be set aside, with due regard to the equities of the case.<sup>78</sup>

<sup>64</sup> *McCrossin v. McCrossin*, 7 D. R. 688.

<sup>65</sup> *King v. Monteith*, 1 W. N. C. 131.

<sup>66</sup> *Supplee v. Ashby*, 8 W. N. C. 407.

<sup>67</sup> *Shaffer v. Watkins*, 7 W. & S. 219.

<sup>68</sup> *Gibbs v. Atkins*, 1 Clark, 476.

<sup>69</sup> *Miller v. Milford*, 2 S. & R. 35; *Gist v. Wilson*, 2 Watts, 30; *Lloyd v. Brock*, 2 W. N. C. 92.

<sup>70</sup> *Pott's Ap.*, 20 Pa. 253; *Missimer v. Ebersole*, 87 Pa. 109.

<sup>71</sup> *McCullough v. Guetner*, 1 Binney, 214.

<sup>72</sup> *Weightman v. Hawkins*, 1 W. N. C. 506.

<sup>73</sup> *Burns v. Toner*, 9 Phila. 37; *P. & L. Dig.*, vol. 7, col. 10775.

<sup>74</sup> *Oelschlager v. Larbling*, 3 W. N. C. 132.

<sup>75</sup> *Bole v. Bogardis*, 86 Pa. 37.

<sup>76</sup> *McKeeby v. Webster*, 170 Pa. 624.

<sup>77</sup> *Lycoming Fire Ins. Co. v. Sensenig*, 16 Phila. 601.

<sup>78</sup> *Harrison v. Soles*, 6 Pa. 393.



**21. Synchronous executions.**

Writs of *fi. fa.*, *ca. sa.* and attachment execution may be issued synchronously on the same judgment, or successively;<sup>79</sup> but the plaintiff can have but one satisfaction, and the defendant may rule him to elect on which he will stand, or to show cause why one or more shall not be set aside.<sup>80</sup>

A *ca. sa.* having issued and proceedings been commenced, a *fi. fa.* should not issue.<sup>81</sup> But a *fi. fa.* may issue with a *ca. sa.*, the latter to be executed if defendant refuses to show property.<sup>82</sup> Where real estate has been condemned an attachment execution will be set aside.<sup>83</sup> The *ca. sa.* is not encouraged,<sup>84</sup> even within its limited scope. A levy on personalty under a *fi. fa.* is considered satisfaction *pro tanto* and an attachment execution issued subsequently can not hold any sum but the balance remaining.<sup>85</sup> Where an attachment execution is inconsistent with a levy on lands, it will be dissolved.<sup>86</sup> If the defendant is summoned as garnishee of the plaintiff and the money has been paid into court the attachment must be disposed of before it can be taken out.<sup>87</sup> An attachment execution summoning as garnishee one to whom the defendant fraudulently conveyed and is not inconsistent with a levy on the land;<sup>88</sup> nor will an attachment in one state bar the right to issue in another state for the same debt.<sup>89</sup> A *fi. fa.* against a member of a partnership may issue simultaneously with a special *fi. fa.* to sell the partner's interest in the firm.<sup>90</sup>

Where the execution defendant gives a judgment note with guarantors, which is entered, an execution issued thereon before the first execution is returned will not be set aside.<sup>91</sup> On a judgment against principal, bail and endorers an execution against principal and bail will not deprive the plaintiff of his right to an execution against the endorers.<sup>92</sup>

Section 27 of the act of 1836, *supra*, provides:

"The plaintiff in any such judgment may have at the same time, thereon, a writ of *feri facias*, or a writ of *capias ad satisfaciendum*, and levy the same, together with the costs of such execution."

<sup>79</sup> *Newlin v. Scott*, 26 Pa. 102; *Kase v. Kase*, 34 Pa. 128; *Pontius v. Nesbit*, 40 Pa. 309; P. & L. Dig., vol. 7, col. 10779.

<sup>80</sup> *Grant v. Potts*, 2 Miles, 164; *Myers v. Riot*, 1 T. & H. Pr., section 73; P. & L. Dig., vol. 7, cols. 10778-82.

<sup>81</sup> *Young v. Taylor*, 2 Binney, 218; *Davis v. Sommer*, 1 Miles, 397.

<sup>82</sup> *Gibson, J.*, in *Allison v. Rheam*, 3 S. & R. 139.

<sup>83</sup> *Hollowell v. McCloy*, 3 Phila. 281.

<sup>84</sup> *Bank of Penna. v. Latshaw*, 9 S. & R. 9; P. & L. Dig., vol. 7, col. 10781.

<sup>85</sup> *Monongahela Nav. Co. v. Ledlie*, 1 Clark, 498; *Herriott v. Wagner*, 26 Pitts. L. J. 109.

<sup>86</sup> *Tripp v. Miller*, 4 Kulp, 515.

<sup>87</sup> *Whitehouse v. Buechley*, 1 Schuylkill L. R. 63.

<sup>88</sup> *Heath v. Page*, 63 Pa. 108.

<sup>89</sup> *Parsons v. Columbia Ins. Co.*, 2 Phila. 21.

<sup>90</sup> *Little v. Lane*, 2 C. C. 609.

<sup>91</sup> *McHugh v. McHugh*, 12 C. C. 380.

<sup>92</sup> *Gro v. Huntingdon Bank*, 1 P. & W. 425.



The *capias* is now only issuable in such actions as are excepted from the act of July 12, 1842, P. L. 339. (See Vol. I, "*Capias*." See also *infra*.)

## 22. Limit upon *capias ad satisfaciendum*.

Section 28 of the act of 1836, *supra*, provides:

"No writ of *capias ad satisfaciendum* shall in any case be executed where the defendant has real or personal estate within the county sufficient to satisfy the judgment and if the defendant shall not have sufficient fully to satisfy the judgment and costs of execution, then such writ may be executed for the deficiency and no more."

## 23. Satisfaction under *capias*.

Section 31 of the act of 1836, *supra*, provides:

"A judgment shall be deemed to be satisfied by the arrest or imprisonment of the defendant, upon a *capias ad satisfaciendum*, if such defendant die in prison, or escape or be discharged therefrom by reason of any privilege, or at his own request, but the party entitled to the benefit of the judgment may have such remedies at law, for the recovery thereof as he would have been entitled to if such *capias ad satisfaciendum* had not been issued; saving nevertheless, all rights and interests which may have accrued to any other persons, between the execution of such writ and the death or escape of such party."

This section has now but a very limited application, as affected by the act of 1842, *supra*.

## 24. Levy on stocks, deposits, etc.

Section 22 of the act of 1836, *supra*, provides:

"The stock owned by any defendant in any body corporate, also, deposits of money in any bank, or with any person or body corporate or politic, belonging to him, and debts due to him, shall be liable to execution, like other goods or chattels, subject nevertheless to all lawful claims thereupon, of such body corporate or person."

The claim above is restricted to the depository.<sup>93</sup> (See *infra*.)

## 25. Sale of stocks, etc.

Section 2 of the act of March 29, 1819, 7 Sm. L. 217, provides:

"The stock of any body corporate, owned by any individual or individuals, body or bodies politic or corporate, in his, her, its or their own names shall be liable to be taken in execution and sold in the same manner that goods and chattels are liable in law to be so taken and sold, subject nevertheless to any debt due by any holder or holders of such stock to the company or body corporate."

This act is held to be in force, and a plaintiff may elect to proceed under it or the 22d section of the act of 1836, *supra*.<sup>2</sup>

<sup>93</sup> *Harry v. Wood*, 2 Miles, 327; *Reed v. Penrose's Ex.*, 36 Pa. 214.

<sup>2</sup> *Lex v. Potters*, 16 Pa. 295; *Weaver v. Railroad Co.*, 50 Pa. 314; *Bonafon v. Canal Co.*, 4 Phila. 29.

**26. Sale of goods pledged or demised.**

Section 23 of the act of 1836, *supra*, provides:

"Goods or chattels of the defendant in any writ of *feri facias*, which shall have been pawned or pledged by him as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term, shall be liable to sale, upon execution as aforesaid, subject, nevertheless, to all and singular the rights and interests of the pawnee, bailee or lessee, to the possession, or otherwise, of such chattels or goods, by reason of such pledge, demise or bailment."

**27. Levy upon coin or currency.**

Section 24 of the act of 1836, *supra*, provides:

"It shall be lawful for the officer charged with the execution of any writ of *feri facias*, when he can find no other real or personal estate of the defendant to seize and take the amount to be levied by such writ, of any current gold, silver, or copper coin, belonging to the defendant, in satisfaction thereof, or he may take the amount aforesaid, of any bank notes, or current bills, for the payment of money issued by any monied corporation, at the par value of such notes."

## CHAPTER XIV.

### EXEMPTION FROM EXECUTION.

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#### 1. Property exempt.

Section 1 of the act of April 9, 1849, P. L. 533, is as follows:

"In lieu of the property now exempt by law from levy and sale on execution, issued upon any judgment obtained upon contract and distress for rent, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles and school books in use in the family (which shall remain exempted as heretofore) and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent."

This act was held not to apply to judgments in actions for tort;<sup>1</sup> but where the tort is waived and the action is *ex contractu* it does;<sup>2</sup> also on judgment for costs which accrued in tort.<sup>3</sup> It does not apply to a suit on a mortgage or the accompanying bond<sup>4</sup> but it does to an action of breach of promise of marriage;<sup>4a</sup> nor in a suit on a

<sup>1</sup> Kenyon v. Gould, 61 Pa. 292; Edwards v. Mahon, 5 Phila. 531; 8 Luz. L. R. 224.

<sup>2</sup> Wireman v. Mueller, 18 W. N. C. 84.

<sup>3</sup> Lane v. Baker, 2 Grant, 424; Bradley v. R. Co., 160 Pa. 72.

<sup>4</sup> McAuley's Ap., 35 Pa. 209; Gangwere's Ap., 36 Pa. 466; P. & L. Dig., vol. 7, col. 10804.

<sup>4a</sup> Keim v. Brumbaugh, 29 Supr. C. 557.

claim property bond in replevin;<sup>5</sup> nor for costs in ejectment at the common law;<sup>6</sup> nor damages in a landlord's proceeding to recover possession;<sup>7</sup> negligence of a constable;<sup>8</sup> suit for taxes;<sup>9</sup> forfeited recognizance;<sup>10</sup> execution out of a federal court;<sup>11</sup> mechanic's lien;<sup>12</sup> and when stock is pledged a waiver of the right to exemption will be presumed.<sup>13</sup> Under the proviso in section 3 of the act of 1849, *infra*, it cannot be claimed as against a judgment for purchase money or real estate.<sup>14</sup> Where an executor owes the testator he may claim exemption against an execution out of the Orphans' Court;<sup>15</sup> but not where he has embezzled the funds of the estate.<sup>16</sup> It cannot be claimed under a mortgage, where legacies are charged on the land as against the legatees.<sup>17</sup>

Section 6 of the national bankruptcy act of 1898 provides that state laws allowing debtors exemptions shall not be affected. After setting aside property as exempt, in bankruptcy, it may be levied upon, under a judgment waiving the exemption, although the *fi. fa.* previously levied had been stayed.<sup>17a</sup>

Under an ejectment clause in a lease, with ten days' notice to quit, the tenant is entitled to claim his exemption against the *fi. fa.*<sup>17b</sup>

A claim of exemption will prevail against a judgment for costs.<sup>17c</sup> Where land claimed is mortgaged it is not exempt from sale and appraisers cannot consider the value above the mortgage.<sup>17d</sup>

The court having once passed upon the title, on a claim of exemption, will not, on distribution, reverse itself except for fraud.<sup>17e</sup>

Under the assignment act of June 4, 1901, property set aside cannot be sold under a subsequent judgment.<sup>17f</sup>

## 2. No exemption against judgment for wages.

The act of March 4, 1887, P. L. 4, provides:

"No exemption of property from attachment, levy or sale upon execution shall be allowed upon judgment for \$100 or less, obtained for wages of manual labor."

<sup>5</sup> *Pierce v. Lewis*, 9 C. C. 250.

<sup>6</sup> *Danner v. Fritz*, 2 Northam. Co. 67; P. & L. Dig., vol. 7, col. 10862.

<sup>7</sup> *Smith v. Carter*, 17 Phila. 344.

<sup>8</sup> *Kirkpatrick v. White*, 29 Pa. 176.

<sup>9</sup> *McKee v. Christman*, 103 Pa. 431.

<sup>10</sup> *Edwards v. Withrow*, 6 C. C. 13; P. & L. Dig., vol. 7, col. 10863; *Comth. v. Savage*, 30 Supr. C. 364.

<sup>11</sup> *Lloyd v. Yost*, 4 Phila. 42.

<sup>12</sup> *Lauck's Ap.*, 24 Pa. 426; P. & L. Dig., vol. 7, col. 10864.

<sup>13</sup> *Hawley v. Hampton*, 160 Pa. 18.

<sup>14</sup> *Ulrich's Ap.*, 48 Pa. 489; *Gibbons v. Gaffney*, 154 Pa. 48; P. & L. Dig., vol. 7, col. 10865; *Denlinger v. Burkey*, 18 Lanc. L. R. 94.

<sup>15</sup> *Wilson's Est.*, 1 Del. Co. 170.

<sup>16</sup> *Wood's Est.*, 7 W. N. C. 84.

<sup>17</sup> *Garrett v. Maylin*, 1 Del. Co. 290.

<sup>17a</sup> *Greenfield v. Golder*, 42 Supr. C. 462; *Bank v. Bartlett*, 35 Supr. C. 593; *Lockwood v. Bank*, 190 Pa. 294.

<sup>17b</sup> *Morris Run, Etc., Co. v. Chrzan*, 31 Supr. C. 184.

<sup>17c</sup> *Hall's Est.*, 20 York, 110.

<sup>17d</sup> *Still v. Mullin*, 10 Del. Co. 593.

<sup>17e</sup> *Pierce v. Boalick*, 36 C. C. 353.

<sup>17f</sup> *Hoffman v. Clemmer*, 25 Montg. Co. 163.

An ordinary judgment cannot be set off against such a judgment, it seems.<sup>18</sup> The transcript must show that the claim was for "wages of manual labor," in order to exclude the claim for exemption.<sup>18a</sup> Teaching school is not "manual labor."<sup>18b</sup>

### 3. No exemption on judgment for boarding.

The act of April 4, 1889, P. L. 23, provides:

"From and after the passage of this act no exemption of property from levy and sale or attachment shall be allowed on judgment obtained for board for four weeks or less."

A judgment for more than four weeks' board cannot be brought within this act by attaching for part of it.<sup>19</sup>

### 4. Application of exemption law.

The defendant is entitled to exemption in account render;<sup>20</sup> account stated;<sup>21</sup> attachment under the act of June 12, 1842;<sup>22</sup> attachment under the act of 1869;<sup>23</sup> or where the tort is waived and the action is in assumpsit;<sup>24</sup> or where the gist of the action is in contract although the form is trover before a justice of the peace;<sup>25</sup> or where the plaintiff has the costs to pay in an action of trover in which he was defeated;<sup>26</sup> upon an appeal bond, it depends whether the original action sounded in contract or not.<sup>26a</sup>

The plaintiff in a bill to restrain trespass may claim it against an order to pay the fee of the master;<sup>27</sup> and also a guardian as against an order to pay the costs of a proceeding to remove him.<sup>28</sup> A surety on the bond of an assignee for the benefit of creditors is entitled to the exemption notwithstanding the tortious act of the assignee.<sup>29</sup> It may be claimed against a decree in equity on a partnership account.<sup>30</sup> Under section 31 of the act of June 4, 1901, P. L. 404, held to be in force as to insolvency proceedings, it cannot be waived by an insolvent debtor.<sup>31</sup> Where attachment was begun for fraud but it appeared by the statement that the defendant had stated an account, exemption will be allowed.<sup>32</sup>

If the original suit arise *ex contractu*, the exemption may be

<sup>18</sup> *Bosche v. Maurer*, 5 C. C. 215.

<sup>18a</sup> *Moskovitz v. Orangers*, 13 D. R. 153.

<sup>18b</sup> *Laffin v. Reinboth*, 1 Justice of the Peace, 87.

<sup>19</sup> *Tredinnick v. Jones*, 7 C. C. 548.

<sup>20</sup> *McTague v. Rehill*, 2 Montg. Co. 35.

<sup>21</sup> *Bank v. Ziegler*, 4 Kulp, 407.

<sup>22</sup> *Waugh v. Burket*, 3 Grant, 319.

<sup>23</sup> *New York, Etc., Co. v. Zuber*, 20 C. C. 21; P. & L. Dig., vol. 7, col. 10866.

<sup>24</sup> *Wireman v. Mueller*, 20 W. N. C. 19; 18 W. N. C. 84.

<sup>25</sup> *McCormick v. Alexander*, 3 D. R. 149.

<sup>26</sup> *Lane v. Baker*, 2 Grant, 424; P. & L. Dig., vol. 7, col. 10867.

<sup>26a</sup> *Penna. Co., Etc., v. Bruner*, 41 Supr. C. 358.

<sup>27</sup> *Bradley v. Westchester St. R.*, 160 Pa. 72.

<sup>28</sup> *Taylor Minors' Est.*, 20 Phila. 63; 9 C. C. 293.

<sup>29</sup> *Comth. v. Brown*, 17 Supr. C. 520.

<sup>30</sup> *Walbridge v. Bell*, 4 Walker, 354.

<sup>31</sup> *Citizens', Etc., Bank v. Gass*, 29 Supr. C. 125.

<sup>32</sup> *Terrill v. Allgeier*, 21 C. C. 346.



claimed on the appeal bond by the surety who is sued thereon;<sup>33</sup> but on a recognizance in the Quarter Sessions there can be no exemption;<sup>34</sup> nor against judgment creditors by a distributee in the Orphans' Court;<sup>35</sup> nor against a charge on land conveyed subject thereto;<sup>36</sup> nor where machinery becomes a fixture and chattel real, as against purchase money;<sup>37</sup> nor as against a judgment which bound the land when claimant got it;<sup>38</sup> nor a judgment set off against debtor's distributive share in an estate;<sup>39</sup> nor upon an assignment as against his waiver.<sup>40</sup> A bachelor has been held entitled to exemption,<sup>41</sup> also a garnishee in an attachment execution,<sup>42</sup> and a debtor whose lands were sold in partition.<sup>43</sup>

A non-resident is not entitled,<sup>44</sup> although he keeps a clandestine residence by hiring a room. Where the non-resident files an answer to a rule to disallow his exemption and no issue is asked, he cannot dispute the jurisdiction of the court.<sup>45</sup>

A mere temporary absence from the state, however, does not constitute one a non-resident.<sup>46</sup>

A complete removal will defeat the claim.<sup>47</sup> The intention not to return must appear.<sup>48</sup> The wife is entitled to claim it where the debtor has abandoned his home and family.<sup>49</sup>

##### 5. Property subject to claim.

Husband and wife each owning property in severalty are both respectively entitled to the exemption.<sup>50</sup>

A life tenant is entitled to his exemption where the estate is sequestrated to pay a judgment creditor.<sup>51</sup> But where one defendant has a life interest and the remainder belongs to the other defendants, no exemption is allowed.<sup>52</sup> A leasehold may be retained as part of the exemption,<sup>53</sup> but personal property bound by a foreign attachment cannot be claimed by the wife, where the husband had absconded.<sup>54</sup>

<sup>33</sup> *Ramsdell v. Seybert*, 14 D. R. 247.

<sup>34</sup> *Comth. v. Miliauckas*, 12 Luz. L. R. 471.

<sup>35</sup> *Morris' Ap.*, 11 Pitts. L. J. 188.

<sup>36</sup> *Gault's Est.*, 15 Lanc. L. R. 163.

<sup>37</sup> *Bradley v. Ritchie*, 12 D. R. 658.

<sup>38</sup> *Eberhart's Ap.*, 39 Pa. 509.

<sup>39</sup> *Maxwell's Est.*, 35 Pitts. L. J. 162.

<sup>40</sup> *Myers' Ap.*, 78 Pa. 452.

<sup>41</sup> *Dieffenderfer v. Fisher*, 3 Grant, 30.

<sup>42</sup> *Strouse v. Becker*, 44 Pa. 206; *Fisher v. Elliott*, 11 Phila. 344.

<sup>43</sup> *Reed v. Hollibaugh*, 3 C. C. 20.

<sup>44</sup> *Snow v. Dill*, 13 Phila. 138; P. & L. Dig., vol. 7, col. 10869; *Collom's Ap.*, 2 Penny. 130.

<sup>45</sup> *Dock v. Cauldwell*, 19 Supr. C. 51.

<sup>46</sup> *Glendenning v. Worrall*, 1 Chester Co. 145; *Horne v. Horne*, 1 Del. Co. 261; *Ott v. Odenwelder*, 15 D. R. 839.

<sup>47</sup> *Wilkins v. Rubincam*, 15 W. N. C. 128.

<sup>48</sup> *McTague v. Rehill*, 2 Montg. Co. 35.

<sup>49</sup> *McNair v. Riesher*, 8 C. C. 494.

<sup>50</sup> *Friday v. Glasser*, 14 Supr. C. 94.

<sup>51</sup> *Buchi v. Pund*, 9 D. R. 446.

<sup>52</sup> *Swarm v. Hanawalt*, 25 C. C. 400.

<sup>53</sup> *Vankirk v. Allen*, 1 W. N. C. 231.

<sup>54</sup> *Yelverton v. Burton*, 26 Pa. 351.

A defendant in an attachment execution may claim it out of a fund in the Orphans' Court produced by the sale of his life estate in land.<sup>55</sup> Partners are not entitled to claim out of partnership property;<sup>56</sup> nor joint obligors out of property held jointly, as a stock certificate,<sup>57</sup> but on a joint judgment a debtor is entitled to his exemption out of his individual property.<sup>58</sup>

A debtor who has absolutely conveyed his real estate is not entitled to claim exemption out of it,<sup>59</sup> but if conveyed to his wife to secure her for advancement of purchase money, it may be claimed.<sup>60</sup>

#### 6. Forfeiture by fraud.

The defendant will lose his right to exemption by making a false and fraudulent disclaimer of ownership.<sup>61</sup>

It matters not that the motive of the defendant was to gain time to pay the sheriff.<sup>62</sup> But it will not be disallowed where the denial was on a different execution on which no valid sale could be had.<sup>63</sup> Where the wife claims the title and the husband becomes her surety in an interpleader decided against her and the sheriff returns the *vend. ex.* "eloigned," the husband is estopped from claiming exemption as against judgment on his bond.<sup>64</sup> But his right is not lost where they held the goods in common and the wife filed a disclaimer.<sup>65</sup>

A defendant will lose his right as to subsequent execution creditors by confessing judgment with a waiver.<sup>66</sup> Concealment of some of his property defeats his right to claim exemption.<sup>67</sup> But statements that his property is not worth more than \$300 do not forfeit his right.<sup>68</sup> A removal when defendant leaves property behind to satisfy his debts does not defeat the exemption.<sup>69</sup> One who claims that the land sold belonged to his wife is not entitled in any event.<sup>70</sup>

#### 7. Waiver of right.

The defendant may by his agreement waive the right of exemption in Pennsylvania,<sup>1</sup> although in other jurisdictions it is held to be a statutory right for the benefit of a man's family which cannot be waived. Such waiver was held binding upon the widow where her

<sup>55</sup> Hoopes v. Price, 17 Phila. 98.

<sup>56</sup> Clegg v. Houston, 1 Phila. 352; Hubbard v. Evarts, 12 C. C. 132.

<sup>57</sup> Hawley v. Hampton, 160 Pa. 18.

<sup>58</sup> Spade v. Bruner, 72 Pa. 57.

<sup>59</sup> Huey's Ap., 29 Pa. 219; P. & L. Dig., vol. 7, col. 10872.

<sup>60</sup> Martin v. Kohr, 19 C. C. 513.

<sup>61</sup> Frank v. Kurtz, 4 Supr. C. 233; Gilleland v. Rhoads, 34 Pa. 187;

Holmes v. Donovan, 21 C. C. 605.

<sup>62</sup> Strouse v. Becker, 38 Pa. 190.

<sup>63</sup> Dunn v. O'Connor, 2 Schuylkill L. R. 230.

<sup>64</sup> Lorenze v. Wright, 6 W. N. C. 539.

<sup>65</sup> Allemong v. Passmore, 14 W. N. C. 124.

<sup>66</sup> Wiseman's Ap., 3 Kulp, 283.

<sup>67</sup> Emerson v. Smith, 51 Pa. 90; Imhoff's Ap., 119 Pa. 350.

<sup>68</sup> Landis v. Lyon, 71 Pa. 473.

<sup>69</sup> McNair v. Riesher, 8 C. C. 494.

<sup>70</sup> Inners v. Hartman, 2 York, 170.

<sup>1</sup> Case v. Dunmore, 23 Pa. 93.

claim was made under the act of 1849 and not under section 5 of the act of April 14, 1851, P. L. 612,<sup>2</sup> which provides for \$300 exemption to the widow or children. Upon this question see a late decision by Galbreath, J., of Butler County, holding that the husband's waiver does not apply to the wife's goods as against a landlord's warrant.<sup>2a</sup>

The intention to waive need not be expressed in any set form of words, if it is clearly made,<sup>3</sup> but it must not be left to inference.<sup>4</sup> A general waiver as to any property is not confined to personalty,<sup>5</sup> but a waiver in a bond as to the mortgaged premises and any other premises is confined to realty and does not cover personalty.<sup>6</sup> Waiver in an agreement to arbitrate will apply to the award and an attachment execution issued upon the judgment entered thereon.<sup>7</sup> In the absence of proof of fraud, defendant is bound by his written waiver although he claims he did not understand it.<sup>8</sup> If induced by fraud, to sign a waiver, it will be stricken out;<sup>9</sup> and where the petition is denied in an answer, an issue may be awarded to try the question of fraud.<sup>10</sup> A waiver has been held not to be binding if made without consideration,<sup>11</sup> but the exemption must be made before sale.<sup>12</sup> Defendant may relinquish his right after making his claim.<sup>13</sup> Where the husband makes no claim, but his wife does and he ratifies it, it must be allowed.<sup>14</sup> A married woman who has power to purchase a sewing machine may also waive the exemption in her contract.<sup>15</sup> A judgment without a waiver may be set off against a judgment with a waiver of exemption;<sup>16</sup> but this has been disputed.<sup>17</sup>

Where the *fi. fa.* is endorsed "exemption waived," the sheriff is bound by this notice of the record, and will disregard it at his own risk.<sup>18</sup> Such indorsement will not be stricken off on a rule, because the copy of the lease was not filed until two weeks after the return day.<sup>19</sup> It was held that a waiver will not be stricken out on a

<sup>2</sup> *Deininger v. Schnee*, 1 Woodward, 94.

<sup>2a</sup> The learned judge discusses *Blanche v. Bradford*, 38 Pa. 344, distinguishing it from *Rosenberger v. Hallowell*, 35 Pa. 369, and quoting *Ch. J. Woodward in Firmstone v. Mack*, 49 Pa. 393, against the policy of waiving the exemption.

<sup>3</sup> *Smiley v. Bowman*, 3 Grant, 132; P. & L. Dig., vol. 7, col. 10879.

<sup>4</sup> *O'Neil v. Craig*, 56 Pa. 161.

<sup>5</sup> *Beatty v. Rankin*, 139 Pa. 358.

<sup>6</sup> *Howard, Etc., Assn. v. P. & R. R. Co.*, 102 Pa. 220; P. & L. Dig., vol. 7, col. 10881.

<sup>7</sup> *Quick v. Gritman*, 3 C. C. 610.

<sup>8</sup> *Adams v. Bachert*, 83 Pa. 524; P. & L. Dig., vol. 7, col. 10882.

<sup>9</sup> *Brewing Co. v. Keziah*, 5 Del. Co. 11.

<sup>10</sup> *Hallman v. Gottshall*, 13 Montg. Co. 161.

<sup>11</sup> *Hoffman v. McDermond*, 1 Pitts. 197; P. & L. Dig., vol. 7, col. 10882.

<sup>12</sup> *Hutchinson v. Campbell*, 25 Pa. 273; P. & L. Dig., vol. 7, col. 10883.

<sup>13</sup> *Nevling v. Arnot*, 42 Leg. Int. 489.

<sup>14</sup> *Kerst's Ap.*, 2 Walker, 117.

<sup>15</sup> *Howe Machine Co. v. Hixenbaugh*, 30 Pitts. L. J. 469.

<sup>16</sup> *Riehl v. Vockroth*, 1 D. R. 80.

<sup>17</sup> *Shoemaker v. Flosser*, 8 C. C. 479.

<sup>18</sup> *Keim v. Logan*, 4 Walker, 398.

<sup>19</sup> *Calahan v. Cooper*, 2 W. N. C. 569.



rule.<sup>20</sup> If there are facts connected with a waiver which raise suspicion and the defendant contests it, the burden of proof is shifted upon the execution creditor.<sup>21</sup>

Where the transcript of a judgment from a justice of the peace does not show a waiver, but the note on which the judgment was obtained shows it, the waiver will hold.<sup>22</sup> Although exemption may not be claimed against a mortgage, it may be against a judgment in which it is not waived.<sup>23</sup>

#### 8. Effect of waiver on prior liens.

Where there are liens on the same property a waiver in a junior lien is a waiver as to all liens affected by it.<sup>24</sup> Such waiver is unaffected by the election of the junior creditor to disregard it after a sheriff's sale.<sup>25</sup> The rule applies to personal as well as real property;<sup>26</sup> but it does not apply where the judgment containing the waiver is no lien on the property;<sup>27</sup> nor where a landlord made claim for rent due on a lease containing a waiver.<sup>28</sup> A claim for rent due, though there is no waiver in the lease, takes priority to an execution with a waiver.<sup>29</sup> If the writ is stayed in which the waiver appears, such waiver will not inure to the benefit of another writ on which there is no waiver as to the personalty.<sup>30</sup> But where on a prior writ the exemption is allowed and a subsequent writ with waiver is executed on the goods set apart, the waiver in the second will inure to the benefit of the first execution.<sup>31</sup> On a landlord's warrant, exemption not being waived, and the goods are appraised and set over to the tenant, if an execution with waiver be subsequently levied, such waiver does not inure to the benefit of the landlord.<sup>32</sup>

Where the exemption cannot be claimed as against taxes or a municipal assessment, such inability operates as a waiver in favor of a prior execution creditor.<sup>33</sup> So of land subject to lien of a judgment which is subsequently mortgaged.<sup>34</sup> The doctrine applies to implied as well as express waiver.<sup>35</sup> Where a waiver in a junior

<sup>20</sup> *Miller v. Mowrer*, 4 Lanc. Bar, No. 39.

<sup>21</sup> *Downward v. Larkin*, 7 Del. Co. 262.

<sup>22</sup> *Kindig v. Kahler*, 10 D. R. 765.

<sup>23</sup> *Keller v. Keller*, 17 Lanc. L. R. 25.

<sup>24</sup> *Bowyer's Ap.*, 21 Pa. 210; *Shelly's Ap.*, 36 Pa. 373; *Hallman v. Hallman*, 124 Pa. 347, limiting *McAfoose's Ap.*, 32 Pa. 276; *Denlinger v. Burkey*, 18 Lanc. L. R. 94; *Hoerner v. Cordell*, 10 Supr. C. 314.

<sup>25</sup> *Keetly v. Campbell*, 15 Supr. C. 415.

<sup>26</sup> *Garrett's Ap.*, 32 Pa. 160; *Miller v. Getz*, 135 Pa. 558.

<sup>27</sup> *Thomas' Ap.*, 69 Pa. 120; *P. & L. Dig.*, vol. 7, col. 10887.

<sup>28</sup> *Temple v. Gough*, 9 C. C. 85.

<sup>29</sup> *Collins' Ap.*, 35 Pa. 83.

<sup>30</sup> *Smith v. Ackerman*, 38 Leg. Int. 394.

<sup>31</sup> *Knoll's Ap.*, 30 Pitts. L. J. 53. (As to attachment executions, see *Watson v. Woodson*, 17 D. R. 84.)

<sup>32</sup> *Frick v. McClain*, 12 Lanc. Bar, 78.

<sup>33</sup> *Hartman v. Holstein*, 2 Northam. Co. 49.

<sup>34</sup> *Hufford's Ap.*, 10 W. N. C. 528; *P. & L. Dig.*, vol. 7, col. 10889.

<sup>35</sup> *Miller's Ap.*, 122 Pa. 95, explaining *Bower's Ap.*, 68 Pa. 126, and *Thomas' Ap.*, 69 Pa. 120.

lien inures to the benefit of a senior lien, the costs of the execution are payable out of the fund.<sup>36</sup>

#### 9. Effect of waiver on concurrent and subsequent liens.

Where two attachment executions are served on the same day, one with a waiver and the other without, the waiver in the first does not inure to the benefit of the second.<sup>37</sup>

Waiver as to one lien operates as a waiver in favor of subsequent liens,<sup>38</sup> but only to the amount of the prior judgment.<sup>39</sup> A waiver in a prior attachment cannot be avoided as to a later one, by payment before the answers of the garnishee are filed.<sup>40</sup> Where real estate is sold under a mortgage the defendant may claim his exemption out of the surplus as against judgment creditors.<sup>41</sup> A waiver on an execution will inure to the benefit of a landlord whose lease contains no waiver.<sup>42</sup> A judgment creditor cannot be compelled to insist on his waiver against the debtor's personalty so as to swell the fund for the benefit of other creditors.<sup>43</sup>

Nor is the defendant obliged to claim his exemption reserved in an assignment, so as to benefit a subsequent creditor with a waiver.<sup>44</sup> Where there were three executions a failure to claim the exemption on the second operated only in favor of the first.<sup>45</sup>

An examination of the cases will show the apparent contradictory efforts of the courts to square their rulings with the doctrine that a plain statutory right may be waived by the individual for whose benefit and protection as well as that of his family, the law has made provision.

#### 10. Exemption of sewing machines.

By act of April 17, 1869, P. L. 69, all sewing machines belonging to seamstresses were declared exempt in addition to the articles theretofore exempt; and by the act of March 4, 1870, P. L. 35, "all sewing machines used and owned by private families," provided the act does "not apply to persons keeping sewing machines for sale or hire." The act of June 25, 1895, P. L. 252, further protects the woman's sewing machine, and it is constitutional.<sup>45a</sup>

#### 11. Exemption of leased musical instruments.

The act of May 13, 1876, P. L. 171, provides:

"Hereafter all pianos, melodeons and organs leased or hired by any person or persons residing in this commonwealth, shall be exempt from levy and sale on execution or distress for rent due by

<sup>36</sup> *Kiefer v. Kiefer*, 14 C. C. 545.

<sup>37</sup> *Irwin's Est.*, 31 Pitts. L. J. 23; *Fitler's Est.*, 16 Phila. 282.

<sup>38</sup> *Pittman's Ap.*, 48 Pa. 315; P. & L. Dig., vol. 7, col. 10890.

<sup>39</sup> *Hallman v. Hallman*, 124 Pa. 347.

<sup>40</sup> *Peterson v. Russell*, 9 Supr. C. 332.

<sup>41</sup> *Hill v. Johnston*, 29 Pa. 362; *Quinn's Ap.*, 86 Pa. 447.

<sup>42</sup> *Steininger v. Butler*, 5 D. R. 43.

<sup>43</sup> *Feak's Ap.*, 81 \* Pa. 76; P. & L. Dig., vol. 7, col. 10893.

<sup>44</sup> *Long v. Wilson*, 4 Northam. Co. 213.

<sup>45</sup> *McCreary's Ap.*, 74 Pa. 194.

<sup>45a</sup> *Singer, Etc., Co. v. Tonkay*, 18 D. R. 963.

such person or persons so leasing or hiring any such piano or pianos, melodeon or melodeons, organ or organs, in addition to any articles or money now exempt by law: *Provided*, That the owner or owners of any such piano, melodeon or organ, or his or their agent, or the person or persons so leasing or hiring the same, shall give notice to the landlord or his agent that the instrument is leased or hired."

The notice above required must be given when the instrument is placed on the premises, or at least before the right of the landlord to distrain has accrued.<sup>46</sup> A notice by the tenant has been held sufficient.<sup>47</sup>

#### 12. Exemption of electric motors, etc.

The act of May 3, 1909, P. L. 407, provides:

"That hereafter all electric motors, electric fans, or dynamos, leased or hired by any person or persons residing in this commonwealth, shall be exempt from levy and sale on execution, or distress for rent, due by such person or persons so leasing or hiring any such electric motors, electric fans, or dynamos, in addition to any article or money now exempt by law: *Provided*, That the owner or owners of such electric motors, electric fans, or dynamos, or his or their agent, or the person or persons leasing or hiring the same, shall give notice to the landlord or his agent, within ten days after such instrument or apparatus is placed upon the demised premises, that the instrument or apparatus is leased or hired."

#### 13. Exemption of soda water apparatus.

The act of May 3, 1909, P. L. 423, provides:

"That hereafter all soda water apparatus and appurtenances thereto, leased or hired by any person or persons, residing within this commonwealth or conditionally sold to any such person or persons, under a contract of sale reserving title in the vendor until paid for, shall be exempt from levy and sale on execution or distress for rent, so long as the title thereto remains in the owner, lessor or conditional vendor: *Provided*, That either the name and address of owner, lessor or conditional vendor of such soda water apparatus be marked on or be attached to said soda water apparatus, on a conspicuous part thereof, or that before levy or distress, the owner, lessor or conditional vendor of such soda water apparatus and appurtenances, or his or their agent, or the person or persons so leasing, hiring or purchasing the same shall have given notice to the landlord or his agent that the same are leased, hired or sold under reservation of title."

#### 14. No exemption on judgments from criminal courts.

Under the act of May 8, 1901, P. L. 143, no exemption is allowed upon any order, sentence, decree or judgment for the payment of money in the Quarter Sessions or Oyer and Terminer, entered in the Common Pleas for lien. An execution out of the Quarter Sessions may sell land, but not without condemnation.<sup>47a</sup>

<sup>46</sup> McGeary v. Mellor, 87 Pa. 461.

<sup>47</sup> Rohrer v. Cunningham, 138 Pa. 162.

<sup>47a</sup> Comth. v. Fetzner, 36 C. C. 591.

## 15. Claim of exemption — how made — form.

The claim of exemption must be made to the officer in charge of the execution and it need not be in writing nor in the precise words of the act of assembly.<sup>48</sup> If the entire property is apparently worth less than \$300, the defendant is not obliged to specify the articles.<sup>49</sup> The officer on claim or demand for the benefit of the law must proceed to appraisement. He is not to put barriers in the way and conjure up excuses for not obeying it.<sup>50</sup> If the debtor is absent from home the demand may be made by any member of his family,<sup>51</sup> and no specific authority to do so is necessary.<sup>52</sup> The selection is in time, after the summoning of the appraisers, if the sale is not delayed thereby, the defendant having good reasons for delay.<sup>53</sup> As to personalty the claim is in time if made before advertisement of sale,<sup>54</sup> but not afterwards;<sup>55</sup> as when the officer was ready to begin the sale.<sup>56</sup> In certain cases the demand is in time when the officer posts the bills.<sup>57</sup> If there is doubt as to whether the claim was made in time it will be resolved in favor of the debtor.<sup>58</sup> Ignorance of the levy may excuse delay in making the demand.<sup>59</sup> Where the officer returned a written demand with his writ, it is evidence that the claim was made in time.<sup>60</sup>

A claim once made upon the officer is sufficient.<sup>61</sup> Under the attachment act of July 12, 1842, P. L. 339, where no execution is issued, a constable cannot be held for refusing the exemption.<sup>62</sup>

In the case of real estate the claim is in time if made within a reasonable time after service of the writ, provided the sale is not delayed.<sup>63</sup> The act must be complied with.<sup>64</sup> It cannot be made after inquisition and issuance of a *vend. ex.*; <sup>65</sup> nor after advertisement.<sup>66</sup> It must be made before sale,<sup>67</sup> even if sold under a mort-

<sup>48</sup> Diehl v. Holben, 39 Pa. 213; Comth. v. Springer, 31 Pitts. L. J. 40; Hart v. Hart, 167 Pa. 13.

<sup>49</sup> Wilson v. McElroy, 32 Pa. 82.

<sup>50</sup> Keller v. Bricker, 64 Pa. 379.

<sup>51</sup> Waugh v. Burket, 3 Grant, 319; Meitzler's Ap., 73 Pa. 368; Pearce v. Landenberger, 16 Phila. 33.

<sup>52</sup> Wilson v. McElroy, 32 Pa. 82; McCarthy's Ap., 68 Pa. 217.

<sup>53</sup> Elliott v. Flanigan, 37 Pa. 425.

<sup>54</sup> Williamson v. Krumbhaar, 132 Pa. 455; Forst v. Lees, 36 Supr. C. 653.

<sup>55</sup> Dieffenderfer v. Fisher, 3 Grant, 30; Diehl v. Holben, 39 Pa. 213; Stewart's Ap., 20 W. N. C. 110; P. & L. Dig., vol. 7, col. 10899.

<sup>56</sup> Cable v. Buckman, 1 Pitts. L. J. 182; Rogers v. Waterman, 25 Pa. 182.

<sup>57</sup> Johnston, Etc., Co. v. Fite, 4 C. C. 415; Gerhab v. Blank, 5 Montg. Co. 126; Kee v. Hobensack, 2 Phila. 82.

<sup>58</sup> Downward v. Larkin, 7 Del. Co. 262.

<sup>59</sup> Barrett v. Smith, 10 D. R. 531; Deitz Co. v. Sullivan, 9 Del. Co. 159.

<sup>60</sup> Smith v. Emerson, 43 Pa. 456.

<sup>61</sup> Norton v. Schmidt (No. 2), 21 Lanc. L. R. 130.

<sup>62</sup> Blakely v. Smith, 27 Supr. C. 583.

<sup>63</sup> Hart v. Hart, 167 Pa. 13; Bowyer's Ap., 21 Pa. 210; Snyder v. Schmuck, 166 Pa. 429.

<sup>64</sup> Sennickson v. Fulton, 1 Phila. 220.

<sup>65</sup> Schwartz v. Croll, 1 Lehigh, 184; Brants' Ap., 20 Pa. 141; Moore v. McMorrow, 5 Supr. C. 559; Lancaster Trust Co. v. Gochenauer, 6 Supr. C. 209; P. & L. Dig., vol. 7, col. 10902.

<sup>66</sup> Boas v. Fendler, 2 Pearson, 361; P. & L. Dig., vol. 7, col. 10903.

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gage.<sup>68</sup> Where there is no undue delay a previous inquisition will not bar the right to make the claim.<sup>69</sup> Where a sequestrator is appointed the claim cannot be considered until distribution.<sup>70</sup>

*Form of Request for Appraisement.*

W. A. Whiston	} In the court of Common Pleas of Venango County, <i>feri facias.</i>	
v.		
Joseph Tatton.		
	No. —	Term, 1910.
	Original No. —	Term, 1910.

To — —, Esq., sheriff of said county:

You are hereby notified of my demand for an appraisement and requested to summon three disinterested and competent persons to appraise and set aside the personal property levied on by you under said execution, which the undersigned shall elect to retain under the provisions of the act of April 9, 1849, and its supplements.

Franklin, Pa., May 4, 1910.

Joseph Tatton.

# 16. Notice to plaintiff — rule in Philadelphia.

Rule 19 of Philadelphia is as follows:

"In all cases in which upon process issued from any of these courts, the defendant shall be entitled to the benefit of the \$300 exemption law and shall claim the same, it shall be the duty of the sheriff, at least forty-eight hours before causing the appraisement to be made, to notify the plaintiff's counsel by writing of the time and place of such intended appraisement, at which time and place the plaintiff and his counsel, or some person deputed by them, shall have the right to be present."

(Compare your rule of court).

# 17. Claim on attachment execution.

Under an attachment execution the claim may be made at or before the term to which the writ is returnable and may be filed with the answers of the garnishee to the interrogatories.<sup>1</sup> But the claim cannot be made later than the term. It may be made when a rule is taken to show cause why the attachment should not be quashed;<sup>2</sup> or when the interrogatories are issued.<sup>3</sup> It cannot be made by special plea after answer,<sup>4</sup> nor after plaintiff and garnishee have joined issue,<sup>5</sup> nor after judgment against the garnishee.<sup>6</sup> The claim once made, is effective, although it be filed by the prothonotary, with another writ.<sup>7</sup>

Where the defendant is not served, the claim is in time if made

<sup>67</sup> Miller's Ap., 16 Pa. 300; Gibbons v. Gaffney, 154 Pa. 48.

<sup>68</sup> Gibbons v. Cutler, 2 Del. Co. 214.

<sup>69</sup> Shaw's Ap., 49 Pa. 177; Comth. v. Boyd, 56 Pa. 402.

<sup>70</sup> First Natl. Bank v. Harkins, 8 Del. Co. 134.

<sup>1</sup> Walbridge v. Bell, 4 Walker, 354; P. & L. Dig., vol. 7, col. 10905.

<sup>2</sup> Hartman v. Weitmeyer, 2 Dauphin Co. 341; Bittinger's Ap., 76 Pa. 105; Harlan v. Haines, 125 Pa. 48.

<sup>3</sup> Heathcote v. Crassley, 9 D. R. 137; Hays v. Lentz, 12 Supr. C. 400.

<sup>4</sup> Strouse v. Becker, 44 Pa. 206.

<sup>5</sup> Zimmerman v. Briner, 50 Pa. 535.

<sup>6</sup> Bair v. Steinman, 52 Pa. 423.

<sup>7</sup> Shields v. Jones, 18 Lanc. L. R. 350.

as soon as defendant has notice of the issuance,<sup>8</sup> although the garnishee's answers have been filed.<sup>9</sup> The time is when the defendant had actual notice of the attachment.<sup>10</sup> By long delay the defendant may lose his right.<sup>11</sup> Before a justice of the peace the claim may be made on the return day of the writ,<sup>12</sup> but not after judgment.<sup>13</sup> Parol evidence is admissible to show that it was made in time.<sup>14</sup> Where defendant is not served, it was held he could make the claim within thirty days after judgment.<sup>15</sup> Notice of the claim must be given within the term, either to the plaintiff or on the record. Notice to the sheriff after service on the garnishee has been held insufficient.<sup>16</sup> Personal notice to the sheriff, counsel for plaintiff and to the garnishee is sufficient although it does not appear on the record;<sup>17</sup> also written notice to the sheriff returned with his writ.<sup>18</sup> But it is insufficient if made only to the garnishee.<sup>19</sup> One who has claimed the exemption may withdraw his claim.<sup>20</sup> Defendant may claim it out of any number of successive executions, so that he always has \$300 worth of goods left for himself and family.<sup>21</sup> Only one exemption is allowable where the claim is made on several executions.<sup>22</sup> A rule to dissolve an attachment execution is not the proper way to raise the question as to defendant's right.<sup>23</sup> The claim once made is good as against an alias.<sup>24</sup> But a claim on an execution will not be good against another execution on a different judgment on which the land is sold.<sup>25</sup>

One who in ignorance of his rights when a judgment against him is only *de terris*, asks the benefit of the exemption law on a levy on his personalty, is not estopped from afterwards suing the plaintiff in trespass.<sup>25a</sup>

#### 18. Election of defendant to retain real estate — form.

Section 3 of the act of 1849, *supra*, provides:

"In any case where the property levied upon as aforesaid shall

<sup>8</sup> Howard B. & L. Assn. v. P. & R. R. Co., 102 Pa. 220.

<sup>9</sup> Holmes v. Pettingill, 12 Phila. 378; P. & L. Dig., vol. 7, col. 10907.

<sup>10</sup> Lennig v. Taylor, 18 W. N. C. 94.

<sup>11</sup> Bancord v. Parker, 65 Pa. 336; P. & L. Dig., vol. 7, col. 10908.

<sup>12</sup> Yost v. Heffner, 69 Pa. 68; Kuhn v. Warren, Etc., Bank, 20 W. N. C. 230; Hawk v. Walz, 7 Northam. 100.

<sup>13</sup> Brown v. Thomas, 3 Kulp, 146; P. & L. Dig., vol. 7, col. 10909.

<sup>14</sup> Bloom v. Alexander, 5 C. C. 553.

<sup>15</sup> Taylor v. Worrel, 4 Leg. Gaz. 401.

<sup>16</sup> Leibfried v. Morrissy, 9 D. R. 740; Denlinger v. Burkey, 18 Lanc. L. R. 94.

<sup>17</sup> Musser v. Musser, 1 Lanc. L. R. 297.

<sup>18</sup> Irwin's Est., 31 Pitts. L. J. 23; Landis v. Lyon, 71 Pa. 473.

<sup>19</sup> Uhrich v. Gockley, 2 D. R. 350; P. & L. Dig., vol. 7, col. 10911.

<sup>20</sup> White Deer, Etc., Ap., 95 Pa. 191; Kyle's Ap., 45 Pa. 353.

<sup>21</sup> Hanley v. O'Donald, 30 Pa. 261; Krauter's Ap., 150 Pa. 47; P. & L. Dig., vol. 7, col. 10913.

<sup>22</sup> Koller v. Miller, 9 D. R. 551; Vogelsong v. Beltzhoover, 59 Pa. 57; P. & L. Dig., vol. 7, col. 10914.

<sup>23</sup> Tioga Cricket Club v. Horn, 19 C. C. 672.

<sup>24</sup> McAfoose's Ap., 32 Pa. 276.

<sup>25</sup> Dodson's Ap., 25 Pa. 232; P. & L. Dig., vol. 7, col. 10915.

<sup>25a</sup> Sensinger v. Boyer, 153 Pa. 628.



consist of real estate of greater value than three hundred dollars, and the defendant shall elect to retain real estate amounting in value to the whole sum of three hundred dollars, or any less sum, the appraisers aforesaid shall determine whether, in their opinion, the said real estate can be divided without injury to or spoiling the whole; and if the said appraisers shall determine that the said real estate can be divided as aforesaid, then they shall proceed to set apart so much thereof as in their opinion shall be of sufficient value to answer the requirement of the defendant in such case, designating the same by proper metes and bounds, all of which proceedings shall be certified in writing by the said appraisers or a majority of them, under their proper hands and seals, to the sheriff, under sheriff, or coroner, charged with the execution of the writ in such case, who shall make return of the same to the proper court from which the writ issued, in connection with the said writ: *Provided*, That this section shall not be construed to affect or impair the liens of bonds, mortgages, or other contracts for the purchase money of the real estate of insolvent debtors."

*Form of Election to Retain Real Estate.*

Jesse Berry	} In the Court of Common Pleas of Clinton County.	
v.		
John Fry.		
		<i>Fi. fa.</i> No. — Term, 1910.
		Original No. — Term, 1910.

To H. D. Loveland, Esq., sheriff of Clinton:

The undersigned defendant elects to retain real estate levied upon by virtue of the execution above specified, to the value of three hundred dollars, and requests an appraisalment thereof according to law.

John Fry.

Tylersville, Pa., May 6, 1910.

**19. Venditioni exponas for residue.**

Section 4 of the act of 1849, *supra*, provides:

"Upon return made of the writ aforesaid, with the proceedings thereon, the plaintiff in the case shall be entitled to have his writ of *venditioni exponas*, as in other cases, to sell the residue of the real estate included in the levy aforesaid, if the appraisers aforesaid shall have determined upon a division of the said real estate; but if the said appraisers shall determine against a division of said real estate, the plaintiff may have a writ of *venditioni exponas* to sell the whole of the real estate included in such levy; and it shall and may be lawful in the latter case for the defendant in the execution to receive from the sheriff or other officer, of the proceeds of said sale so much as he would have received at the appraised value had the said real estate been divided."

**20. Election to retain money, stocks, etc.**

By virtue of the act of April 8, 1859, P. L. 425, the defendant "may elect to retain the same or any part thereof, out of any bank notes, money, stocks, judgments or other indebtedness to such person."

**21. Appraisalment on defendant's request.**

Section 2 of the act of 1849, *supra*, provides:

"The sheriff, constable, or other officer charged with the execu-

tion of any warrant issued by competent authority, for the levying upon and selling the property, either real or personal of any debtor, shall, if requested by the debtor, summon three disinterested and competent persons, who shall be sworn or affirmed to appraise the property which the said debtor may elect to retain under the provisions of this act, for which service the said appraisers shall be entitled to receive fifty cents each, to be charged as part of the costs of the proceedings; and property thus chosen and appraised, to the value of three hundred dollars, shall be exempt from levy and sale on the said execution or warrant, excepting warrants for the collection of taxes." (See form, *supra*.)

## 22. Necessity for appraisement.

The only way to make the exemption good is to follow the law, hold an appraisement and set the property apart to the debtor.<sup>26</sup> It cannot be waived.<sup>27</sup> Where a valid claim is made after the return day a rule of court does not apply which requires the sheriff to file the appraisement before the return day.<sup>28</sup>

### *Form of Summons of Appraisers.*

Maris Edmonds	} In the Court of Common Pleas of Armstrong County.	
v.		
Almon Shick.		
	No. — <i>fi. fa.</i>	Term, 1910.
	Original No. —	Term, 1910.

To Henry Cope, John Bull and Abner Fague:

You are hereby summoned to appraise, under oath, the personal property of Almon Shick, the debtor named in the above execution, which he shall elect to retain to the value of \$300, exclusive of other exemptions allowed by law.

Witness my hand the 7th day of May, A. D. 1910.

— — —, Sheriff.

## 23. Swearing appraisers.

Section 1 of the act of April 8, 1857, P. L. 170, provides:

"Hereafter it shall be lawful for the sheriff, deputy sheriff or constable of any county or township to administer the oath or affirmation required to be administered to appraisers \* \* \* "

### *Oath of Appraisers.*

We and each of us do solemnly swear (or affirm) that we will without prejudice or partiality appraise the personal property of Almon Shick, which he shall elect to retain as exempt from sale under the execution herein and in all respects perform our duties as appraisers to the best of our skill and judgment.

Sworn to and subscribed, etc.

Henry Cope,  
John Bull,  
Abner Fague.

<sup>26</sup> Mark's Ap., 34 Pa. 36; Nyman's Ap., 71 Pa. 447; P. & L. Dig., vol. 7, col. 10918.

<sup>27</sup> Pearson's Ap., 2 Mona. 678.

<sup>28</sup> Barrett v. Smith (Montgomery Co.), 10 D. R. 531.



**24. Qualification of appraisers — returns.**

The appraisers must be disinterested and a relative of defendant is disqualified;<sup>29</sup> so is an employee of the sheriff.<sup>30</sup> An appraisement will be set aside if execution creditors are excluded from witnessing it;<sup>31</sup> or are not notified of the time and place;<sup>32</sup> or where the goods are grossly under-valued.<sup>33</sup> If the claim was made in time the appraisement may be made shortly before the sale.<sup>34</sup>

*Return of Appraisers of Personalty.*

To ———, sheriff of the county of Armstrong:

We, the undersigned appraisers, duly summoned by you, having been first duly sworn according to law, do hereby certify under oath that we have appraised and set aside the property of said Almon Shick as set forth in the inventory and appraisement hereto annexed, to-wit:

Inventory of personal property elected to be retained as exempt, by Almon Shick, the defendant in the above-stated execution, viz.:

Four chamber suits each \$20.....	\$80 00
One cook stove .....	25 00
One parlor stove .....	35 00
One cupboard and dishes .....	25 00
One clock .....	10 00
One dozen chairs .....	15 00

Appraised May 9, 1910.

Henry Cope,  
John Bull,  
Abner Fague.

*Return of Appraisers Dividing Realty.*

To H. D. Loveland, sheriff of Clinton County.

The undersigned having been summoned by you and having been first duly sworn according to law, do return that we went upon the real estate of said John Fry, defendant herein, and having ascertained that it is of greater value than three hundred dollars, do determine that, in our opinion, said real estate can be divided without injury to or spoiling the whole, and have proceeded to set apart to said defendant, so much thereof as in our opinion shall be of sufficient value to amount to three hundred dollars and no more and we do designate the portion so set apart, by metes and bounds as follows: Beginning at, etc.

Witness our hands and seals, the 7th day of May, A. D. 1910.

Robert Bartly, (Seal.)

Erman Speaker, (Seal.)

Earl Vock, (Seal.)

If the return is against division they will state that "in their opinion it cannot be divided without prejudice to or spoiling the whole."

<sup>29</sup> Schaeffer v. Heine, 22 C. C. 133.

<sup>30</sup> Levinite v. Chuya, 10 Kulp, 264; Staples v. Wells, 2 W. N. C. 139.

<sup>31</sup> Huddy v. Sproule, 4 Phila. 353; P. & L. Dig., vol. 7, col. 10920.

<sup>32</sup> Ruhl v. Crawford, 13 W. N. C. 13.

<sup>33</sup> Sleeper v. Nicholson, 1 Phila. 348; P. & L. Dig., vol. 7, col. 10920.

<sup>34</sup> Seibert's Ap., 73 Pa. 359; Meitzler's Ap., 73 Pa. 368; Coleman's Ap., 103 Pa. 366.

### 25. Effect of appraisement

An appraisement on one execution does not affect subsequent executions. The claim must be made on each successive writ,<sup>35</sup> and independent execution creditors cannot except to appraisement on other writs than their own.<sup>36</sup> If the appraisement is set aside a new appraisement cannot be had on the same execution;<sup>37</sup> and this applies to an alias.<sup>38</sup> The return of the appraisement is not conclusive of the right where it has been waived in the judgment.<sup>39</sup> If the interest of defendant in real estate be found to be less than \$300, a *vend. ex.* should not be issued.<sup>40</sup> When growing crops are appraised and set apart to defendant they do not pass with the sale of the land.<sup>41</sup>

Exceptions to the appraisement will not be sustained where the value of the property is obviously correct, although notice was not filed in time under the rule of court.<sup>41a</sup>

The property set aside to the debtor belongs to him absolutely and he may sell it or do with it what he likes,<sup>42</sup> and the proceeds are not attachable in his attorney's hands;<sup>43</sup> but if a gift, it must be accompanied with a change of possession, since, in Pennsylvania, possession is a badge of property.<sup>44</sup> It has been held that the proceeds of sale may be attached in the hands of a purchaser,<sup>45</sup> and also damages for not allowing exemption.<sup>46</sup> Where a life interest has been valued under \$300 and set apart, sequestration will not be granted.<sup>47</sup> An attempt to assign the exemption in advance of its allowance has been held equivalent to waiver of the right.<sup>48</sup>

### 26. Liability of officer.

The officer in charge of an execution will allow or disallow a demand for exemption, on his official responsibility.<sup>49</sup> If he wrongfully sells property exempt, he is liable in trespass.<sup>50</sup> The court will not determine the debtor's right on exceptions to the appraisement. The plaintiff should indemnify the sheriff and direct him to proceed with his execution.<sup>51</sup> If not, the sheriff should proceed with the appraisement. The court will not determine the right,

<sup>35</sup> Wilcox v. Stark, 18 Phila. 325.

<sup>36</sup> Wisser v. Wisser, 8 D. R. 673.

<sup>37</sup> Geisinger v. Applebach, 6 W. N. C. 557.

<sup>38</sup> Harris v. Shuster, 3 Supr. C. 331.

<sup>39</sup> Lauck's Ap., 24 Pa. 426.

<sup>40</sup> Constable v. Norris, 6 Kulp, 16.

<sup>41</sup> Hershey v. Metzgar, 90 Pa. 217.

<sup>41a</sup> Alderfer v. Groff, 24 Montg. Co. 20.

<sup>42</sup> Ehrisman v. Roberts, 68 Pa. 308.

<sup>43</sup> Lehr v. Lehigh, Etc., 1 Lehigh V. R. 65; Gery v. Ehrgood, 31 Pa. 329.

<sup>44</sup> Yeager v. Nichols, 7 Phila. 91.

<sup>45</sup> Charles v. Oatman, 2 Clark, 452.

<sup>46</sup> Knabb v. Drake, 23 Pa. 489.

<sup>47</sup> Sener v. Scherff, 10 C. C. 529.

<sup>48</sup> Good's Est., 8 Lanc. L. R. 345.

<sup>49</sup> Thornton v. Aubrey Hotel Co., 5 W. N. C. 428.

<sup>50</sup> Wilson v. Ellis, 28 Pa. 238; Emerson v. Smith, 51 Pa. 90; Nevling v. Arnot, 4 Walker, 165.

<sup>51</sup> Tasker v. Sheldon, 115 Pa. 107; Fisher v. Hummel, 2 D. R. 233.

either, on a rule to set the appraisement aside.<sup>52</sup> The officer is not liable to the plaintiff for allowing exemption when the writ does not show the waiver;<sup>53</sup> but he will be liable to the defendant, when waiver is endorsed on the writ and the defendant is entitled nathless. A reference to the judgment before the justice of the peace, when issued on a transcript, is insufficient.<sup>54</sup>

If the sheriff by mistake allows an appraisement when the defendant is not entitled a rule to set it aside will lie;<sup>55</sup> and, also, the defendant may have a rule to show cause why his exemption should not be allowed.<sup>56</sup> Since *Tasker v. Sheldon*, cited *supra*, the practice by rule to show cause has steadily grown in favor, with the purpose of avoiding the necessity of another action at law.<sup>57</sup> If the officer improperly allows exemption he is liable for the loss, suffered by the plaintiff.<sup>58</sup> The debt cannot be set off against the claim for damages in a suit against the officer for disallowance.<sup>59</sup> The sale passes title to the goods although the exemption be disallowed and the plaintiff purchases them.<sup>60</sup> Where the amount realized on a sale of real estate is less than the exemption, the costs of sale cannot be deducted from it.<sup>61</sup>

#### 27. Claims not assignable to non-residents.

The act of May 23, 1887, P. L. 164, provides as follows:

"It shall be unlawful for any person or persons, being a citizen or citizens of this commonwealth to assign or transfer any claim for debt against a resident of this commonwealth for the purpose of having the same collected by proceedings in attachment in courts outside of this commonwealth, or to send out of this commonwealth by assignment, transfer or other manner whatsoever, either for or without value, any claim for debt against any resident thereof, for the purpose or with the intent to deprive such persons of the right to have his personal earnings or property exempt from application to the payment of his debts according to the laws of this commonwealth, where the creditor and debtor and the person or corporation owing intended to be reached by such proceedings are within the jurisdiction of the courts of this commonwealth; and the person or persons assigning or transferring any such claim for the purpose or with the intent aforesaid, shall be liable in an action of debt to the person or persons from whom any such claim shall have been collected by attachment or otherwise outside of the courts of this commonwealth, for the full amount of debt, interest and costs so collected, and the defendant or defendants therein shall not be entitled to the benefit of the exemption laws of this commonwealth upon any

<sup>52</sup> *Pile v. Grambo*, 1 W. N. C. 7; P. & L. Dig., vol. 7, col. 10928.

<sup>53</sup> *O'Neil v. Craig*, 56 Pa. 161.

<sup>54</sup> *Schock v. Waidelich*, 27 Supr. C. 215.

<sup>55</sup> *Ramsdell v. Seybert*, 14 D. R. 247.

<sup>56</sup> *Moskovitz v. Orangers*, 13 D. R. 153.

<sup>57</sup> *Williamson v. Krumbhaar*, 132 Pa. 455; *Moore v. Dunn*, 147 Pa. 359.

<sup>58</sup> *Hare v. Comth.*, 26 Pitts. L. J. 149.

<sup>59</sup> *Wilson v. McElroy*, 32 Pa. 82.

<sup>60</sup> *Hatch v. Bartle*, 45 Pa. 166.

<sup>61</sup> *McFarland v. Short*, 1 Chester Co. 410; *Hain v. Rhoads*, 7 C. C. 568.

execution process issued upon any judgment recovered in any such action."

The above act is constitutional<sup>1</sup> and not in violation of sections 1 and 2 of article 4 of the U. S. constitution.<sup>2</sup> Where the employer combines with the foreign claimant it constitutes a conspiracy punishable with fine and imprisonment.<sup>3</sup> Under this act the wage-earner who wishes to defeat his creditor, may have an injunction to prevent the appropriation of his wages, but not where it is to pay a claim assigned to a non-resident for the purposes of attachment in a foreign jurisdiction. His remedy is at law.<sup>4</sup> The statement must aver that the suit was brought in a foreign jurisdiction for the purpose and with intent to deprive the wage-earner of his right to exemption of wages under the laws of Pennsylvania and the act applies only to claims assigned and transferred, and not to suits originally brought by the creditor himself.<sup>5</sup> An affidavit of defense is sufficient when it denies that the assignment was made with intent to deprive the debtor of his exemption.<sup>6</sup> Where the debtor recovers judgment against his creditor under this act, the latter cannot by assignment of a judgment note of the debtor to his wife attach the money in his hands.<sup>7</sup>

#### 28. Baggage of guests at hotels, etc.

Where the keeper of a hotel, restaurant, inn or boarding house shall post a notice in a conspicuous place in his office and every room of his house a printed copy of the act of April 20, 1876, P. L. 45, he may prosecute one who fraudulently obtains board or lodging, or absconds, and if baggage is left it may be sold after thirty days, on five days' notice of the sale, any excess to be held for the owner.

In such case there is no exemption.

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<sup>1</sup> Assignment of Claims, *in re*, 11 D. R. 309; *Workingman v. Merchant*, 26 C. C. 470.

<sup>2</sup> *Sweeny v. Hunter*, 145 Pa. 363.

<sup>3</sup> *Comth. v. Stambaugh*, 22 Supr. C. 386.

<sup>4</sup> *Galbraith v. Rutter*, 20 Supr. C. 554.

<sup>5</sup> *Rumford v. Stevens*, 12 D. R. 569.

<sup>6</sup> *Cordes v. Swartz*, 11 D. R. 425.

<sup>7</sup> *Steel v. McKerrihan*, 172 Pa. 280.

## CHAPTER XV.

### TESTATUM WRIT.

- |   |   |
|---|---|
| 1. Issuance of.                             | 6. Lien of <i>testatum fi. fa.</i>            |
| 2. Form of suggestion.                      | 7. Penalty for failure to execute writ.       |
| 3. <i>Alias</i> and <i>pluries</i> writs.   | 8. Venue of interpleader.                     |
| 4. Duty of sheriff on receipt of writ.      | 9. Satisfaction on discharge.                 |
| 5. Duty of prothonotary on receipt of writ. | 10. <i>Testatum capias ad satisfaciendum.</i> |

#### 1. Issuance of.

Section 76 of the act of June 16, 1836, P. L. 76, provides:

"If the defendant in any judgment for the recovery of money shall have no real or personal estate in the county where such judgment may be obtained, it shall be lawful for the plaintiff, upon his own suggestion of that fact, verified by affidavit, without any previous writ, to have a *testatum* writ of *feri facias*, directed to the sheriff or coroner of any other county, where the defendant may have real or personal estate, which shall be made returnable into the court from which it shall issue."

#### 2. Form of suggestion.

Eave Smith } In the Court of Common Pleas of Lehigh County.  
v. } Judgment against defendant March 17, 1910, for \$400,  
Gold Huhn. } Judgment Docket I, p. 40.

May 12, 1910, Eave Smith, the plaintiff above named, suggests that Gold Huhn, the defendant in said judgment, has no real or personal estate in Lehigh County. Eave Smith.

Issue *testatum fi. fa.* on the above judgment to the sheriff of Carbon County, returnable next term.

Debt \$400.

Interest from March 17, 1910.

Costs, etc.

Lawrence Rupp, P. Q.

To \_\_\_\_\_

Prothonotary.

Lehigh County, ss.

Eave Smith, being duly sworn, says that the above suggestion is true, as he verily believes.

Eave Smith.

Sworn to and subscribed May 12, 1910.

\_\_\_\_\_  
Prothonotary.

The suggestion above has been held to be unnecessary where an

execution has been issued and returned "*nulla bona*;"<sup>1</sup> but the act should be obeyed.

Such writ can only issue from the court of original entry of the judgment. It cannot issue on an exemplified and transferred judgment although revived.<sup>2</sup> A return of *nulla bona* and a *testatum* writ returnable to the same return day is irregular.<sup>3</sup>

### 3. Alias and pluries writs.

Section 77 of the act of 1836, *supra*, provides:

"If the estate of the defendant in the county in which a *testatum* writ of *fiery facias* shall first be issued, be insufficient to satisfy the judgment, it shall be lawful for the plaintiff to have in like manner an alias or *pluries* writs of *fiery facias* in succession, into any other county in which the defendant may also have real or personal estate, until such judgment shall be fully satisfied." Before an alias can issue the first must be returned.<sup>4</sup>

### 4. Duty of sheriff on receipt of writ.

Section 78 of the act of 1836, *supra*, provides:

"It shall be the duty of every sheriff and coroner, on receiving a *testatum* writ of *fiery facias*, immediately to deliver the same to the prothonotary of the Court of Common Pleas of his proper county."

### 5. Duty of prothonotary on receipt of writ.

Section 79 of the act of 1836, *supra*, provides:

"It shall be the duty of every prothonotary to whom any *testatum* writ of *fiery facias* shall be delivered as aforesaid, forthwith to enter the same of record, in a docket, to be provided for that purpose, and, as of the preceding term, stating particularly the amount of the debt, or damages, and costs, endorsed upon such writ, and thereupon he shall redeliver the said writ to the sheriff or coroner, to be by him executed."

### 6. Lien of *testatum fi. fa.*

Section 80 of the act of 1836, *supra*, provides:

"Every *testatum* writ of *fiery facias* shall be a lien upon the real estate of the defendants named in such writ, within the county where it shall be so entered of record, during five years from the date of such entry, unless the debt or damages and costs, be sooner paid."

This provision is held to apply only where the *testatum* is issued for the purpose of creating a lien.<sup>5</sup> A *testatum vend. ex.* if issued within five years from the entry of the *testatum fi. fa.* is regular, though more than five years have elapsed since the entry of the original judgment.<sup>6</sup> The common law lien of a *testatum fi. fa.* is an independent one only because the lien of the judgment only covers

<sup>1</sup> Boyer v. Kimber, 2 Miles, 393.

<sup>2</sup> Nelson v. Guffy, 131 Pa. 273.

<sup>3</sup> Root v. Oil Creek R. Co., 31 Leg. Int. 285.

<sup>4</sup> Gibbs v. Atkinson, 1 Clark, 476.

<sup>5</sup> West's Ap., 5 Watts, 87.

<sup>6</sup> Neil v. Colwell, 66 Pa. 216; Sylvester v. DeWitt, 34 Supr. C. 205.

the lands in the same county.<sup>7</sup> In order to bind the lands of a decedent such writ must be preceded by a *sci. fa.* to the widow and heirs, under a judgment against the administrator.<sup>8</sup> When the levy is stricken off the lien of the *testatum* writ is gone, and a sale of the land before an alias issues, confers a clear title.<sup>9</sup>

An order in the original county staying the writ until a rule by defendant is disposed of, although it does not say that the lien of the levy shall remain, will not be postponed by a subsequent execution.<sup>10</sup>

#### 7. Penalty for failure to execute writ.

Section 82 of the act of 1836, *supra*, provides:

"If any sheriff or coroner, to whom any *testatum* writ of execution shall be directed and delivered, as aforesaid, shall neglect or refuse to execute and return the same, according to the exigency thereof, he shall be amerced in the court where he ought to return it, and also be liable to the action of the party aggrieved."

Before an attachment can issue against the sheriff he must be ruled to return his writ.<sup>11</sup> An order to stay the writ must issue out of the court which issued it.<sup>12</sup> The sheriff of a county to whom a *testatum fi. fa.* is delivered must make his return to the court from which it issued, unaffected by a rule to show cause issued in the county wherein executed to pay the money into the court of the latter county.<sup>13</sup>

#### 8. Venue of interpleader.

The act of April 11, 1899, P. L. 35, provides:

"Whenever a levy upon personal property shall be made on a *testatum fieri facias* and a dispute arises concerning the ownership of such property, the interpleader proceedings shall be carried on in the county where the property is, and the levy has been made.

#### 9. Satisfaction on discharge.

Section 1 of the act of April 1, 1823, P. L. 288, provides:

"The plaintiff or plaintiffs in any such *testatum fieri facias*, upon the amount thereof being discharged, shall enter satisfaction therefor in the same manner, and under the same penalties, that satisfaction is now required to be entered on judgments."

#### 10. *Testatum capias ad satisfaciendum.*

Section 81 of the act of 1836, *supra*, provides:

"If the defendant in any judgment, as aforesaid, shall have no real or personal estate within the commonwealth, and if the defendant cannot be found within the county where such judgment may be, it shall be lawful for the plaintiff, if he shall make affidavit of the fact, to the best of his knowledge and belief, to have, upon

<sup>7</sup> Jameson's Ap., 6 Pa. 280.

<sup>8</sup> McLaughlin v. McCumber, 36 Pa. 14.

<sup>9</sup> McLaughlin v. Kain, 45 Pa. 113.

<sup>10</sup> Batdorff v. Focht, 44 Pa. 185.

<sup>11</sup> Borlin's Ap., 9 W. N. C. 545.

<sup>12</sup> Comth. v. Smith, 4 Phila. 419.

<sup>13</sup> Fleisher v. Friedman, 7 D. R. 421; P. & L. Dig., vol. 7, col. 10949.

his own suggestion, and without any previous writ, a *testatum* writ, or at the same time several *testatum* writs of *capias ad satisfaciendum* into any other county or counties, which writs shall be made returnable to the court from which they shall issue: *Provided*, That the plaintiff shall not be allowed the costs of more than one of several such writs, unless the court shall be satisfied that the plaintiff had sufficient cause for issuing the same."

When the sheriff arrests one on such writ he must commit him to the jail of his bailiwick.<sup>14</sup> It is no longer issuable for debt (see "*Capias*," Vol. I).

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<sup>14</sup> *Avery v. Seely*, 3 W. & S. 494.



## CHAPTER XVI.

### EXECUTIONS — SHERIFF'S INTERPLEADER.

1. Purposes of interpleader.
2. Rule by sheriff.
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#### I. Purpose of act.

When it is claimed by the defendant or another that the goods and chattels levied upon by the sheriff are not the property of the defendant but of some other person, the law has provided a proceeding called an interpleader by which such claim may be determined in due process of law. It was held under the act of April 10, 1848, P. L. 448, that the law was passed for the protection of the sheriff<sup>1</sup> and that the sheriff might take the responsibility of returning the writ "*nulla bona*" or of proceeding to sale.<sup>2</sup> He could protect himself by demanding indemnity from the plaintiff, when notice was served upon him that the goods levied upon were not defendant's but another's. It was not necessary that an actual levy had been made<sup>3</sup> but the act of 1897 says: "Whenever goods or chattels have been levied upon or seized," and it would seem, therefore, that the sheriff's return must show an actual seizure and an inventory of the goods which must be in the issue when made up. Under the act of 1848 the sheriff could be ruled to particularize his levy, which must be as particular as a merchant's account

<sup>1</sup> Bain v. Funk, 61 Pa. 185; Necker v. Sedgwick, 36 Supr. C. 593.

<sup>2</sup> Comth. v. Van Dyke, 57 Pa. 34.

<sup>3</sup> Phillips v. Reagan, 75 Pa. 381.

of stock.\* Another question of importance is as to the time of the appraisalment, to be made by the sheriff, whether when notice is given, or after issue is awarded, which should be settled by rule of court.

## 2. Rule by sheriff.

Under the act of May 26, 1897, P. L. 95, it is provided:

"That whenever goods or chattels have been levied upon or seized by the sheriff of any county under any execution or attachment process issued out of any court of this commonwealth, and the sheriff has been notified that said goods and chattels, or any part of them, belong to any person or persons other than the defendant or defendants in said execution or process, said sheriff shall enter a rule in the court out of which said execution or process issued, on the supposed owner (hereinafter called the claimant), to show cause why an issue should not be framed to determine the ownership of said goods and chattels; notice of said rule shall be given to the plaintiff and defendant in said execution or process, the claimant, and the person or persons found in possession of the goods and chattels levied upon or seized."

## 3. Præcipe of sheriff — form.

Under this section, it is not necessary to present a petition to the court, as ruled by Judge Schuyler of Northampton County, unless the rules of courts prescribe that method. The sheriff by his attorney files a præcipe for the rule with the prothonotary in the following form:

Continental Brewing Co.	} Court of Common Pleas of Northampton County. No. 42, <i>Pluries fi. fa.</i>	Sept. T. 1903,
v.		
Jacob Frech.		

To L. F. Giering, Esq., Prothonotary.

Issue rule on Louis F. Neuweiler, claimant of goods and chattels levied upon by Granville Hahn, sheriff, under above stated execution to show cause why an issue should not be framed to determine ownership, etc. Returnable to next term.

Aug. 27, 1903.

O. J. Mutchler,  
Attorney for Granville Hahn, Sheriff.

## 4. Form of rule.

In pursuance of the præcipe, the prothonotary issues a rule in the following form:

Continental Brewing Co.	} In the Court of Common Pleas of Northampton County, No. 24, Sept. T., 1903, <i>Pluries fi. fa.</i>
v.	
Jacob Frech.	

And now, August 27, 1903, entered rule on Louis F. Neuweiler,

\*Parmentier v. Stewart, 1 T. & H. Pr., section 1137; Lentz v. Witte, 1 T. & H. Pr., section 1137.

claimant, who makes claim to certain goods and chattels levied on, under above stated execution, to appear in open court on Monday, the 14th day of September, A. D., 1908, at 10 o'clock, A. M., and show cause why an issue should not be framed to determine the ownership of said goods and chattels.

From the record,  
[Seal.]

L. F. Giering, Proth'y.

#### 5. Notice of rule.

Notice of this rule must be given to the plaintiff, the defendant and to any third person in whose possession the goods may be found, and to the claimant, whether in or out of possession.<sup>5</sup> The form may be as follows:

James Hartzog	}	Court of Common Pleas of Northampton County.
v.		<i>Fi. fa.</i> No. 3, Sept. Term, 1908.
Henry Kramer.		Original, No. —, Jan'y T., 1908.

To J. L. Bruner, Esq.,

Please take notice that a rule has been entered in above stated case by the sheriff of Northampton county, against one Vera Giddings, claimant, who claims to be the owner of the goods and chattels seized in your possession on the — day of —, 1908, by virtue of said execution, requiring her to appear in said court on the — day of September, 1908, and show cause why an issue should not be framed to determine the ownership of said goods and chattels, when and where you may attend, if you see fit so to do.

Granville Hahn, Sheriff.

Aug. 23, 1908.

#### 6. Rule for issue in Allegheny county.

Rule 133, Allegheny county, provides: "Applications under the sheriff's interpleader act must be in writing, verified by affidavit, setting forth facts necessary to give the court jurisdiction, and containing a schedule or other sufficient description of the goods or chattels taken in execution; whereupon a rule will be granted on the claimant of the goods and chattels and the plaintiff in the execution to show cause why an issue should not be framed to determine the ownership of said goods and chattels; a copy of which rule shall be served by the sheriff on the parties or their attorney."<sup>5a</sup>

#### 7. Answer to rule — practice in Allegheny county.

Rule 134, Allegheny County, provides:

"1. If the parties, or either of them, fail to appear and answer the rule under oath within five days after the service thereof, the rule shall be discharged; and if the default is made by the plaintiff alone, the officer shall release the property claimed, otherwise he shall proceed with the execution."

2. If both parties appear and answer as aforesaid, the court may

<sup>5</sup> The sheriff should make return of service of notice promptly, *Eaby v. Ziegler*, 9 D. R. 536.

<sup>5a</sup> See *Strouse v. Bard*, 8 Supr. C. 48; *Horsuch v. Fry*, 23 Supr. C. 509, approving these rules.

discharge the rule and direct the officer to release the property; or order him to proceed with the execution; or make the rule absolute and award an issue to determine whether the right of property, in the goods and chattels claimed, is in the claimant or not, or make such other order as the justice of the case may require."

#### 8. Hearing — rule absolute — bond.

Upon the return day of this rule and hearing the rule is either made absolute or discharged. If discharged for any reason, the execution or process goes on. A hearing is implied.<sup>6</sup>

Section 2 of the act of 1897 was amended by the act of May 8, 1909, P. L. 475, so as to read as follows:

Section 2. "If the court shall make said rule absolute, the claimant shall give bond to the commonwealth of Pennsylvania, with security to be approved by the court, if in term time, or a judge thereof, if in vacation, in double the value of the goods and chattels claimed, in case the appraised value of the said goods and chattels does not exceed the amount of the judgment, interest and costs, upon which said execution is issued, and in case the appraised value does [not] <sup>7</sup> exceed the amount of said judgment and interest, then bond to be given in double the amount of said judgment and interest and probable costs; conditioned that he shall at all times maintain his title to said goods and chattels, or pay the value thereof to the party thereunto entitled, and thereupon the sheriff shall deliver said goods and chattels to the claimant."

Under section 2 of the act of 1897 it was held the bond must be "in double the value of the goods and chattels claimed," <sup>8</sup> and the act of 1909 was doubtless intended to remedy this, so as to apply only where the value does not exceed the judgment; but where it does, then the bond shall be double the amount of the judgment, etc. But the act has two negatives as printed.

A married woman may give her own bond where the property is in the possession of the family; <sup>9</sup> but if in the joint possession of herself and her husband she cannot.<sup>10</sup>

#### 9. Issue and bond in Allegheny county.

Rule 135, Allegheny county, provides:

"If rule is made absolute and issue awarded, the claimant shall be plaintiff, and all other parties shall be defendants; and the claimant shall give bond to be approved by the court, in accordance with law."

(Compare your rules of court.)

#### 10. Effect of failure to give bond and file statement.

Rule 136, Allegheny county, is as follows:

"If the claimant fails to give bond and file statement within

<sup>6</sup> *Gerner v. Kuntz*, 1 Lehigh, 63.

<sup>7</sup> This "not" must be an interloper so trifling that the editor of the "session laws" could not see it.

<sup>8</sup> *Friedman v. Natl., Etc., Co.*, 16 D. R. 71, disapproving *Ellis v. Juster*, 7 D. R. 277, *infra*.

<sup>9</sup> *Hochman v. Carroll*, 12 Northam. 73.

<sup>10</sup> *Wolffington v. Conaway*, 18 D. R. 235; *Sullivan v. Craine*, 18 D. R. 752.

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two weeks after award of issue, as required by law, the claimant shall be deemed to have abandoned all claim to the goods levied on, and upon production of the prothonotary's certificate, showing such failure of claimant, the sheriff shall proceed with the execution. If the claimant fails to give bond, but files his statement, as required by law, upon the production of the prothonotary's certificate of such fact, the sheriff shall proceed with the execution and pay the proceeds of the sale of the claimed goods into court, to await the determination of the issue."

### 11. Feigned issue.

Wharton defines a feigned issue thus: "A proceeding whereby an action is supposed to be brought by consent of the parties to determine some disputed right, without the formality of pleading, saving thereby both time and expense." The issue thus raised is usually incidental to or springing out of some other action or proceeding at law or in equity. Under the old interpleader law the issue raised by another party's coming in as claimant of a right was called a feigned issue and the question to be tried and decided was framed by the parties under the direction of the court and placed on "the feigned issue list."

Rule 137, Allegheny county, provides that "feigned issues shall be regularly entered on the appearance docket, and as soon as plea is entered, shall be placed on the issue docket, as other causes."

(Compare your rules of court.)

### 12. The issue framed by the court and practice thereon.

Section 10 of the act, *supra*, provides, as follows: "In the issue to be framed under this act the claimant shall be the plaintiff and all other parties thereto shall be defendants. The issue shall consist of a concise statement of the source of the claimant's title, signed and sworn to by him, or by some one in his behalf and an affidavit to be filed by the defendant or defendants in the issue that he verily believes the title of the plaintiff therein to be invalid, and if the defendant fail or refuse to file said affidavit within fifteen days after notice of a rule to file same, the court shall upon motion of the claimant enter judgment against the defendant for want of such affidavit. The courts of Common Pleas may make general rules governing the proceedings under this act, not inconsistent herewith, and may grant new trials of such issues, and the judgment recovered shall be subject to appeal to the Supreme Court or Superior Court as in other cases. By leave of court other parties may be allowed to intervene and become parties to the issue, with like rights and remedies as if made parties at the commencement of the proceedings." The clause above in regard to rules is confined to procedure in the trial of the issue made up and has no reference to the granting of an issue.<sup>11</sup> In case the affidavit above required, on the issue, is made by a stranger he must show therein why the defendant failed to make it.<sup>12</sup> The rules made by the court will not be disturbed by

<sup>11</sup> Book v. Sharpe, 189 Pa. 44; Comth. v. Burns, 14 Supr. C. 248.

<sup>12</sup> Horsuch v. Fry, 23 Supr. C. 509.



the appellate court, in their enforcement,<sup>13</sup> unless there is an abuse of discretion.<sup>14</sup>

It was held in York county that a special order framing an issue is not necessary, since the plaintiff is required to file his statement within two weeks from the order making the rule absolute.<sup>15</sup> Notwithstanding a rule of court providing for discharge of rule in default of appearance and answer after five days' notice, no discharge of rule can be made before the return day.<sup>16</sup> Under the Philadelphia rule of court, a rule will be made absolute where the wife makes affidavit that she owns the goods and did not derive title from or through her husband, the defendant.<sup>17</sup>

Under this act, the court must investigate and if it finds that there is no substantial question in dispute it may refuse an issue.<sup>18</sup> It is still largely discretionary with the court.<sup>19</sup>

### 13. Duty of court.

In ordering an issue "the court is not to inquire into the merits of the respective claims further than to see that they are not merely colorable, or collusive, or frivolous, but may be the bases of *bona fide* suits. If they may be, the interpleader must be granted, even though the court be of the opinion that the claims cannot finally prevail."<sup>20</sup>

It has been held to apply to foreign attachment.<sup>21</sup> A stranger may demand an issue,<sup>22</sup> but the award of it is not of right;<sup>23</sup> nor does an appeal lie for refusal generally,<sup>24</sup> except for abuse of discretion.<sup>25</sup> In case no answer is made to the notice of the rule, the issue should be awarded.<sup>26</sup> A surviving partner may be made a plaintiff in the issue.<sup>27</sup> This law does not apply, it was held, to attachment under the act of June 13, 1836, P. L. 606, because the trustees have full power to unravel disputes as to title.<sup>28</sup> If the sheriff assumes the risks, he cannot demand an issue.<sup>29</sup> It will not be awarded on a bare question of law, there being no facts in dispute.<sup>30</sup>

<sup>13</sup> Strouse v. Bard, 8 Supr. C. 48.

<sup>14</sup> Book v. Day, 189 Pa. 44.

<sup>15</sup> Lentz v. Ruth, 21 York, 169.

<sup>16</sup> Likins v. Conn, 18 D. R. 448.

<sup>17</sup> Charlton v. Richter, 18 D. R. 313.

<sup>18</sup> Platt v. McQuown, 20 C. C. 401; Fyan v. Brown, 11 D. R. 105; Plante v. Kearns, 3 Lehigh, 327.

<sup>19</sup> Comth. v. Burns, 14 Supr. C. 248; Raife v. Brewing Co., 15 Luz. L. R. 5.

<sup>20</sup> Book v. Sharpe, 189 Pa. 44.

<sup>21</sup> Morgan, Etc., Co. v. Gaites, 18 D. R. 313.

<sup>22</sup> Thomas v. Bauer, 6 D. R. 177.

<sup>23</sup> Berger v. Juerger, 7 Supr. C. 388.

<sup>24</sup> Barton v. Reynolds, 17 Supr. C. 504; Seip v. Seip, 16 York, 180; Assn. v. Bishop, 50 Pitts. L. J. 382.

<sup>25</sup> Gillespie v. Agnew, 22 Supr. C. 557.

<sup>26</sup> Meyer v. Jeske, 8 D. R. 239.

<sup>27</sup> Lippincott v. Keller, 2 Blair Co. 72.

<sup>28</sup> McCullough v. Goodheart, 8 D. R. 378.

<sup>29</sup> Taylor v. Neale, 12 Luz. L. R. 17.

<sup>30</sup> Mellon v. Kress, 47 Pitts. L. J. 81.

**14. Form of order for an issue.**

Continental Brewing Co. } In the Court of Common Pleas of North-  
 v. } ampton Co. No. 42, Sept. T., 1903, *plur-*  
 Jacob Frech. } *ies fi. fa.*

Now September 14, 1903, the sheriff's rule for interpleader issue in the above case is made absolute and an issue to determine the ownership of the goods claimed is awarded, wherein the claimant, Louis F. Neuweiler, is made plaintiff, and Continental Brewing Co. is made defendant.

By the court,  
 W. W. Schuyler, P. J.

After interpleader and issue granted, if other parties seek to intervene, they will be made parties to the issue framed.<sup>31</sup> Where the issue is made up on the right to rescind the contract the claimant may not amend by changing it to an issue on alleged fraud and collusion in the judgment.<sup>32</sup>

**15. Bond in interpleader — form.**

Sabilla Hersch,  
 Claimant,  
 v.  
 Construction Supply } In the Court of Common pleas of Berks  
 Co., Execution Plain- } county. No. 8, May Term, 1908, E. D.  
 tiff, and A. Hersch, } Interpleader bond under act of 1897.  
 Execution Defendant. }

KNOW ALL MEN by these presents: That we, Sabilla Hersch and John Gallagher are held and firmly bound unto the commonwealth of Pennsylvania in the sum of three hundred thirty-nine and 50/100 dollars (\$339.50), lawful money of the United States of America, to be paid to the said commonwealth; to which payment well and truly to be made and done we do bind ourselves, our heirs, executors and administrators, and every of them firmly by these presents.

Sealed with our seals and dated the 11th day of June, 1908.

Whereas, John C. Bradley, Sheriff of Berks county, did by virtue of a writ of *fieri facias* to No. 8, May term, 1908, levy upon certain goods and chattels as the property of A. Hersch, which goods and chattels have been claimed by Sabilla Hersch as her property, and

Whereas, the said sheriff thereupon in pursuance of the act of May 26, 1897, P. L. 95, entered a rule on the said Sabilla Hersch to show cause why an issue should not be framed to determine the ownership of said goods and chattels, which said rule was made absolute June 10, 1908, by the court, and

Whereas, by said act the said claimant is directed to give bond to the commonwealth in double the value of the goods claimed, which value by appraisal duly made, has been fixed at \$169.75 [or double the judgment, etc., as the case may be under act of 1909].

Now THE CONDITION of this obligation is such, that if the above bounden Sabilla Hersch shall in the said suit above mentioned maintain her title to said goods and chattels; or on failing to do so pay

<sup>31</sup> Epstein v. Bush, 31 C. C. 511.

<sup>32</sup> Sopherstein v. Salsberg, 17 Supr. C. 288.

the value thereof to the party or parties adjudged to be the owner or owners thereof, then this obligation to be void; otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in presence of Paul H. Price.

Sabilla Hersch [Seal].

John Gallagher [Seal].

*Approval by the Court.*

And now, to-wit, June 12, 1908, the within bond and surety are approved by the court.

G. A. Endlich, Judge.

A bond given before issue awarded has been held good.<sup>33</sup> The defendant should be given time to except to the sufficiency of the bond.<sup>34</sup>

**16. Filing bond and statement — default.**

By section eleven, *supra*, "the bond and claimant's statement of title shall be filed within two weeks after the sheriff's rule for an issue shall be made absolute, unless the court, for cause shown, shall extend the time for doing so."

After the plaintiff has filed his bond and statement, it is too late to take judgment of *non pros*.<sup>35</sup> A formal statement is required<sup>36</sup> which may be allowed by the court to be filed after two weeks, *nunc pro tunc*.<sup>37</sup> The time for filing may be extended by the court.<sup>38</sup> Section 12 of the act of 1897 as amended by the act of 1909, provides:

"If the claimant fails to give bond, but otherwise files his or her statement, or title within the time herein specified, the court if in [his] term time, or a judge thereof, if in vacation, may on motion of the plaintiff in the execution or process, or other party interested therein, direct a sale of the goods and chattels claimed as aforesaid; and the plaintiff in the execution or process shall direct the sheriff as to what goods and chattels he shall sell, but no more shall be sold than enough to satisfy the said execution or process, and the proceeds shall be paid into court to await the determination of the issue."

**17. Plaintiff's statement — form.**

Parties —

Court, etc.

*Claimant's Statement.*

The plaintiff's and claimant's demand is founded and the source of her title to the goods and chattels for which said interpleader issue is granted, is as follows, to-wit:

1. The plaintiff avers that she is the wife of Allen Hersch, execution defendant, and resides with her husband and family at No. 550 Linden street, Reading, Penna. That she is the sole owner of the

<sup>33</sup> Comth. v. Beary, 9 Supr. C. 246.

<sup>34</sup> Jones v. Moyer, 4 Kulp, 288.

<sup>35</sup> Barndollar v. Fogarty, 203 Pa. 617; Fishman v. Oyler, 11 Dauphin Co. 130.

<sup>36</sup> Provost v. Algeo, 8 D. R. 517.

<sup>37</sup> Chase v. Kemble, 17 D. R. 1083.

<sup>38</sup> Amberson v. Cooper, 32 C. C. 29; Lentz v. Ruth, 21 York, 169; Schiller v. Cohen, 24 Montg. Co. 30.



goods and chattels hereinafter set forth in the schedule hereto attached and made a part of this statement, which goods and chattels have been levied upon as the property of A. Hersch by the sheriff of Berks county on an execution issued to No. 8, May Term, 1908, E. D., by the Construction Supply Company.

2. The plaintiff avers that for a period of ten years and upwards, prior to the fall of 1907, she was employed and worked for various parties in the city of Reading, viz. [naming them], and various other parties, and received compensation for her services rendered, all of which income or money she retained as her separate property and wherewith the plaintiff and claimant, at various times purchased the goods and chattels hereinafter set forth, with the exception of a few articles, viz.: one stand appraised at five cents, and one bed spring appraised at one dollar, which were given to her as presents by persons not members of her family.

All of which is true to the best of the claimant's knowledge and all of which the plaintiff expects to be able to prove upon the trial of the cause.

Sabilla Hersch.

June 11, 1908.

State of Penna. }  
County of Berks. } ss.

[Affidavit of claimant to truth of above.]

#### 18. Annexed schedule of goods as appraised.

##### APPRAISEMENT.

Title  
Berks county, ss. } Venue.

We the subscribers, having been summoned by the sheriff of the county of Berks, to value and appraise the goods and chattels under the provisions of the act of assembly, approved the 26th day of May, A. D., 1897, entitled, "an act, etc.," being duly sworn, say that we will well and truly, faithfully and without prejudice or partiality value and appraise the same.

Sworn and subscribed to before me, \_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Appraisers.

John Bradley, sheriff.

Inventory and appraisalment.

[Here follow the articles and values.]

##### *Certificate.*

We, the undersigned appraisers, appointed and summoned by the sheriff of Berks county to value and appraise the property claimed by Sabilla Hersch in the above stated execution, having been duly sworn or affirmed as above set forth, do certify that we have valued and appraised the said property as above set forth.

Witness our hands and seals the 4th day of June, A. D., 1908.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [Seal].  
[Seal].  
[Seal].

A defective statement may be amended. Objections must be taken by demurrer and not a motion for *non pros*.<sup>27a</sup>

**19. Bond, for whose benefit.**

Section 3, *supra*, says: "Such bond shall inure to the benefit of the plaintiff in the execution or process, or of any other person who may be adjudged to have the right or title to said goods or chattels, or any part thereof, and successive suits may be brought thereon to the use of such persons until the amount thereof is exhausted.

The sureties cannot be released on the allegation that the claimant is about to abscond.<sup>29</sup>

Where a judgment has been taken for want of an affidavit of defense in a suit on the bond, it will be properly opened when the statement fails to aver a judgment assessing the value of the goods, without which such judgment will be vacated and a new trial awarded.<sup>40</sup> Suit on the bond may be prematurely brought, for want of the filing of the statement within the time and before judgment of *non pros*.<sup>41</sup> Fraud of defendant in procuring the bond cannot be set up by the maker when plaintiff had no notice of it.<sup>42</sup>

**20. One bond for several writs — notice to each.**

"Section 4. If there be more than one execution or process issued against said goods and chattels, only one bond shall be filed in the court out of which the first execution or process issued, but notice of an intention to present security for approval shall be given to the plaintiff in every such execution or process and to the person found in possession of such goods and chattels."

**21. Claimant may file own bond, when.**

"Section 5. If the goods and chattels levied on are found in the possession of the claimant or his agent or bailee, and not in the possession of the defendant in the execution or process, the court may permit the claimant to file his own bond upon it being shown that the claimant does not derive his title thereto by, from or through the defendant."

A claimant will not be allowed to file his own bond where the goods were in the actual and sole possession of the defendant;<sup>43</sup> nor will the wife be permitted to do so where the goods are in possession of her and her husband.<sup>44</sup>

**22. Amount of bond and incidents.**

The amount of the bond, in any event, should be large enough to cover all the writs, and it should be in double the value of the

<sup>27a</sup> *Barndollar v. Fogarty*, 203 Pa. 617.

<sup>29</sup> *Armour v. Tabor*, 7 D. R. 462.

<sup>40</sup> *Gain v. Steinberger*, 36 Supr. C. 303.

<sup>41</sup> *Comth. v. Tuchman*, 15 D. R. 103.

<sup>42</sup> *Gordon v. Ricardo*, 10 Lack. Jur. 37.

<sup>43</sup> *Schiller v. Cohen*, 24 Montg. Co. 30.

<sup>44</sup> *Sullivan v. Craine*, 35 C. C. 173; *McKee v. Hood*, 17 D. R. 1032; *Shearer v. Quigle*, 16 D. R. 220; *Wolflington v. Conoway*, 18 D. R. 235.

goods or the amount of the judgment.<sup>1</sup> The penalty of the bond includes costs,<sup>2</sup> so a non-resident claimant need not give bond for costs in addition.<sup>3</sup> The bond is forfeit by failing to file a statement as required by law.<sup>4</sup> If, when the bond and declaration are filed, the property has ceased to be in possession of the sheriff, the court will not order the sheriff to deliver possession.<sup>5</sup> A married woman may now give her own bond,<sup>6</sup> but not when the goods are in the joint possession of her and her husband.<sup>7</sup> Under the act of 1848, P. L. 450, extended by act of Mar. 10, 1858, P. L. 91, the lien of the execution on the goods remained,<sup>8</sup> but now, when delivered to the claimant, the lien is gone and the bond is substituted.<sup>9</sup> They cannot be replevied.<sup>10</sup> Unwonted delay will be held to waive objection to irregularities in the bond.<sup>11</sup>

### 23. Appraisement of goods.

Section 6 of the act of 1897 as amended by the act of 1909, *supra*, provides:

"The value of the goods and chattels claimed shall be determined by appraisers appointed by the sheriff, duly qualified and sworn by him to make a just and fair valuation of the said goods and chattels claimed, subject to the approval thereof by the court." Although the value may be agreed upon.<sup>12</sup>

The act does not fix the number of appraisers. Following the practice in other cases, it should not be less than three.

### 24. Cost of appraisement. Failure to pay.

Section 7 of the act of 1897, is amended by the act of 1909, so as to read as follows:

"The cost of making an appraisement of said goods and chattels shall be the sum of four dollars, to be paid to the sheriff, which shall form part of the costs of the case, and shall be paid by the claimant at the time of making his or her claim. If the claimant fails to pay said sum when required under this act so to do, it shall be treated as an abandonment of his or her right to have the goods and chattels themselves as the case may be, and the sheriff shall proceed to sell said goods and chattels, or so much thereof as may be necessary, and apply the money received from the sale thereof, in satisfaction of said execution or process."

Under the act of 1897, it was held that where the claim is meritorious failure to pay the fees will not prevent making the rule

<sup>1</sup> *Ellis v. Jester*, 7 D. R. 277. (See act 1909 as to the alternative.)

<sup>2</sup> *Reger v. Manhattan Brass Co.*, 6 Supr. C. 375.

<sup>3</sup> *Mills v. Bell*, 42 W. N. C. 128.

<sup>4</sup> *Comth. v. Beary*, 9 Supr. C. 246.

<sup>5</sup> *Nelson v. Nelson*, 14 Lanc. L. R. 356.

<sup>6</sup> *Hagen v. Dormeyer*, 14 Lanc. L. R. 231.

<sup>7</sup> *Ruffner v. Brown*, 24 C. C. 507; *Austen v. Bannister*, 31 C. C. 288.

<sup>8</sup> *Riley v. Ogden*, 185 Pa. 506; commenced in 1894.

<sup>9</sup> *Meyer v. Knight*, 21 Supr. C. 1; *Boginski v. Tobolski*, 21 C. C. 531; *Comth. v. Walter*, 195 Pa. 446.

<sup>10</sup> *Taylor v. Ellis*, 200 Pa. 191.

<sup>11</sup> *Makinson v. Calely*, 11 D. R. 516; *Maher v. Conner*, 2 W. N. C. 335.

<sup>12</sup> *Chicago Etc., Co. v. Kirby*, 15 Lanc. L. R. 361.

absolute.<sup>13</sup> Having once paid these fees, the claimant cannot recover them.<sup>14</sup> It was held under the act of 1897 that a married woman was not obliged to pay the costs of appraisement when she made claim for the goods levied upon<sup>15</sup> for her husband's debt. Where there is a divided verdict the costs will be apportioned.<sup>16</sup>

**25. Valuation prima facie evidence.**

"Section 8. The appraised value thus ascertained shall be *prima facie* evidence of the real value in any proceedings touching the ownership of said goods and chattels, but at the trial the real value thereof may be shown to be more or less than the appraised value, and a verdict and judgment may be rendered against the claimant up to the value of said goods and chattels as so proven," not exceeding the claim of the defendant.<sup>17</sup>

**26. Sheriff to retain possession, when.**

"Section 9. If the plaintiff in the execution or process voluntarily relinquish or abandon the lien of the levy upon the goods and chattels levied upon, or seized and claimed as aforesaid, the sheriff shall retain possession of the goods and chattels so claimed for a period of forty-eight hours after notice of such relinquishment or abandonment shall have been given by the sheriff to the claimant, so that the claimant may have an opportunity to take other proceedings to recover possession of the claimed goods."

**27. Sale of property.**

"Section 12. If the claimant fail to give a bond, but otherwise files his statement of title within the time herein specified, the court may, on motion of the plaintiffs in the execution or process, or other party interested therein, direct a sale of the goods and chattels claimed as aforesaid, and the proceeds thereof shall be paid into court to await the determination of the issue."

**28. Burden of proof.**

Upon the trial, the claimant has the burden of proof of title.<sup>18</sup> If a married woman be claimant, it is a question of fact whether the money invested in the business, though procured on loan by her husband, was paid by her.<sup>19</sup> There is no presumption in favor of its being her separate estate.<sup>20</sup> Where the husband has given his wife a bill of sale, the question is immaterial whether she is estopped

<sup>13</sup> Rood v. Jenkins, 3 Justice's L. R. 91.

<sup>14</sup> Lakeland Stables v. Kaufman, 21 Lanc. L. R. 28; 13 D. R. 569.

<sup>15</sup> Morrison v. Nipple, 39 Supr. C. 184.

<sup>16</sup> Dillich v. B. & L. Assn., 26 Lanc. L. R. 69.

<sup>17</sup> Penna., Etc., Mills v. Bibb Mfg Co., 12 Supr. C. 346; Mann v. Sala-berg, 17 Supr. C. 280.

<sup>18</sup> Gallagher v. Davis, 179 Pa. 504; Fidelity, Etc., Co. v. Madden, 190 Pa. 69; Yinger v. Clark, 7 Northam. 298; Maier v. Rosenbluth, 11 Kulp, 233.

<sup>19</sup> Fritchey Lumber Co. v. Isenberg Milling Co., 19 Supr. C. 321; Hall v. Will, 18 Lanc. L. R. 117.

<sup>20</sup> Hannum v. Pownall, 182 Pa. 587; 187 Pa. 292.



from setting up title under the bill of sale against others than the defendant.<sup>21</sup>

Where the goods seized are in the joint possession of the husband and wife, the presumption is that they belong to him and this must be overcome with clear proof.<sup>22</sup>

Where an issue of fact is raised by the proof, it must go to the jury.<sup>23</sup> The defendant in the issue being plaintiff in the execution or process, must maintain the title of the debtor.<sup>24</sup> The title to property *in transitu*, by a carrier, when levied upon, depends whether there was a symbolic delivery by transfer or assignment of the bill of lading.<sup>25</sup>

On the trial of an issue, where there is evidence to show that defendant had an agreement with the claimant by which he acquired an interest, it is for the jury to decide what this interest, if any, was.<sup>26</sup>

Where the issue is framed to try the absolute ownership of the property by the claimant he can not sustain a verdict based on evidence of lien or security only.<sup>27</sup>

Where the claimant takes the goods on giving bond, the jury must find the value thereof.<sup>28</sup> For non-appearance of the plaintiff on the trial a non-suit is properly entered.<sup>29</sup> If the parties agree upon the value of the goods, leaving them in the custody of the defendant, interest is not allowable.<sup>30</sup>

#### 29. Costs — attorney fee.

"Section 13. If upon the trial of said issue the title to said goods and chattels be found not to be in the claimant, he shall pay all the costs of said proceeding, including the allowance of a fee to counsel for the plaintiff in the execution or process, as shall be fixed by the court, and the proceeds of said goods and chattels, if in court, shall be paid to the party entitled thereto as thus ascertained. If, however, said goods and chattels have been taken by the claimant, a verdict and judgment for the value thereof shall be entered against the claimant and in favor of the defendant in the issue."

And by section 14 of the act, *supra*, it is provided that "in all issues framed under this act all the costs of the proceedings shall follow the judgment and be paid by the losing party as in other cases."

If the execution plaintiff is a non-resident, though made a defendant in the issue, he may be ruled to give security for costs.<sup>31</sup> But a

<sup>21</sup> Thomas v. Butler, 24 Supr. C. 305.

<sup>22</sup> Gerner v. Kuntz (No. 1), 1 Lehigh, 60.

<sup>23</sup> Ralph v. Fon Dersmith, 3 Supr. C. 618.

<sup>24</sup> Schoeneman v. Weill, 3 Supr. C. 119.

<sup>25</sup> Storey v. Hershey, 19 Supr. C. 485.

<sup>26</sup> McKinney v. Tuttle, 10 Supr. C. 535.

<sup>27</sup> Leach v. Alexander, 12 Supr. C. 377.

<sup>28</sup> Mann v. Salsberg, 17 Supr. C. 280; Penna., Etc., Mills v. Bibb Mfg Co., 12 Supr. C. 340.

<sup>29</sup> O'Neill v. Wilt, 4 Leg. Gaz. 70.

<sup>30</sup> Chicago, Etc., Co. v. Kirby, 15 Lanc. L. R. 361.

<sup>31</sup> Saint, Etc., Church v. Little, 10 Kulp, 303.

non-resident claimant who has given bond to interplead cannot be so ruled.<sup>32</sup>

Whilst the act of 1897 places the costs on the claimant if he fails to establish his title—the court may, in case of a divided verdict apportion them equitably.<sup>33</sup> But if the claimant is defeated, except in a trifling item, the costs must be paid by him.<sup>34</sup> And in York county and some others it was held that if a part of the goods belonged to the execution defendant, the claimant must pay all the costs, including counsel fee of \$10.<sup>35</sup>

### 30. Appeals, joint or several.

By section 10 the right of appeal is preserved, as in other cases. When there are several issues with different plaintiffs, separate appeals must be taken. If an appeal be taken before judgment is entered on the verdict it will be quashed.<sup>36</sup> Where more than one party appeals from a judgment in a joint appeal, and it appears that their rights are independent, the appellants may be required to elect which one will prosecute the appeal, and as to the others a *non pros.* will be entered.<sup>37</sup>

Where the court refuses an issue and the claimant gives bond for appeal, with condition to prosecute his appeal and pay all costs and damages awarded by the appellate court, if the sheriff sells the goods pending such appeal, and the first execution creditor agrees to the application of the fund to junior executions he cannot, after affirmance, realize on this bond.<sup>38</sup>

### 31. Second writ — remedy of lessee.

The refusal of an issue is not a final judgment on the merits of the title of claimant in possession, who may be a pledgee only. The interest of defendant may be sold on a second writ.<sup>39</sup>

Where the goods of a lessee are levied upon and the lessor interpleads and obtains judgment against the creditor, the sheriff must deliver to the lessor. The lessee's remedy, if injured, is not against the sheriff, but his lessor for wrongful detention.<sup>40</sup>

<sup>32</sup> Orion, Etc., Mills v. Bell, 42 W. N. C. 128.

<sup>33</sup> Derr v. Frank, 17 Lanc. L. R. 193; Myers v. Jackson, 11 D. R. 369; King v. Randall, 13 D. R. 601; Dillich v. B. & L. Assn., 26 Lanc. L. R. 69; 18 D. R. 518.

<sup>34</sup> Marsh v. Ernhart, 17 Lanc. L. R. 195.

<sup>35</sup> Hoerner v. Pine Grove Brewing Co., 14 York 87; Wagner v. Bertholf, 11 D. R. 367; Dunn v. Shaw, 11 D. R. 129. Counsel fee was not allowed in Myers v. Jackson, 11 D. R. 369; King v. Randall, 13 D. R. 601; section 13, providing for counsel fee, is constitutional; Merrill v. Thorpe, 22 C. C. 181.

<sup>36</sup> Kimmel v. Johnson, 18 Supr. C. 429.

<sup>37</sup> White's Ap., 15 W. N. C. 313; Reynolds v. Lumber Co., 175 Pa. 437; Fotteral v. Floyd, 6 S. & R. 315.

<sup>38</sup> Comth. v. McNaught, 28 Supr. 369.

<sup>39</sup> Barton v. Reynolds, 17 Supr. C. 504.

<sup>40</sup> Comth. v. Walter, 195 Pa. 446. (For jangled practice, see Gottlieb v. Middleburg, 14 D. R. 616.)

**32. Sheriff's liability absolved.**

Section 15 provides: "If the sheriff shall comply with the provisions of this act, he shall be free from all liability to the claimant, the plaintiff and defendant in the execution, the person found in possession of the goods and chattels levied on or seized, and every other person who had knowledge of such levy or seizure prior to the sale of said goods and chattels, or who shall take any step under the provisions of this act."

**33. Form of affidavit of defense.**

Following is a form of affidavit of defense to plaintiff's statement in interpleader:

Parties.

State of Penna., } ss.  
County of Berks.

Venue.

E. Thalheimer of the Construction Supply Co., being duly sworn according to law, deposes and says that he verily believes the title of Sabilla Hersch, the plaintiff, to the articles set forth in the schedule filed with the plaintiff's statement, to be invalid.

Construction Supply Co., by Emanuel Thalheimer.

Sworn and subscribed before me this 17th day of August, A. D., 1908.

Sue E. Conner, Notary Public.

Commission expires Jan'y 21, 1911.

Wagner & Leidy, Att'ys for Defendant.

It has been held that plaintiff must rule the defendant to file an affidavit of defense; notice of filing is not sufficient.<sup>41</sup>

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<sup>41</sup> Standard, Etc., Co. v. Heath, 36 C. C. 590.

## CHAPTER XVII.

### EXECUTIONS IN PARTICULAR CASES.

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|--|--|
| 1. Execution against partner for individual debt.                        | 3. Sale of growing crops.                    |
| 2. Suits and executions against husband and wife for family necessities. | 4. Sale of fixtures.                         |
|  | 5. Execution for costs.                      |
|  | 6. Executions from Federal and State courts. |

#### 1. Execution against partner for individual debt.

Section 1 of the act of April 8, 1873, P. L. 65, provides: "Whenever any judgment has been or hereafter shall be obtained against one or more of the members of a partnership, upon any individual indebtedness of such defendant or defendants, any such creditor may have execution—*feri facias*—issued from the court where such judgment is entered: *Provided*, The same be entered in the county where the chief office or place of business of the said partnership is or was last located, which shall command the sheriff or other officer to levy the sum of said judgment, with interest and costs of suit, upon the interest of the defendant or defendants in said writ, of any personal, mixed or real property, rights, claims, and credits in such partnership and thereupon proceed and sell the same; and the purchaser at such sale shall thereupon have a right to compel a settlement of the partnership accounts of such partnership, by proceeding in equity, and to determine and receive the interest of said judgment debtor or debtors in the partnership property, rights, claims and credits aforesaid; in case of judgment obtained or entered of record in a county other than that wherein the chief office or place of business of said partnership is or was located the plaintiff may issue a *testatum* writ of *feri facias*, commanding the sheriff or other officer to proceed as in other cases where such writ may issue, and levy the sum of said judgment, with interest and costs of suit, in the same way and with the same force and effect as herein provided in case of sale under execution of *feri facias*: *Provided*, That such rights, claims and credits shall be proceeded against and sold in the manner provided in cases for the sale of personal property, except where real estate is taken in execution, in which case the same shall be advertised three weeks, in manner as is provided by law."

(The remainder of the section applied to pending suits and rights, at its passage.)

The special *fi. fa.* provided by this act does not exclude an ordinary *fi. fa.*, but is an additional process.<sup>1</sup> Both writs may issue simul-

<sup>1</sup> Dengler's Ap., 125 Pa. 12.



taneously subject to the control of the court.<sup>2</sup> The landlord cannot claim rent out of such interest sold.<sup>3</sup>

## 2. Suits and executions against husband and wife for necessities.

Section 8 of the act of April 11, 1848, P. L. 536, provides: "That in all cases where debts may be contracted for necessities for the support and maintenance of the family of any married woman, it shall be lawful for the creditor in such case, to institute a suit against the husband and wife for the price of such necessities, and after obtaining a judgment, have an execution against the husband alone; and if no property of the said husband be found, the officer executing the said writ shall so return, and thereupon an alias execution may be issued, which may be levied upon and satisfied out of the separate property of the wife secured to her under the provisions of the first [sixth] section of this act: *Provided*, That judgment shall not be rendered against the wife, in such joint action, unless it shall have been proved that the debt sued for in such action, was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife."

In order that an execution may issue against the separate estate of the wife, she must be joined in an action against her and her husband and a judgment must be had against both, on proof that she contracted the debt as well as that it was incurred for articles necessary for the support of their family.<sup>4</sup> The articles must have been purchased by her<sup>5</sup> and they must have been necessities, the word "or" meaning and in this act.<sup>6</sup> If the debt was contracted in a state where joinder of husband and wife is unnecessary such joinder is not necessary here.<sup>7</sup> The pleadings formerly had to show that she contracted the debt for articles necessary for the support of their family.<sup>8</sup> But since the act of June 8, 1893, a judgment against her is presumed to be regular<sup>9</sup> and need not show affirmatively all the requisites.<sup>10</sup> The presumption, however, still remains that when the wife purchases necessities for the family she does so as her husband's agent and this must be overcome by proof;<sup>11</sup> because the husband is still primarily liable for the support of his family.<sup>12</sup>

Before an execution may issue against the wife's separate estate

<sup>2</sup> Little v. Lane, 15 W. N. C. 380.

<sup>3</sup> Randall v. Stedje, 2 C. C. 608.

<sup>4</sup> Bear's Est., 60 Pa. 430; Berger v. Clark, 79 Pa. 340; Sawtelle's Ap., 84 Pa. 306; Fell v. Brown, 115 Pa. 218; Bair v. Robinson, 108 Pa. 247.

<sup>5</sup> Murray v. Keyes, 35 Pa. 384.

<sup>6</sup> Park v. Kleeber, 37 Pa. 251; Cummings v. Miller, 3 Grant, 146; Wilson v. Renshaw, 91 Pa. 224.

<sup>7</sup> Evans v. Cleary, 125 Pa. 204.

<sup>8</sup> Berger v. Clark, 79 Pa. 340.

<sup>9</sup> Abell v. Chaffee, 154 Pa. 254; Adams v. Grey, 154 Pa. 258.

<sup>10</sup> Toomey v. Rosansky, 11 Supr. C. 506; Hogan's Est., 181 Pa. 500; Burnes v. Maloney, 7 Kulp, 341; Harrar v. Croney, 13 C. C. 193.

<sup>11</sup> Llewellyn v. Levy, 163 Pa. 647; Moore v. Copley, 165 Pa. 294; Waesch's Est., 166 Pa. 204.

<sup>12</sup> Roll v. Davison, 165 Pa. 392; Gross' Est., 15 D. R. 38.

under this act an execution must have issued against the husband and his property be exhausted or the writ returned "*nulla bona*."<sup>13</sup> The wife's estate is only liable to satisfy claims for family necessities, where her husband is insolvent and unable to pay.<sup>14</sup> An attachment execution comes within the terms of the act.<sup>15</sup>

An alias without a return of *nulla bona* as to the husband will be set aside, especially when the *fi. fa.* was issued to the same return day as the alias.<sup>16</sup>

### 3. Sale of growing crops.

An execution against a tenant who farms for a share of the crop deliverable in the bushel is good against the crop, as the landlord has no interest in it until severed and divided.<sup>1</sup> But the lessor may proceed by distress as for money rent, because "a distress is inseparably incident to every service that may be reduced to a certainty."<sup>2</sup> Growing grain is personal property and may be seized and sold in satisfaction of an execution, though there be an older judgment which is a lien on the land and a purchaser of the land does not take it, where the tenant had it set aside as his exemption on a *fi. fa.*<sup>3</sup> A sale on a *fi. fa.* implies severance and a subsequent sale of the land on a *vend. ex.* does not embrace the crop.<sup>4</sup>

So an assignment by a mortgagor for the benefit of creditors carries the growing grain, and if the sheriff sells it on a *lev. fa.* the owner of the crop, although not in possession of the land may maintain an action of trespass *quare clausum fregit* against him, because the tenant is entitled to enter and take the away-going crop,<sup>5</sup> under the custom of the state.<sup>6</sup> He shall reap what he has sown.<sup>7</sup> But where a cropper leases after a judgment and levy though he pays cash in advance, it was held that a sale passes the crop.<sup>8</sup> Upon this, Trunkey, J., observes that the test is whether there has been a severance,<sup>9</sup> and it was later said where the defendant is in possession the title to the crop passes by the sale. But the landlord has no title to his share until it is harvested,<sup>10</sup> unless he reserves it in his lease, providing that the tenant shall not be entitled to his share until severance and division, which holds the possession in the landlord. The purchaser at the sheriff's sale is entitled to the

<sup>13</sup> *Franklin v. Rush*, 1 Phila. 571; *Stiles v. Jeffries*, 8 Phila. 303; *Berger v. Clark*, 79 Pa. 340; *Cleaver v. Scheetz*, 70 Pa. 496.

<sup>14</sup> *Wauhoup's Est.*, 29 Pitts. L. J. 256; *Reed's Est.*, 4 Phila. 375; *Bear's Est.*, 60 Pa. 430; *Waesch's Est.*, 166 Pa. 204.

<sup>15</sup> *Franklin v. Rush*, 1 Phila. 571.

<sup>16</sup> *Overpeck v. Baltzell*, 25 Mont'g Co. 147.

<sup>1</sup> *Rinehart v. Olwine*, 5 W. & S. 157; *Ream v. Harnish*, 45 Pa. 376.

<sup>2</sup> *Fry v. Jones*, 2 Rawle, 11.

<sup>3</sup> *Hershey v. Metzgar*, 90 Pa. 217.

<sup>4</sup> *Stambaugh v. Yeates*, 2 Rawle, 161.

<sup>5</sup> *Myers v. White*, 1 Rawle, 353.

<sup>6</sup> *Stultz v. Dickey*, 5 Binney, 285.

<sup>7</sup> *Bittinger v. Baker*, 29 Pa. 66, limiting *Sallade v. James*, 6 Pa. 144, and *Groff v. Levan*, 16 Pa. 179.

<sup>8</sup> *Groff v. Levan*, 16 Pa. 179; *Sallade v. James*, 6 Pa. 144.

<sup>9</sup> *Hershey v. Metzgar*, 90 Pa. 217.

<sup>10</sup> *Long v. Seavers*, 103 Pa. 517; *Lamberton v. Stouffer*, 55 Pa. 284.

rent after the acknowledgment of the deed.<sup>11</sup> Where the tenant is to apply the rent to the landlord's debt and does so for the whole year there is no rent to pass to the purchaser.<sup>12</sup> Where one rents a field for two successive crops for a money consideration he is a tenant and not a cropper.<sup>13</sup> A tenant is entitled to his exemption (unless waived) and when the crop is set aside to him and sold for taxes, the landlord cannot replevy it.<sup>14</sup> "Growing crops of grain and vegetables, *fructus industriales*, distinguished from trees or *fructus naturales*, being goods and chattles and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution, as personal chattels"<sup>15</sup> at the common law, and this is not changed by the statute of frauds.<sup>16</sup>

#### 4. Sale of fixtures.

A difficult question has sometimes arisen as to the distinction between movable fixtures which are the subject of sale as personalty and permanent fixtures which pass with the realty. It was held that gas fixtures, lamps, awnings and signs are personalty;<sup>1</sup> also a heater and gas fixtures;<sup>2</sup> a movable glass show case and gas pendants;<sup>3</sup> materials old and new on hand for repair;<sup>4</sup> radiators and valves used for heating purposes, if not strongly or permanently attached to the realty.<sup>5</sup> But a mortgage may be so comprehensive as to embrace all machinery on the premises which would include coal cars used in mining.<sup>6</sup> The rule as between vendor and vendee is more strict than that between landlord and tenant, where trade fixtures are removable.<sup>7</sup> But where the fixtures are intended to be permanent, such as counters, etc., they are not personalty;<sup>8</sup> also filling cars used with a furnace and a necessary part of the operation;<sup>9</sup> also machinery necessary to a factory plant;<sup>10</sup> also beer pump, bar and appurtenances, wall fixtures and closet, counter and desk, necessary to a bibulosity plant;<sup>11</sup> also the necessary articles to operate a slate quarry, such as derrick, chain hoist, pumps, etc.<sup>12</sup>

<sup>11</sup> Bank of Penna. v. Wise, 3 Watts, 394 (act June 16, 1836.)

<sup>12</sup> Fullerton v. Schaffer, 12 Pa. 220.

<sup>13</sup> Irwin v. Mattox, 138 Pa. 466.

<sup>14</sup> Hazlett v. McCutcheon, 158 Pa. 539.

<sup>15</sup> Green v. Armstrong, 1 Denio, 550 N. Y.

<sup>16</sup> Backenstoss v. Stahler's Admrs., 33 Pa. 251; Fetrow's Exs. v. Fetrow, 50 Pa. 253.

<sup>1</sup> Wilson v. Steel, 13 Phila. 153; Vaughan v. Haldeman, 33 Pa. 522; Penn., Etc., Co. v. Thackara, 11 W. N. C. 391.

<sup>2</sup> Heysham v. Dettre, 89 Pa. 506.

<sup>3</sup> McLean v. Palmer, 2 Kulp, 349.

<sup>4</sup> Wright v. Pyne, 17 Leg. Int. 364.

<sup>5</sup> Natl. Bank of Catasauqua v. North, 160 Pa. 303.

<sup>6</sup> Hillard, Etc., Co. v. Amity Coal Co., 2 C. P. R. 117.

<sup>7</sup> Wilson v. Steel, 13 Phila. 153.

<sup>8</sup> McLean v. Palmer, 2 Kulp, 349; Christian v. Dripps, 28 Pa. 271.

<sup>9</sup> Wright v. Pyne, 17 Leg. Int. 364.

<sup>10</sup> Voorhis v. Freeman, 2 W. & S. 116; Pyle v. Pennock, 2 W. & S. 390; Harlan v. Harlan, 15 Pa. 507.

<sup>11</sup> Wilson v. Steel, 13 Phila. 153; Weaver v. Morris, 1 Del. Co. 230.

Chattels affixed to the free-hold pass with it;<sup>13</sup> but not where the parties have agreed to a severance.<sup>14</sup>

Machinery delivered to a rolling mill but never put in place remains personalty.<sup>15</sup> "Privilege for the benefit of trade holds only betwixt landlord and tenant; not betwixt third persons and the owner of the soil."<sup>16</sup> Where the machinery is sold separately as personalty, the execution creditor is entitled to the proceeds of the sale in a contest between creditors. The purchaser assumes the risk as to whether his title is good.<sup>17</sup> A temporary separation of a fixture, which is re-annexed does not become personalty.<sup>18</sup> Scales and scoop shovels used generally about mills were held to be personalty.<sup>19</sup> The sale of fixtures as personalty may be enjoined.<sup>20</sup> Where fixtures are treated by the parties as personalty the burden of proof is on him who avers they are not.<sup>21</sup> The subscription list passes with the sale of a newspaper printing establishment.<sup>22</sup>

#### 5. Execution for costs.

The act of May 3, 1889, P. L. 78, provides:

"Execution process may be issued to enforce all orders of court, either final or interlocutory, for the payment of costs, made in any of the courts of this commonwealth, the same as on a judgment in the Courts of Common Pleas and shall be executed in the same manner."

Exemption, if not waived, may be claimed against such execution.<sup>23</sup>

#### 6. Executions from the federal and state courts.

Where goods are levied upon by the U. S. marshal under an execution from the federal courts, and there is a surplus in his hands an execution in the hands of the sheriff, after the marshal's levy, will become a lien on the surplus, although irregularly issued. No levy can be made on the property already levied upon.<sup>24</sup>

<sup>13</sup> Williams' Ap., 1 Mona. 274.

<sup>14</sup> Ross' Ap., 9 Pa. 491.

<sup>15</sup> Burke v. Weiss, 1 Kulp, 310.

<sup>16</sup> Johnson v. Mehaffey, 43 Pa. 308.

<sup>17</sup> Oves v. Ogelsby, 7 Watts, 106.

<sup>18</sup> Hutchman's Ap., 27 Pa. 209; Levinstein v. Born, 18 Phila. 265.

<sup>19</sup> Heaton v. Findlay, 12 Pa. 304.

<sup>20</sup> Conklin v. Meyer, 1 C. P. R. 3.

<sup>21</sup> Landell v. Harrison, 16 Phila. 85; Witmer's Ap., 45 Pa. 455.

<sup>22</sup> Gallagher v. Davis, 179 Pa. 504.

<sup>23</sup> M'Farland v. Stewart, 2 Watts, 111.

<sup>24</sup> Taylor Minors' Est., 27 W. N. C. 316.

<sup>25</sup> Bayard v. Bayard, U. S. Cir. Ct., 3 Clark, 261.

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## CHAPTER XVIII.

### EXECUTION — MANDAMUS TO MUNICIPALITIES

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|---|--|
| 1. Process against counties and townships.    | 4. Mandamus execution against a borough.         |
| 2. Mandamus writ, in the nature of execution. | 5. Mandamus execution against a school district. |
| 3. Mandamus execution against a township.     | 6. Form of petition for writ.                    |
|   | 7. Form of writ.                                 |

#### 1. Process against counties and townships.

Section 5 of the act of 1834, P. L. 538, provides that:

"All suits by a county or township shall be brought and conducted by the commissioners or supervisors thereof respectively, and in all suits against a county or township, process shall be served upon and defense made by the commissioners or supervisors thereof respectively."

#### 2. Mandamus writ, in the nature of execution.

Section 6 provides:

"If the judgment shall be obtained against a county in any action or proceeding, the party entitled to the benefit of such judgment may have execution thereof as follows, and not otherwise, viz.: It shall be lawful for the court in which such judgment shall be obtained, or to which such judgment may be removed by transcript from a justice of the peace or alderman, to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entitled to the benefit of such judgment, out of any moneys unappropriated of such county, or if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment."

Whether the duty to provide for the payment of the liabilities of a municipal corporation be specifically enjoined or result from the general powers and nature of the corporation, it may in all cases be equally enforced, by mandamus, and a peremptory writ will issue;<sup>1</sup> but not where the ordinance was repealed<sup>2</sup> or the order was revoked;<sup>3</sup> or where the county treasurer knows of an irregularity in the issuing of the order and there is no record of approval by the commissioners;<sup>4</sup> or to compel municipal officers to provide for services never rendered.<sup>5</sup>

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<sup>1</sup> Douglas v. McLean, 25 Supr. C. 9.

<sup>2</sup> Comth. v. Barker, 211 Pa. 610.

<sup>3</sup> Comth. v. Sholtis, 24 Supr. C. 487.

<sup>4</sup> Loucks v. Thompson, 11 D. R. 563.

<sup>5</sup> Comth. v. Upper Providence Twp., 13 D. R. 736.

This remedy has been held to be the only one to collect a debt from a municipality.<sup>6</sup> Where the debts of a district are marshalled and a decree made levying a special tax, interest will be allowed only to the date of such decree.<sup>7</sup> It is a proper writ to collect an award of damages for road improvements by a county<sup>8</sup> or the costs of an election contest under act of May 8, 1876, P. L. 148.<sup>9</sup>

The payment of costs for which a county is liable in a criminal case may be thus enforced.<sup>10</sup> It is the proper writ against a city and should be directed to the city treasurer whose duty it is to pay,<sup>11</sup> and covers the award of damages<sup>12</sup> which must be paid forthwith,<sup>13</sup> also costs imposed on a city;<sup>14</sup> nor will trivial excuses relieve the city from the duty or postpone payment.<sup>15</sup> The writ was refused to an assignee of part of a claim where the city afterwards had paid the whole to the plaintiff on the record.<sup>16</sup>

### 3. Mandamus execution against a township.

Section 7 of the act of 1834, *supra*, provides:

"If judgment shall be obtained against a township, the like proceedings may be had to enforce payment out of the township funds, according to the circumstances of the case."

Service on two commissioners, one of whom had not yet taken the oath, was held sufficient in *Kleckner v. Lehigh County*, 6 Wharton, 66; and so service upon one supervisor has been held sufficient.<sup>17</sup> The mandamus execution is final process<sup>18</sup> and no other form of execution can be used against a municipality to which this or a similar law applies;<sup>19</sup> nor can bail be given for a stay.<sup>20</sup> The funds which may be ordered applied in satisfaction are such as have not been appropriated;<sup>21</sup> and not those necessary to defray the ordinary current expenses of government.<sup>22</sup>

If the officers make answer that there are no "unappropriated moneys" in the treasury, and this is uncontradicted the court

<sup>6</sup> *Lyon v. Adams*, 4 S. & R. 443; *Wilson v. Huntingdon County*, 7 W. & S. 197; *Comth. v. Thompson*, 86 Pa. 442; *Hilbert v. North Codorus Twp.*, 14 York, 21.

<sup>7</sup> *Plains Township Indebtedness*, 7 Kulp, 234.

<sup>8</sup> *Hibberd v. Del. County*, 1 Supr. C. 204.

<sup>9</sup> *Cumberland County v. Trickett*, 107 Pa. 118.

<sup>10</sup> *Walton v. Lerch*, 2 Northam. 388.

<sup>11</sup> *Monaghan v. Phila.*, 28 Pa. 207; *Parke v. Pittsburgh*, 1 Pitts. 218; *Hay v. Wilkes-Barre*, 4 Kulp, 399; *Betz v. Phila.*, 4 C. C. 481.

<sup>12</sup> *Lex Street*, 12 Phila. 622.

<sup>13</sup> *Devereux Street Case*, 13 Phila. 103.

<sup>14</sup> *Hodges v. Scranton, Etc.*, 3 Law Times (N. S.), 77.

<sup>15</sup> *Comth. v. Hinkson*, 161 Pa. 266; *Lancaster County v. Lancaster City* (No. 4), 12 Lanc. L. R. 201.

<sup>16</sup> *Schuck v. Pittsburgh*, 11 Atl. 651.

<sup>17</sup> *Shea v. Plains Twp.*, 7 Kulp, 554.

<sup>18</sup> *Pollock v. Lawrence County*, 2 Pitts. 137 (U. S. Cir. Ct.).

<sup>19</sup> *Wilson v. Huntingdon County*, 7 W. & S. 197; *Boyle v. Lloyd*, 9 Kulp, 389; *Marcy Twp.*, in re, 9 Kulp, 424; *Hilbert v. N. Codorus*, 14 York, 21.

<sup>20</sup> *Morgan v. Moyamensing*, 2 Miles, 397.

<sup>21</sup> *Loute v. Allegheny County*, 2 Pitts. 411; *Comth. v. Floyd*, 2 Pitts. 422.

<sup>22</sup> *Comth. v. Floyd*, *supra*.

will not grant a mandamus.<sup>23</sup> Such execution will take funds remaining in a township treasury, after paying expenses of roads and keeping the poor.<sup>24</sup>

#### 4. Mandamus executions against a borough.

Section 26 of the act of April 2, 1860, P. L. 589, provides:

"In all cases where judgments have been or shall be obtained against a borough in this commonwealth, like proceedings to enforce payment thereof out of the borough fund, may be had, as are provided by law for enforcing payment of judgments against townships; and the writ of execution to be issued in such cases shall be served upon the burgess, or treasurer, or secretary of the town council of the proper borough."

Under the act of 1860, *supra*, the proceeding by mandamus execution is the proper mode of collecting from a borough.<sup>25</sup> Though in case the officers whose duty it is to assess, levy and collect the revenue refuse to perform their duty in this behalf, first an alternative writ, then a peremptory writ of mandamus will lie against them.<sup>26</sup> The creditor is entitled to his writ and will not be restrained by bill.<sup>27</sup> But in case of assessment of damages by viewers a final report refusing to assess any damages, no mandamus execution will lie;<sup>28</sup> nor upon an irregularly entered judgment on the day of the verdict.<sup>29</sup> It is not a writ, issuable of course, at the suggestion of the plaintiff, nor strictly of right. It must be based upon a petition setting out the facts which show the necessity or urgency for the writ, a legal claim, duly ascertained in legal form and such facts as appeal to the discretion and sense of justice of the court. The discretion of the court in awarding or refusing the writ will not be reviewed. An appeal, therefore, has only the effect of a certiorari and the record only will be examined upon the questions of jurisdiction and regularity.<sup>30</sup>

The officers are not liable to attachment for neglect or failure to appropriate moneys, when the ordinary<sup>31</sup> necessary running expenses have exhausted their levy, but they should promptly make answer and avoid further process.

#### 5. Mandamus against a school district.

Section 21 of the act of May 8, 1854, P. L. 621, provides:

"If judgment shall be obtained against a school district in any action or proceeding, the party entitled to the benefit of such judg-

<sup>23</sup> Comth. v. Allegheny County, 2 Pitts. 417.

<sup>24</sup> Larimer v. Pitt Twp., 2 Pitts. 352. (See act of May 3, 1852, section 5, P. L. 530, as to townships in Tioga county.)

<sup>25</sup> Comth. v. Mifflintown, 2 Leg. Gaz. 75; Oil City v. McAbey, 74 Pa. 249.

<sup>26</sup> Allen v. Dubois, 5 D. R. 565.

<sup>27</sup> Myers v. South Bethlehem, 149 Pa. 85.

<sup>28</sup> Pringle Street, 167 Pa. 646.

<sup>29</sup> Moravian Seminary v. Bethlehem, 153 Pa. 583.

<sup>30</sup> Conshocken Ave. Widening, 12 Supr. C. 573.

<sup>31</sup> Lackawanna, Etc., Co. v. Walsh, 3 Luz. L. Obs. 53; Larimer v. Pitt Twp., 3 Luz. L. Obs. 27; 2 Pitts. 352.

ment may have execution thereof as follows and not otherwise, to-wit: it shall be lawful for the court in which such judgment shall be obtained, or to which such judgment shall be removed by transcript from a justice of the peace or alderman, to issue thereon a writ, commanding the directors or controllers and treasurer of such school district, to cause the amount thereof, with interest and costs, to be paid to the party entitled to the benefit of such judgment, out of any moneys unappropriated of such district; or, if there be no such moneys, out of the first moneys that shall be received for the use of such district, and to enforce obedience to such writ by attachment."

This remedy is exclusive;<sup>32</sup> it is special and not alternative, and will be enforced by attachment against the officers.<sup>33</sup> If it is improperly issued an alias may be obtained.<sup>34</sup> A return of no funds is sufficient without specifying. Before an attachment will issue there must be plain disobedience of a peremptory command to pay.<sup>35</sup>

Under the act of May 8, 1854, P. L. 617, *supra*, a mandamus execution, and not an alternative writ, is the proper process to collect a judgment against a school district and such judgment must be revived every five years in order to entitle the plaintiff to issue;<sup>36</sup> and then the writ must be allowed by the court upon proper petition and be a command directed to the treasurer in the proper form<sup>37</sup> naming the school district as the legal entity.<sup>38</sup> The officers may not disregard such writ and should answer promptly, if they have no unappropriated moneys on hand.<sup>39</sup> It can issue only after judgment;<sup>40</sup> though a sewer assessment may be collected by this means<sup>41</sup> and the Quarter Sessions may issue it for road damages within its jurisdiction.<sup>42</sup> Where the officer to whom it is directed goes out of office and the judgment remains unpaid an alias may issue naming his successor.<sup>43</sup> A judgment against a township may be revived the same as against an individual to preserve the seniority of it.<sup>44</sup>

#### 6. Form of petition for writ.

Following is a brief form of petition for the writ, which must be varied to suit the case:

Irenus Clemmer	}	In the Court of Common Pleas of Berks
v.		No. ——— Term, 1910.
The Township of Alsace.	}	County.

To the Honorable the Judges of said court your petitioner re-

<sup>32</sup> Comth. v. Pease, 1 Dauphin, 47.

<sup>33</sup> O'Donnell v. School Dist., 133 Pa. 162; Barrett v. Pittston, Etc., Dist., 12 Luz. L. R. 409.

<sup>34</sup> Cavanaugh v. Cass School Dist., 6 C. C. 35.

<sup>35</sup> Gilbert School Dist. v. Mahanoy, Etc., Dist., 6 C. C. 38.

<sup>36</sup> O'Donnell v. Cass Twp. School Dist., 133 Pa. 162.

<sup>37</sup> Penna., Etc., Co. v. Denison School Dist., 3 Kulp, 64.

<sup>38</sup> Cavanaugh v. Cass School Dist., 6 C. C. 35.

<sup>39</sup> Burgess v. Northmoreland Twp. School Dist., 2 Lack. Jur. 106.

<sup>40</sup> South Chester School Dist. v. Hill, 1 Walker, 400.

<sup>41</sup> Harding Street Sewer Case, 48 Pitts. L. J. 147.

<sup>42</sup> Sedgely Ave., 88 Pa. 509. (See P. & L. Dig., vol. 18, col. 31361.)

<sup>43</sup> Bonner v. Foster Twp., 10 C. C. 477; Larimer v. Pitt Twp., *supra*.

<sup>44</sup> Conyngnam Twp. v. Walter, 95 Pa. 85.



spectfully represents that he recovered judgment in this case on the — day of — A. D. — 19—, to No. — Term, 1910, for the sum of — dollars and that although he has often requested the supervisors [or treasurer, in case the township has a treasurer] to-wit: [here name the disbursing officers], the said officers have hitherto neglected and refused and still neglect and refuse to pay said sum or any part thereof; and further, he verily believes that they have in their possession and control sufficient of the funds of said township, applicable to the payment of this debt to discharge the same. He therefore prays that a writ in the nature of a mandamus execution be directed to them commanding them to pay said judgment and the costs out of any money in their hands unappropriated and belonging to said township and he will ever pray.

Irenus Clemmer.

Sworn to this — day of  
—, 1910.

Upon this petition the court, if satisfied of the truth of it will award the writ as prayed for. It may, however, grant a premonitory rule to show cause first. If the writ is awarded there is no answer to it except to pay or show that there are no "unappropriated moneys" of the district in their hands. (See *supra*.)

#### 7. Form of writ.

City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania,

To the Commissioners of the incorporated part of Kensington District:

Whereas, lately, to-wit, on the — day of —, 1—, in our Court of Common Pleas, No. —, for the city and county of Philadelphia, Marie Antoinette Wood obtained a judgment against said, —, for the sum of — dollars and the costs and these same with the interest from the date aforesaid, remain due and unpaid as it is represented to us. Now we command you that you cause the said sum of — dollars with the interest due thereon from the — 1—, and — the costs on said judgment to be paid to the said Marie Antoinette Wood, out of any moneys unappropriated of your district, or if there be no such moneys, out of the first moneys that shall be received for the use of the said district, and herein fail not under penalty of law.

Witness the Honorable — Judge of said court, etc.

[Seal.]

—,  
Prothonotary.

## CHAPTER XIX.

### EXECUTION — BILL OF DISCOVERY IN AID OF.

- |                                   |   |
|-----------------------------------|---|
| 1. When bill will lie.            | 7. <i>Scire facias</i> upon defendants. |
| 2. Parties — jurisdiction.        | 8. Service of copy prerequisite.        |
| 3. Filing, etc., in Philadelphia. | 9. Clause of <i>capias</i> .            |
| 4. Contents of bill.              | 10. Effect of service.                  |
| 5. Verification — by whom.        | 11. Costs.                              |
| 6. Interrogatories to defendant.  |   |

#### 1. When bill will lie.

Section 9 of the act of 1836, *supra*, provides:

"It shall be lawful for the plaintiff, in any judgment for the recovery of money obtained in any court of this commonwealth, to have a bill for the discovery of the real and personal estate of the defendant in such judgment."

Before such bill will be allowed it must comply strictly with the act, *supra*, and show that there is no adequate remedy at law.<sup>1</sup>

The intent of a bill is not to discover real estate interests and effects whereof there is a record, but such interests as are occult and known to the defendant, only, as where it is held in trust.<sup>2</sup> As to personalty, there must first have been a return of "*nulla bona*" on a *fi. fa.*;<sup>3</sup> or where the sheriff has made a levy and the defendant declared the property belonged to a third person, and stopped the sheriff,<sup>4</sup> or where an attachment execution applies.<sup>4a</sup>

It lies against a corporation,<sup>5</sup> in which case it must be filed by a sequestrator.<sup>6</sup> But there is another remedy under the act of April 14, 1828, P. L. 439,<sup>7</sup> where the officers are concealing the effects of the corporation.

A bill will be refused unless prayed for in clear terms, in proper form and it discloses the grounds of jurisdiction.<sup>8</sup>

[This being an equitable proceeding, it will be treated fully and in detail in Vol. IV on Equity.]

A bill will be demurrable unless the petitioner shows that he verily believes the defendant has sufficient property to satisfy his claim but that he has transferred or concealed such property to avoid process of law and that he does not believe that defendant has any

<sup>1</sup> Comth. v. Baker, 14 W. N. C. 75.

<sup>2</sup> Rose v. Lloyd, 1 Clark, 333.

<sup>3</sup> Page v. Heath, 56 Pa. 215.

<sup>4</sup> Bevens v. Dingman's Choice Turnpike, 10 Pa. 174.

<sup>4a</sup> French v. Breidelman, 2 Grant, 319.

<sup>5</sup> Large v. Bristol Trans. Co., 2 Ashmead, 394.

<sup>6</sup> Bevens v. Dingman's, Etc., 10 Pa. 174.

<sup>7</sup> Bickly v. Paul, 2 W. N. C. 301. (See *supra*.)

<sup>8</sup> Gandolfo v. Hood, 1 Pearson, 269.

other property liable to execution and out of which the money might be made.\*

## 2. Parties to bill of discovery — jurisdiction.

Section 10 of the act of June 16, 1836, *supra*, provides:

"Such bill may be filed against the defendant in the judgment and against any person having possession of such real or personal estate, or who may owe, or be accountable for the same, or may have knowledge of the same, and shall be filed in the Court of Common Pleas of the county in which such judgment may be; or, if the person of whom discovery may be sought, shall reside out of such county, such bill may be filed in the Court of Common Pleas of the county where such person shall reside."

## 3. Filing, etc., in Philadelphia.

Rule 11, Philadelphia, provides:

"Bills of discovery in aid of proceedings at law shall be filed in the court in which the action at law is pending, and entitled as of the same term and number, and if the defendant in such bill is a non-resident, the complainant may apply by affidavit setting forth the place of residence, or supposed residence of the defendant, and thereupon, he shall be entitled to a rule to show cause why the defendant should not, within a time to be fixed at the hearing of the rule, answer the bill, or in default thereof, that an order be made in the proceedings at law for a judgment of nonsuit in case the plaintiff at law shall be the defendant in the bill, or that the plaintiff may read the bill in evidence on the trial of the cause, in case the defendant at law is also the defendant in the bill. Service of the rule may be made on the attorney of record, in the proceeding at law, and a copy of the affidavits shall be served, together with the rule; and if, at the expiration of the time allowed for putting in an answer, no sufficient answer shall be filed, the rule for nonsuit or for the admission of the allegations, shall be made absolute, unless reasons to the contrary be then shown."

## 4. Contents of bill.

Section 11, same act, "*supra*."

"Every such bill shall set forth:

I. The recovery of a judgment, as aforesaid, and the amount actually due thereon.

II. That there is reason to believe that the defendant in such judgment has real or personal estate, wherewith the same may be satisfied.

III. That such real estate has been conveyed, transferred or encumbered, or that such personal estate has been removed, transferred or concealed, or that by reason of concealment, or fraudulent transfer or encumbrance thereof, the complainant is prevented from having execution of his judgment.

IV. If such bill shall be filed against any person other than the defendant in such judgment, it shall set forth also that such person

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\* Comth. v. Baker, 14 W. N. C. 75.

has possession or knowledge of such real or personal estate, or that he can make discovery of such facts as will enable the plaintiff to have satisfaction of his judgment."

This applies where there are adverse claimants to the property.<sup>10</sup>

**5. Bill must be verified — by whom. —**

"Section 12. But no such bill shall be filed unless the complainant therein shall make oath or affirmation, to be filed therewith, that he verily believes the facts set forth therein to be true."

This was amended by act of April 29, 1844, P. L. 512, so as to authorize the oath to be made by "the agent, attorney or any disinterested person, on behalf of the complainant."

**6. Interrogatories to defendants.**

"Section 13. The complainant in such bill may also, either in the said bill, or by interrogatories to be filed therewith, propound to the defendants therein named such questions touching the subject matter thereof as may be necessary or proper for the purposes thereof, and as may be according to the rules and practice of courts of equity."

**7. Scire facias upon defendants.**

"Section 14. Upon the filing of such bill it shall be lawful for the court, or any judge thereof in vacation, to award a writ of *scire facias* to the sheriff requiring him to make known to the defendants therein named that they be and appear, at a certain time to be appointed by the said court, to answer the said bill, and all such interrogatories as shall be propounded to them, or show cause why they should not, and abide the judgment of the court in the premises."

**8. Service of copy pre-requisite to answer.**

"Section 15. But no such defendant shall be compelled to answer such bill or interrogatories, at the time so appointed, unless a copy of such bill and interrogatories shall have been served upon him at least ten days previously thereto."

The time mentioned is not ten days between the service and return, but ten days before the time for the return.<sup>11</sup>

**9. Clause of capias.**

"Section 16. It shall be lawful for the court or judge, at the time of answering such writ of *scire facias*, to order that a clause of capias be inserted in such writ, against the defendants, or any one or more of them, under the rules and regulations provided in the case of a garnishee in a foreign attachment."

This can only apply to cases in which a capias is issuable under the act of 1842.

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<sup>10</sup> *Large v. Bristol Trans. Co.*, 2 Ashmead, 394.

<sup>11</sup> *Large v. Bristol Trans. Co.*, 2 Ashmead, 394.

#### 10. Effect of service.

"Section 17. From the time of the service of any *scire facias*, as aforesaid, upon any person other than the defendant in the judgment, the personal property of the defendant in the hands of such person shall be bound thereby, and shall be liable to be taken in execution, at the instance of the plaintiff in such judgment, in like manner as goods or effects in the hands of the garnishee in a foreign attachment; and if such person shall transfer such personal property to any other person, after such service, he shall be liable to pay the value thereof to the complainant out of his own proper goods and chattels."

The service of the bill binds the person of the garnishee, but a fraudulent transfer subsequently, makes the property liable to seizure by any creditor.<sup>12</sup>

These proceedings follow the practice in foreign attachment, which see, and where the defendant and garnishee have waived their right to a jury trial, by omitting to plead to the *scire facias*, and have submitted their case upon answers to the interrogatories, the court may, if fraud be discovered, render a joint judgment against them for the plaintiff's claim.<sup>13</sup>

#### 11. Costs.

"Section 18. The costs of all proceedings as aforesaid shall be within the discretion of the court in which such bill shall be filed, who shall have power to direct payment of the same, by either of the parties to such bill, according to the rules of equity and justice."

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<sup>12</sup> Bennett's Ap., 22 Pa. 476.

<sup>13</sup> Shaffer v. Watkins, 7 W. & S. 219.

## CHAPTER XX.

### EXECUTIONS — SALE OF PERSONALTY ON FL. FA.

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|---|--|
| 1. Notice of sale.                        | 11. Liability of officers, etc.                                      |
| 2. Form of notice.                        | 12. Preference of wages of laborers on timber and bark peeling jobs. |
| 3. Place and manner of sale.              | 13. Preference of wages of miners, mechanics, etc.                   |
| 4. Setting aside of sale.                 | 14. Notice and form.   |
| 5. Landlord's lien on goods for rent.     | 15. Character of labor embraced.                                     |
| 6. Notice of claim.                       | 16. Receipt to purchaser.  |
| 7. Form of landlord's notice of rent due. | 17. Leaving property in possession of the defendant.                 |
| 8. Preference as to proceeds.             |  |
| 9. Limit of colliery landlord's lien.     |  |
| 10. Time to which rent is payable.        |  |

#### I. Notice of sale.

Having disposed of all preliminary questions which may have arisen concerning the levy, exemption, etc., the sheriff will proceed to sell the property levied upon as required by law, and the exigencies of his writ.

He must first give notice.

Section 42 of the act of 1836, *supra*, provides:

"But before making sale as aforesaid notice thereof shall be given by such officer, during at least six days, by not fewer than six hand-bills, to be put up at such places as he shall deem best calculated to give information to the public of such sale."

Without such notice the officer becomes a trespasser *ab initio*.<sup>1</sup> In case there are no bystanders or bidders at the sale, except the plaintiff, the sheriff should inquire whether notice was given,<sup>2</sup> and if in doubt the sale should be adjourned and notice given of the adjournment.

The plaintiff and defendant cannot agree upon a sale without notice,<sup>3</sup> or one with shorter time than the law requires, which would bind other execution creditors.<sup>4</sup> A sale upon one bid is suspicious, but where a reasonable effort was made to secure a second, the sale will not be void.<sup>5</sup> In order to pass title the sheriff should sell in parcel and not in bulk or mass.<sup>6</sup>

<sup>1</sup> *Carrier v. Esbaugh*, 70 Pa. 239.

<sup>2</sup> *McMichael v. McDermott*, 17 Pa. 355; *Conniff v. Doyle*, 8 Phila. 630; *P. & L. Dig.*, vol. 19, col. 33871.

<sup>3</sup> *Bingham v. Young*, 10 Pa. 395.

<sup>4</sup> *Gibbs v. Neely*, 7 Watts, 305.

<sup>5</sup> *Swires v. Brotherline*, 41 Pa. 135.

<sup>6</sup> *Klopp v. Witmoyer*, 43 Pa. 219; *Grim v. Reinbold*, 148 Pa. 446; *Gourley v. Lukens*, 4 Mont'g Co. 15.



But reasonable regard must be had as to the nature of the property, and whether it can be properly segregated;<sup>7</sup> or whether it would not be most advantageous to sell it as a whole plant.<sup>8</sup>

Sale of a lot of farm implements out of sight, as "odds and ends," and not in the mind of the purchaser, or the sheriff, passes no title.<sup>9a</sup>

## 2. Form of notice.

### SHERIFF'S SALE.

By virtue of a writ of —, No. —, — Term, 190—, issued out of the Court of Common Pleas of Jefferson County, and to me directed, I will expose to public sale or outcry, at —, in —, Jefferson County, Pennsylvania, on — the — day of — next, at — o'clock, — M., the following described Personal Property, to-wit:

All the defendant's right, title, interest and claim of, in and to  
[Describe the same by items.]

Seized and taken in execution and to be sold as the property of —  
—, at the suit of —  
Sheriff's Office, Brookville, Pa.,  
— —, 19—.

A. E. Galbraith,  
Sheriff.

## 3. Place and manner of sale.

The general rule is that the sale of personal property shall be made with the articles in view, but if not in view, the sale is not necessarily void for that reason alone,<sup>9</sup> and the sale of a leasehold need not be on the premises.<sup>10</sup> But a sale of goods in a store cannot be made in the usual course of business by a special deputy.<sup>11</sup> If the sale is public, the officer will not be answerable for inadequacy of price.<sup>12</sup>

The sheriff is not obliged to accept a limited bid:<sup>13</sup> or one by a minor or one financially or otherwise irresponsible.<sup>14</sup> He must sell to the highest and best bidder, and if the highest bidder is unable to pay he may take the next bidder.<sup>15</sup> However, in Dauphin County, it was held, that he must put up the property again.<sup>16</sup> The sale is not consummated, at common law, until the officer has called "Once, twice, thrice."

<sup>7</sup> Smith v. Meldren, 107 Pa. 348.

<sup>8</sup> Furbush v. Greene, 108 Pa. 503; Yost v. Smith, 105 Pa. 628.

<sup>9a</sup> Derr v. Flexer, 3 Lehigh Co. 184.

<sup>9</sup> Klopp v. Witmoyer, 43 Pa. 219; Henry v. Patterson, 57 Pa. 346.

<sup>10</sup> Sowers v. Vie, 14 Pa. 99.

<sup>11</sup> Bingham v. Young, 10 Pa. 395; Keyser's Ap., 13 Pa. 409.

<sup>12</sup> Lynch v. Comth., 6 Watts, 495.

<sup>13</sup> Faunce v. Sedgwick, 8 Pa. 407.

<sup>14</sup> Hotchkiss v. Homan, 11 D. R. 43.

<sup>15</sup> Zantzing v. Pole, 1 Dallas, 419; Negley v. Stewart, 10 S. & R. 207; Holdship v. Doran, 2 P. & W. 9; South v. Lavens, 6 W. N. C. 528; Houseman v. Potts, 40 W. N. C. 452.

<sup>16</sup> Kunkel v. Eby, 7 D. R. 672.

Where a resale is made necessary by the refusal of a bidder to take the property, and at the subsequent sale he buys it at an inadequate price or for anything but cash, the re-sale is void and will be set aside. He should be held for the difference between his bid and what it eventually sold for.<sup>17</sup> The sheriff is not obliged to offer the property a third time on the same day.<sup>18</sup>

#### 4. Setting aside sale, etc.

Section 1 of the act of April 10, 1849, P. L. 597, provides:

"It shall and may be lawful for any court<sup>11</sup> \* \* \* from which any execution or order of sale shall issue for the sale of personal property, to inquire into the regularity and fairness of the sale, at the instance of any party interested, by execution, foreign or domestic attachment, or under a general assignment, upon affidavit of circumstances, before delivery of the goods; and if it appear that the sale shall have been so irregular or fraudulent as, in the opinion of the court, to have produced a sacrifice of the property, to the prejudice of any such party, it shall be competent for the court to set aside such sale, and the same property may be again exposed to sale, as if no such previous sale had been made: *Provided*, That it shall be lawful for the court to direct an issue for the trial of questions of fact, whenever the circumstances of the case shall require, and to order the sale, in the meantime, of all perishable or chargeable goods; the proceeds to be held to abide the result of the trial."

It cannot be set aside after the return day on the application of the sheriff, when the sale was regularly and fairly made.<sup>12</sup>

One who is not a lien creditor cannot move to set aside the sale.<sup>13</sup> Nor a creditor who has not secured judgment, the sale having realized the highest estimated value of the goods.<sup>14</sup>

A creditor who attaches property and whose attorney is present at the sale and might have bidden, cannot move to set aside the sale.<sup>15</sup> The motion to set aside the sale should be made at the earliest practicable time. Two months after the sale and delivery of the goods has been held too late.<sup>16</sup> After the sale, delivery and payment of the purchase money, a motion to set aside the sale on a rule will not be encouraged.<sup>17</sup> Inadequacy of price may be a ground for setting aside a sale, where there has been fraud, although the purchaser was not a party to it;<sup>18</sup> and the more so where the purchaser is.<sup>19</sup> A sale will be set aside where the interest of but one

<sup>17</sup> *Tripp v. Silkman*, 1 Luz. L. R. 175; *Hotchkiss v. Homan*, 11 D. R. 43.

<sup>18</sup> *Hartman v. Pemberton*, 24 Supr. C. 222.

<sup>11</sup> Phila. county made general by act of March 10, 1858, P. L. 91.

<sup>12</sup> *Mackanness v. Long*, 85 Pa. 158.

<sup>13</sup> *Hirsh v. Hirsh*, 11 Lanc. L. R. 270.

<sup>14</sup> *Dateman v. Trine*, 2 Luz. L. R. 103.

<sup>15</sup> *Atherholt v. Atherholt*, 7 Supr. C. 82.

<sup>16</sup> *Dateman v. Trine*, 2 Luz. L. R. 103.

<sup>17</sup> *Lawrence v. Gallagher*, 2 W. N. C. 261; *Trevathan v. Ithica, Etc., Co.*, 7 C. C. 347.

<sup>18</sup> *Moyer v. Nickol*, 1 Leg. Rec. 55.

<sup>19</sup> *Yocum v. Specht*, 1 W. N. C. 6.



partner is advertised to be sold and the sale embraced the other partner's interest.<sup>20</sup>

Under the lien creditor act a sale of personalty will not be set aside on the application of the sheriff averring that he made a mistake in his distribution.<sup>21</sup> Where a sale is alleged to be fraudulent the remedy of the creditor is to issue a *fi. fa.* and contest the title by means of a feigned issue.<sup>22</sup> In setting aside a sale of personalty, as to some articles only, the court may impose the costs of the sale on the defendant.<sup>23</sup> Where the sheriff advertises personal property which is not on the premises, the purchaser may have the sale annulled.<sup>24</sup>

##### 5. Landlord's lien on goods for rent.

Section 83 of the act of 1836, *supra*, provides:

"The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent."

This act applies to a constable's levy,<sup>25</sup> and the right of the landlord depends on his right to distrain at the time; for if the landlord has lost this right he is not entitled to the preference.<sup>26</sup> The lease need not be in writing, if it is valid,<sup>27</sup> and it extends to a monthly lease.<sup>27a</sup> The goods must be on the demised premises,<sup>28</sup> unless removed by a constable under an attachment.<sup>29</sup> The landlord may claim although some years have elapsed;<sup>30</sup> but not for rent due after a surrender.<sup>31</sup> The claim runs to the levy and not the day of sale.<sup>31a</sup> He may claim it out of the sale of the sub-tenant's goods although the rent of such sub-tenant is not in arrear.<sup>32</sup> The right to distrain being gone, the right to claim is also gone.<sup>33</sup> If the landlord himself claims title he cannot claim from the proceeds of sale;<sup>34</sup> nor can he claim where he takes accepted drafts for the rent and receipts for it;<sup>35</sup> nor where he takes property

<sup>20</sup> *Mole v. Deamer*, 1 W. N. C. 100.

<sup>21</sup> *Mackanness v. Long*, 85 Pa. 158.

<sup>22</sup> *Cardwell v. Hickman*, 3 W. N. C. 258.

<sup>23</sup> *Totten v. Cooper*, 129 Pa. 314.

<sup>24</sup> *Wood v. Cunningham*, 1 W. N. C. 143.

<sup>25</sup> *Seitzinger v. Steinberger*, 12 Pa. 379.

<sup>26</sup> *Grant's Ap.*, 44 Pa. 477; *Lewis' Ap.*, 66 Pa. 312; *Rowland v. Goldsmith*, 2 Grant, 378. (But see *Duffy v. Patterson*, 25 Montg. Co. 34.)

<sup>27</sup> *Greenwood's Ap.*, 79 Pa. 294.

<sup>27a</sup> *Reece v. Rogers*, 40 Supr. C. 171.

<sup>28</sup> *Hoskins v. Houston*, 2 Clark, 489.

<sup>29</sup> *Morgan v. Moody*, 6 W. & S. 333.

<sup>30</sup> *Moss' Ap.*, 35 Pa. 162.

<sup>31</sup> *Greider's Ap.*, 5 Pa. 422.

<sup>31a</sup> *Reece v. Rogers*, 40 Supr. C. 171.

<sup>32</sup> *McComb's Ap.*, 43 Pa. 435.

<sup>33</sup> *Lichtenthaler v. Thompson*, 13 S. & R. 157.

<sup>34</sup> *Vetter's Ap.*, 99 Pa. 52; *Edwards' Ap.*, 105 Pa. 103.

<sup>35</sup> *Riddlesburg, Etc., Co.'s Ap.*, 114 Pa. 58.

to apply on future rent;<sup>36</sup> nor where the tenant has replevied the distress;<sup>37</sup> but a distraint for a part of the rent due does not preclude his right to claim for the balance.<sup>38</sup> If he enters judgment on his lease he cannot hold the goods of a stranger.<sup>38a</sup>

#### 6. Notice of claim.

The landlord must give formal notice of his claim to the officer executing the writ.<sup>39</sup> If he fails to give notice he cannot sue the execution creditor and purchaser for the rent.<sup>40</sup> It has been held that the notice is in time before the money is paid over, if made after the return day;<sup>41</sup> and if made before the return day, although the money has been paid over.<sup>42</sup> Notice has been held unnecessary where the money is paid into court for distribution.<sup>42a</sup>

#### 7. Form of landlord's notice of rent due.

Mann Wilt } In the Court of Common Pleas of Clinton County.  
v. }  
Felt Dodd. } *Fi. fa.* No. — Term, 1910.

To Wesley Groop, sheriff of Clinton County:

Please take notice that the premises, upon which are the goods and chattels taken by virtue of the above execution are held by the said Felt Dodd under a demise for one year from the undersigned at the annual rental of one hundred dollars all of which was due at the time of the levy on said goods, and that said goods and chattels so levied upon were liable to the distress of the undersigned landlord, and demand is hereby made for said amount from the proceeds of the sale.

Jerry Barner.

Carroll, Pa., May 10, 1910.

After the sheriff has accepted and acted upon a notice it is too late to except to its sufficiency.<sup>43</sup> It is no objection to the claim that it is slightly in excess of the actual amount.<sup>44</sup>

#### 8. Preference as to proceeds.

Section 84 of the act of 1836, *supra*, provides:

"After the sale by the officer, of any goods or chattels as aforesaid, he shall first pay out of the proceeds of such sale the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution: *Provided*, That if the proceeds of the sale shall not be sufficient to pay the landlord and the costs of the execution, the landlord shall be entitled to

<sup>36</sup> Martin's Ap., 5 W. & S. 220.

<sup>37</sup> Gray v. Wilson, 4 Watts, 39.

<sup>38</sup> Kreiter v. Hammer, 1 Pearson, 559.

<sup>38a</sup> Liquid Carbonic Co. v. Truby, 40 Supr. C. 634.

<sup>39</sup> Mitchell v. Stewart, 13 S. & R. 295; Work's Ap., 92 Pa. 258.

<sup>40</sup> Schuyler v. Phila. Coach Co., 29 W. N. C. 343.

<sup>41</sup> Ege v. Ege, 5 Watts, 134.

<sup>42</sup> Fisher v. Allen, 2 Phila. 115.

<sup>42a</sup> Wadas v. Sharp, 27 Supr. C. 233.

<sup>43</sup> Greenwood's Ap., 79 Pa. 294.

<sup>44</sup> Timmes v. Metz, 156 Pa. 384.

receive the proceeds, after deducting so much for costs as he would be liable to pay in case of a sale under a distress."

Under the acts of 1872 and June 12, 1878, P. L. 207, wages of a certain class of laborers is preferred to the landlord's claim.<sup>45</sup>

#### 9. Limit of colliery landlord's lien in some counties.

Section 3 of the act of March 30, 1859, P. L. 319, provides:

"The lien of the rent due to the landlord or landlords of any colliery or collieries within the counties of Schuylkill, Northumberland, Somerset, Carbon, Washington and Dauphin, the amount of which said landlord or landlords shall be entitled to receive out of the proceeds of the sale under a landlord's warrant, execution or other writ for the sale of the property liable to the distress of the landlord, except execution upon judgment obtained for such rent, which shall rank according to priority and be paid as other executions, shall be and the same is hereby restricted to one month's rent due, together with any fraction of a month's rent, accruing immediately prior to the time of taking such property in execution or levy, under such landlord's warrant or other writ."

#### 10. Time to which rent is payable, etc.

The time to which the rent is calculable is the date of the levy. "Liable to the distress" does not mean ripe for distress.<sup>46</sup> He cannot claim for rent accruing between the levy and the sale.<sup>47</sup> If there are several executions, the date of the levy on the last to participate is the proper date.<sup>48</sup> The landlord may claim the full amount payable in advance although the term is not ended;<sup>49</sup> and also where the lease provides that the whole rent shall become due upon a contingency which has happened.<sup>50</sup>

The vacating of the premises on the day of the levy is necessarily subsequent thereto and only rent is payable which was due at the levy.<sup>51</sup> Where rent is payable quarterly in advance he cannot claim for the next quarter.<sup>52</sup> The rent which is preferred is one whole year's rent, and is not confined to the current year<sup>53</sup> or the year preceding the levy.<sup>54</sup> This claim does not embrace taxes which the tenant has agreed to pay,<sup>55</sup> nor water rent.<sup>56</sup> Where improve-

<sup>45</sup> Yeager v. Tool, 1 Dauphin Co. 120; Riddlesburg Coal & Iron Co.'s Ap., 18 W. N. C. 361; 114 Pa. 58.

<sup>46</sup> Wickey v. Eyster, 58 Pa. 501, commenting on Purdy's Ap., 23 Pa. 97; Thropp's Ap., 70 Pa. 395; P. & L. Dig., vol. 11, col. 18164.

<sup>47</sup> Wager v. Duke, 1 Clark, 316; Mining v. Sterrett, 7 C. C. 73; Case v. Davis, 15 Pa. 80.

<sup>48</sup> Leaming's Ap., 5 W. N. C. 221.

<sup>49</sup> Collins' Ap., 35 Pa. 83.

<sup>50</sup> Platt v. Johnson, 168 Pa. 47.

<sup>51</sup> Lowry v. Evans, 2 Lack. Jur. 43.

<sup>52</sup> Purdy's Ap., 23 Pa. 97.

<sup>53</sup> Ege v. Ege, 5 Watts, 134.

<sup>54</sup> Richie v. McCauley, 4 Pa. 471; Parker's Ap., 5 Pa. 390; Weltner's Ap., 63 Pa. 302.

<sup>55</sup> Binns v. Hudson, 5 Binney, 505; Case v. Davis, 15 Pa. 80.

<sup>56</sup> Lewin v. Atcheson, 47 Pitts. L. J. 215.

ments are allowed for on the rent, the auditor should find the actual amount of rent due.<sup>57</sup>

The lien of the U. S. upon distilleries fixtures and products has been held to take priority to the landlord's claim for rent.<sup>58</sup> Where an execution has priority over proceedings in bankruptcy the landlord's claim is also preferred;<sup>59</sup> and where the tenant has waived his exemption, it inures to the benefit of the landlord.<sup>60</sup> On the sale of a partner's interest the landlord has no claim upon the proceeds.<sup>61</sup>

#### 11. Liability of officers, etc.

When the landlord has presented his claim in due form, if the officer returns the writ stayed without his consent in writing he does so at his own risk.<sup>62</sup> Such notice is too late if given after the writ has been ordered stayed by the plaintiff.<sup>63</sup> The officer's liability is for the difference between the value of the goods and the amount which at the time of the levy the landlord had a right to claim.<sup>64</sup> The liability is *ex delicto* and a justice of the peace has no jurisdiction of the action which was formerly in case for official misfeasance, now trespass.<sup>65</sup> If the tenant dies before the rent is collectible by distress the landlord's claim fails.<sup>66</sup>

The landlord is entitled to his rent out of the sale of a leasehold only where he reserves the right to re-enter until arrears are paid.<sup>67</sup>

By the act of May 26, 1891, P. L. 122, it is provided that where a tenant makes an assignment his landlord shall be entitled to a preference for one year's rent. The landlord may be charged with a part of the costs of the audit.<sup>68</sup> Notice to the assignee for creditors, of rent due will have the same effect as if given to the sheriff.<sup>69</sup> The contract of the assignee to pay rent due is valid.<sup>70</sup> Only what is actually due, however, can be claimed, and the landlord must deduct rents he received on a releasing of the premises.<sup>71</sup>

#### 12. Preference of wages of laborers on lumber and bark peeling jobs.

The act of May 7, 1891, P. L. 44, amends the act of June 12, 1879, so as to read as follows:

<sup>57</sup> *Wilkinson v. Kugler*, 153 Pa. 238.

<sup>58</sup> *Dungan's Ap.*, 68 Pa. 204.

<sup>59</sup> *Barnes' Ap.*, 76 Pa. 50.

<sup>60</sup> *Collins' Ap.*, 35 Pa. 83.

<sup>61</sup> *Rundall v. Stedje*, 2 C. C. 608.

<sup>62</sup> *Borlin v. Comth.*, 110 Pa. 454.

<sup>63</sup> *Work's Ap.*, 92 Pa. 253.

<sup>64</sup> *Comth. v. Contner*, 21 Pa. 266.

<sup>65</sup> *Seitzinger v. Steinberger*, 12 Pa. 379.

<sup>66</sup> *Hoakins v. Houston*, 2 Clark, 489.

<sup>67</sup> *Stark v. Hight*, 3 Supr. C. 516; *Spangler's Ap.*, 30 Pa. 277n; *Wood's Ap.*, 30 Pa. 274.

<sup>68</sup> *Lane v. Washington Hotel Co.*, 190 Pa. 230.

<sup>69</sup> *Leidich's Est.*, 161 Pa. 451.

<sup>70</sup> *Osborne's Est.*, 5 Wharton, 267; *Cooper v. Rose Valley Mills*, 174 Pa. 302.

<sup>71</sup> *Evans v. Lincoln Co.*, 204 Pa. 448.

"That all moneys that may due from any person or persons to any and every laborer, for work done in and about the cutting, peeling, skidding, hauling and driving of saw logs, the hewing, making, skidding and hauling of square timber and the peeling and hauling of bark, for a period not exceeding six months prior to the death or assignment for the benefit of creditors of the employer or employers, or to a sale of said saw logs, square timber or bark upon execution process against said employer or employers, shall be preferred and first paid out of the proceeds of any executor's, administrator's, assignee's, sheriff's or other officer's sale of saw logs, square timber or bark as the property of the employer or employers: *Provided*, That when work as aforesaid shall have been done for a contractor or contractors and not for the owner or owners of said saw logs, square timber or bark, all moneys due as aforesaid shall be preferred and paid to laborers as aforesaid, and any payment or payments so made, shall be a good charge against the contractor or contractors in favor of the owner or owners in settlement of their account: *And provided further*, That not more than two hundred dollars to any one laborer shall be preferred under this act."

This gives a lien on a fund arising from the sale of the contractor's teams and camp equipage.<sup>1</sup> It is constitutional.<sup>2</sup>

### 13. Preference of wages of miners, mechanics, etc.

The act of May 12, 1891, P. L. 54, which amended preceding acts, provides,

"That all moneys that may be due or hereafter become due for labor and services rendered by any miner or mechanic, servant girl at hotels, boarding houses, restaurants or in private families, porter, hostler or any other person employed in and about livery stables or hotels, laundryman or washwoman, seamster or seamstress employed by merchant tailors or by any other person, milliner, dressmaker, clothier, shirt maker or clerk employed in stores or elsewhere, hand laborer, including farm laborer or any other kind of laborer, printer, apprentice and all other tradesmen hired for wages or salary from any person or persons, chartered company, joint stock company, limited partnership or other partnership, either as owner or lessee, contractor or under-owner, whether at so much *per diem* or otherwise, for any period not exceeding six months preceding the sale or transfer of the real or personal property, works, mines, manufactories or business or other property connected therewith in carrying on the same of said person or persons, chartered company, joint stock company, limited partnership or other partnership, by execution or otherwise, on account of the death or insolvency of such employer or employers, shall be a lien upon said real or personal property, mine, manufactory, business or other property in and about, or used in carrying on said business or in connection therewith, to the extent of the interest of such employer or employers in said property, and shall be preferred and first paid out of the proceeds of the sale of such real and personal property, mine, manufactory,

<sup>1</sup> Weed & Co. v. Robinson, 14 C. C. 7.

<sup>2</sup> Hoffa v. Person, 1 Supr. C. 357.

business or other property as aforesaid: *Provided, however,* That the claim thus preferred shall not exceed two hundred dollars: *And provided further,* That this act shall not be so construed as to impair contracts existing or liens of record vested prior to its passage: *And provided further,* That no such claim shall be a lien upon any real estate, unless the same be filed in the prothonotary's office of the county in which such real estate is situated, within three months after the same becomes due and owing, in the same manner as mechanic's liens are now filed."

#### 14. Notice and form.

A notice of claim under this act and that of May 7, 1891, P. L. 44, must be sufficiently full and clear to show the officer and others interested that the labor was performed within the time limited and in the business defined, the amount due as wages, the property subject to the lien of such claim and the place of its transaction.<sup>3</sup> Several may join in one notice.<sup>4</sup>

In common use the word wages is applied specifically to the payment made for manual labor or other labor of a menial or mechanical kind, distinguished, but somewhat vaguely, from salary and from fee, which denote compensation to professional men.<sup>5</sup>

#### 15. Character of labor embraced.

The kind of labor protected by the act of April 9, 1872, P. L. 47, and its supplements is such as is done in and about works already constructed and not in the construction thereof.<sup>6</sup> The employment must not be of merely a temporary nature.<sup>7</sup> A traveling salesman was held not to be a laborer embraced in the meaning of the act.<sup>8</sup> The act of 1891 very much enlarges the classes entitled and they are preferred to all creditors except mortgage and judgment creditors whose liens attached before the labor was done, as provided by section 4 of the act of 1872, *supra*.<sup>9</sup>

The property to which the lien relates must be used in connection with the business in which the services are rendered.<sup>10</sup> The assignee of the claim stands in the same position as the assignor, as to his right of preference.<sup>11</sup> Where the employer transfers personal property in good faith to pay a debt it is freed from any claim for wages.<sup>12</sup>

The act was not intended to cover an officer of a corporation although he performed clerical services in the business.<sup>13</sup> A teamster,

<sup>3</sup> *Hoffa v. Person*, 1 Supr. C. 357; *Adamson's Ap.*, 110 Pa. 459.

<sup>4</sup> *Yeager v. Toole*, 1 Dauphin Co. 120.

<sup>5</sup> *Jones v. Susq. Coal Co.*, 1 Supr. C. 331.

<sup>6</sup> *Wolf v. Krick*, 3 Supr. C. 601; *Llewellyn's Ap.*, 103 Pa. 458.

<sup>7</sup> *Wilson v. Gibson*, 10 C. C. 191.

<sup>8</sup> *Mulholland v. Brown*, 166 Pa. 486; *Witmer v. Miller*, 12 C. C. 363.

<sup>9</sup> *Rees v. Hulings*, 9 Supr. C. 265.

<sup>10</sup> *Gibbs & Sterrett's Ap.*, 100 Pa. 528.

<sup>11</sup> *Riddlesburg Coal, Etc., Co.'s Ap.*, 114 Pa. 58.

<sup>12</sup> *Wilkinson v. Patton*, 162 Pa. 12; *Brown v. Title & Trust Co.*, 174 Pa. 443.

<sup>13</sup> *William Dick Co. v. U. S. Coffee Co.*, 16 D. R. 622.

with his teams, was held not to be embraced in the act of May 12, 1891<sup>14</sup> though he is under that of May 7, 1891, relating to lumber operations.<sup>15</sup>

**16. Receipt to purchaser.**

When a sheriff sells personalty a receipt to the purchaser for the money is all that is required.<sup>16</sup> A leasehold interest for a term of years passes to the purchaser without a deed.<sup>17</sup> The sheriff is not bound to accept the receipt of the execution plaintiff for personalty bought by him at the sale.<sup>18</sup>

**17. Leaving personal property with defendant.**

If the purchaser of personal property sees fit to leave it with the defendant, no presumption of fraud arises from it;<sup>19</sup> and the latter may hold it as agent or bailee, and if the purchaser agrees he may sell it and apply the proceeds to his debts, or turn it over to his wife on her claim against him.<sup>20</sup> Where the purchaser's claim is satisfied out of another fund, he cannot come in later and claim against other executions.<sup>21</sup> It is customary to give notice when property is left in the custody of the defendant after a sale.

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<sup>14</sup> *Thompson v. Haslett*, 13 D. R. 403.

<sup>15</sup> *Millheim's Ap.*, 1 Supr. C. 367.

<sup>16</sup> *Sewall v. Lancaster Bank*, 17 S. & R. 285.

<sup>17</sup> *Sowers v. Vie*, 14 Pa. 99; *Williams v. Downing*, 18 Pa. 60.

<sup>18</sup> *Wilson v. Am. Photo., Etc., Co.*, 4 W. N. C. 13.

<sup>19</sup> *Hare v. Neidle*, 26 Pitts. L. J. 36; *Sharp v. Cong'l Pub'g Co.*, 2 C. C. 620; *Snyder v. Boring*, 4 Supr. C. 196.

<sup>20</sup> *Miller v. Irvine*, 94 Pa. 405.

<sup>21</sup> *Chancellor v. Schott*, 23 Pa. 68.



## CHAPTER XXI.

### EXECUTION — SHERIFF'S INQUISITION.

- |                                       |  |
|---------------------------------------|--|
| 1. Sheriff to summon a jury.          | 8. Inquisition, on the premises.               |
| 2. Inquisition when necessary or not. | 9. Inquisition on mineral lands.               |
| 3. Waiver of right.                   | 10. Assessment of value and return.            |
| 4. Inquest by six jurors.             | 11. Second inquest.                            |
| 5. Form of summons.                   | 12. Forms of return.                           |
| 6. Form of oath.                      | 13. Approval by the court — rule in Allegheny. |
| 7. Notice of inquisition.             |  |

#### 1. Inquisition — Sheriff to summon a jury.

It was provided by statute 4th Anne, that:

"It shall not be lawful for any sheriff or other officer to sell any such lands, tenements or hereditaments which shall or may yield any yearly rents or profit, beyond all reprises, sufficient to pay within the space of seven years, the debts or damages, with costs, etc." <sup>1</sup>

Section 44, of the act of 1836, *supra*, is:

"Whenever real estate shall be taken in execution, as aforesaid, by any sheriff, it shall be his duty to summon an inquest, for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy, within seven years, the judgment upon which such execution was issued, with the interest and costs of suit, and he shall make a return in due form of law, of the inquisition so taken, to the court with the writ."

#### 2. Inquisition, when necessary or not.

Without an inquisition or a waiver thereof the sale of real estate under a *fi. fa.* cannot be legally made; <sup>1a</sup> nor under a *vend. ex.* <sup>2</sup> But when made the defendant alone is concerned or has a standing to except thereto. <sup>3</sup> The interest of a vendee under articles of agreement cannot be sold without an inquisition; <sup>4</sup> nor does a mortgage on the land dispense with it; <sup>5</sup> nor where the law provides that there shall be no stay of execution, as in judgment against a surety on a constable's bond. <sup>6</sup> But where the defendant's interest is such that

<sup>1</sup> *Humphreys v. Humphreys*, 1 Yeates, 427.

<sup>1a</sup> *Gardner v. Siak*, 54 Pa. 506; P. & L. Dig., vol. 7, col. 11204.

<sup>2</sup> *McLaughlin v. Shields*, 12 Pa. 283; *Buehler v. Rogers*, 68 Pa. 9; P. & L. Dig., vol. 7, col. 11205.

<sup>3</sup> *Wray v. Miller*, 20 Pa. 111; *Spragg v. Shriver*, 25 Pa. 282.

<sup>4</sup> *Baird v. Lent*, 8 Watts, 422.

<sup>5</sup> *Naples v. Minier*, 3 P. & W. 475.

<sup>6</sup> *Myers v. Comth.*, 34 Pa. 270.



there can be no rents, issues and profits, an inquisition is not necessary;<sup>7</sup> as where the estate is of uncertain duration;<sup>8</sup> or a term of years only;<sup>9</sup> or unimproved lands.<sup>10</sup> Where the defendants claim to hold adversely and there is no reason to believe that they will pay the annual rentals, an extent may be quashed.<sup>11</sup>

### 3. Waiver of right by defendant.

Section 45, same act, *supra*, provides:

"That the defendant in any execution, being at the time of issuing thereof the owner of such real estate, or the person owning such estate by title from him, may, by writing filed in the proper court, dispense with and waive an inquisition, as aforesaid, and, in such case, the sheriff may, after giving notice in the manner hereinafter provided, proceed to sell such real estate, upon the writ of *feri facias*, before the return day thereof, without any other writ."

The legal owner, although not in possession, alone, can waive the right given.<sup>12</sup> An administrator may waive for his decedent;<sup>13</sup> as well on a *sci. fa.* to revive judgment, against the decedent;<sup>14</sup> but not where, if the decedent were living, he could not do so.<sup>15</sup> A defendant cannot waive after he has sold, so as to affect the right of the purchaser.<sup>16</sup> The waiver of a lunatic without lucid intervals is void.<sup>17</sup>

Where no objection is taken for irregular sale without inquisition, to the acknowledgment of the sheriff's deed the purchaser takes a good title;<sup>18</sup> but if objection is made in time the sale will be set aside.<sup>19</sup> Irregularities may be waived by the conduct of the parties.<sup>20</sup> If there was a waiver of record, though lost, it may be established by parol evidence;<sup>21</sup> and an alleged waiver may be shown by parol, to have been a forgery,<sup>22</sup> or to have been signed without authority by church wardens, in case of a church property.<sup>23</sup> But where judgment was entered by an attorney on a warrant to confess, evidence of forged signature was held inadmissible in an action of ejectment for the land.<sup>24</sup> The right to waive is for the benefit of the defendant if he wishes to save costs.<sup>25</sup> Waiver of "extension" is

<sup>7</sup> *Macalester v. Wistar*, 2 Miles, 156.

<sup>8</sup> *Stewart v. Kenower*, 7 W. & S. 288.

<sup>9</sup> *Dalzell v. Lynch*, 4 W. & S. 255.

<sup>10</sup> *Duncan v. Robeson*, 2 Yeates, 454.

<sup>11</sup> *Myers v. Snyder*, 14 D. R. 888.

<sup>12</sup> *St. Barth. Church v. Wood*, 61 Pa. 96.

<sup>13</sup> *Hunt v. Devling*, 8 Watts, 803, doubted in *Sample v. Barr*, 25 Pa. 457.

<sup>14</sup> *Bennett v. Fulmer*, 49 Pa. 155.

<sup>15</sup> *Hadden v. Clark*, 2 Grant, 107.

<sup>16</sup> *Wolf v. Payne*, 35 Pa. 97; P. & L. Dig., vol. 7, col. 11227.

<sup>17</sup> *Hope v. Everhart*, 70 Pa. 231.

<sup>18</sup> *Kostenbader v. Spotts*, 80 Pa. 430.

<sup>19</sup> *Rohrer v. Rohrer*, 14 C. C. 332.

<sup>20</sup> *Jackson v. Morter*, 82 Pa. 291.

<sup>21</sup> *Hamberger v. Brookes*, 2 Foster, 97.

<sup>22</sup> *Zuver v. Clark*, 104 Pa. 222.

<sup>23</sup> *St. Bartholomew's Church v. Wood*, 61 Pa. 96.

<sup>24</sup> *Hageman v. Salisberry*, 74 Pa. 280.

<sup>25</sup> *Kimball v. Kelsey*, 1 Pa. 183.

equivalent to waiver of inquisition.<sup>26</sup> It may be made before advertisement of the sale in writing filed with the sheriff and returned with the writ.<sup>27</sup> It need not be noted on the *fi. fa.* where the judgment note contains it.<sup>28</sup> An amicable revival carries the waiver with it as against the original owner of the land.<sup>29</sup> Waiver as under act of 1836 is not exclusive.<sup>30</sup>

#### 4. Inquest of six jurors.

The act of May 10, 1881, P. L. 13, provides:

"Hereafter, whenever any real estate shall be taken in execution under existing laws of this commonwealth by any sheriff, it shall be his duty to summon an inquest of six men, for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy, within seven years, the judgment on which such execution was issued, with the interest and costs of suit; and he shall make a return, in due form of law, of the inquisition so taken, to the court with the writ: *Provided*, That the defendant in any execution, being at the time of the issuing thereof the owner of such real estate, or the person owning such real estate by title from him, may by writing filed in the proper court, dispense with and waive an inquisition as aforesaid, and in such case the sheriff may, after giving notice in the manner provided by law, proceed to sell such real estate upon the writ of *feri facias*, without any other writ."<sup>30a</sup>

#### 5. Form of summons.

No particular form of summons is required. The custom is for the sheriff to notify qualified persons that he wishes them to accompany him and constitute the inquest. If the defendant makes request they are required to hold the inquisition on the premises.

#### 6. Form of oath.

The jurors are sworn as a body, as follows, if upon the Holy Gospels:

"You and each of you do swear that you will true inquiry make whether the rents, issues and profits of the lands, tenements and hereditaments, taken in execution by the sheriff of — county, by virtue of certain writs of *feri facias*, which will be laid before you, are of a clear yearly value, beyond all reprises, sufficient within the period of seven years to pay or satisfy the debts or damages in the said writs respectively mentioned, with costs of suit, and a true inquisition thereof make, according to the best of your judgment: so help you God."

<sup>26</sup> *Kostenbader v. Spotts*, 80 Pa. 430.

<sup>27</sup> *Overton v. Tozer*, 7 Watts, 331.

<sup>28</sup> *Carr v. Wright*, 19 W. N. C. 576.

<sup>29</sup> *Hyde Park, Etc., Assn. v. Flanagan*, 1 C. P. Rep. 122.

<sup>30</sup> *Mitchel v. Freedley*, 10 Pa. 198.

<sup>30a</sup> *Dubitur* whether this applies to the jury under act of June 13, 1840, P. L. 689. (See *Enterline v. Miller*, 27 Supr. C. 463.)

### 7. Notice of inquisition.

Section 46 of the act of 1836, *supra*, provides:

"The sheriff shall give at least five days' notice of the time and place of the holding of such inquisition, to the defendant in the execution, or, if he be not found within the county, to his attorney or agent, and if the attorney or agent be not known to him, he shall give such notice by hand-bill, to be fixed on the premises."

The notice should be in writing. When a statute provides for notice and is silent as to the manner of giving it, it will be presumed that it shall be in writing.<sup>31</sup> Notice need not be given to defendant's assignee in bankruptcy.<sup>32</sup> An irregularity in giving notice by hand-bill, will not invalidate the sale to a *bona fide* purchaser.<sup>33</sup>

If notice is served on the defendant, it is not necessary to serve the *terre-tenant* also,<sup>34</sup> and where the defendant resides in another state service on his tenant is sufficient.<sup>35</sup> The defendant may lose his right to object by laches;<sup>36</sup> and a sale will not be avoided unless he objects before the acknowledgment and delivery of the deed to the purchaser.<sup>37</sup> The sheriff's return need not show service of notice,<sup>38</sup> but it should do so and if the fact cannot be established the inquisition will be set aside.<sup>39</sup>

### 8. Inquisition to be held on the premises.

Section 47 of the act of 1836, *supra*, provides:

"Every such inquisition shall be held on the premises taken in execution, as aforesaid, if required by the defendant, or his agent, and notice of such requisition be given to the sheriff, or other officer executing such writ."

The return on the *fi. fa.* need not show when or where the inquisition was held, if it shows due service of notice. It is conclusive and the remedy is against the officer for a false return.<sup>40</sup>

### 9. Inquisition on mineral lands.

Section 3 of the act of May 4, 1852, P. L. 569, provides:

"In all cases of real estate mainly valuable as developed mineral lands, levied upon by virtue of a writ of *fi. fa.*, and an inquest shall be held thereon in pursuance of the 44th section of the act of the 16th of June, 1836, entitled 'An act relating to executions,' it shall be the duty of the inquest, in ascertaining the yearly rents and profits of such real estate, to take into consideration the amount of rent or mineral leave paid, and which said real estate may produce from the iron ore, coal or other minerals mined from such

<sup>31</sup> Church v. Phila., 4 Clark, 181.

<sup>32</sup> Fuller v. Sherridan, 2 Luz. L. R. 207.

<sup>33</sup> Atkinson v. Tomlinson, 91 Pa. 284.

<sup>34</sup> Krebs v. Hechler, 2 Leg. Rec. R. 363.

<sup>35</sup> Evans v. Sidwell, 9 Lanc. Bar, 113.

<sup>36</sup> Geyer v. Reeder, 1 W. N. C. 2.

<sup>37</sup> Meanor v. Hamilton, 27 Pa. 137; McLaughlin v. McLaughlin, 85 Pa. 317.

<sup>38</sup> Weightman v. Hawkins, 1 W. N. C. 506.

<sup>39</sup> Huddy v. Jones, 5 W. N. C. 491.

<sup>40</sup> Eberly v. Billingsfelt, 27 C. C. 258.

estate, and which its capacity as developed mineral land may or shall produce, and said inquest shall estimate the rent or mineral leave aforesaid, with the other rents and profits of the same for the next succeeding seven years, and in case such rent, mineral leave and profits shall be sufficient to satisfy the judgment upon which said execution was issued, with interest and costs of suit beyond all reprises, within said seven years, it shall be the duty of the inquest to extend said real estate and determine the amount of rental to be paid, in each of the next succeeding seven years, respectively."

#### 10. Assessment of value and return.

Section 48 of the act of 1836, *supra*, provides:

"If the clear profits of the real estate of any such defendant will, in the opinion of the inquest, be sufficient to pay the debt or damages, to be levied as aforesaid, together with the costs, the sheriff or other officer, shall proceed, by the inquest as aforesaid, to assess the value of the yearly rents or profits of such lands beyond all reprises, and make return thereof to the court with his writ as aforesaid."

The jury, in considering whether the land will in seven years pay all the liens "beyond all reprises," will consider the interest, taxes, etc.,<sup>40a</sup> which must be met. The practice, when inquisitions were more frequent than now, was for the sheriff to lay before the jury a list of liens certified by the prothonotary. The jury then considered what the property would reasonably rent for per annum.

It was said by Coulter, J., that in many counties the jury added 17 per cent. interest to the amount of the liens, "then add all the costs, fix the net annual rent beyond repairs and taxes, and payable at the commencement of the year, and if it will pay the debt and interest of all the liens with the interest and costs, the land is extended." But the plaintiff is not entitled to charge commission for collecting the rents.<sup>40b</sup> Kennedy, J., said:<sup>40c</sup> "It would be their duty, if the same should be laid before them, to take into consideration all the liens existing against the estate, that are or shall become payable within the seven years, as composing in this particular instance a portion of what has been considered reprises."

The jury should consider the real debt and not the sum of an installment due, where all the installments would fall due within seven years.<sup>41</sup> Unpaid purchase money is not such a lien as should be considered against the vendee.<sup>42</sup> The inquisition may be set aside for misconduct or an excessive valuation or be quashed for irregularity.<sup>43</sup> The sheriff himself must hold the inquisition, it being a judicial act which cannot be performed by his deputy,<sup>44</sup> but he should

<sup>40a</sup> *Mellon v. Campbell*, 11 Pa. 415. "Reprises" are deductions necessary to be made from a gross fund in order to show a net result, or in the language of the statute, "a clear profit." *D. & H. Canal Co. v. Von Storch*, 196 Pa. 102.

<sup>40b</sup> *Mellon v. Campbell*, 11 Pa. 415.

<sup>40c</sup> *Near v. Watts*, 8 Watts, 325.

<sup>41</sup> *Pulaski v. King*, 1 Yeates, 477; *P. & L. Dig.*, vol. 7, col. 11212.

<sup>42</sup> *Springer v. Walters*, 34 Pa. 328.

<sup>43</sup> *Myers v. Snyder*, 14 D. R. 888.

<sup>44</sup> *Haberstroh v. Toby*, 9 Phila. 614; *Klopp v. Breitenbach*, 2 Foster, 73,

not unduly influence the jury. If the jury is guilty of misconduct it cannot be shown by affidavits of a juror.<sup>44a</sup>

### 11. Second inquest.

Where an inquisition has been set aside, a second one may be held without an alias *fi. fa.*<sup>45</sup> but the issuing of an alias will not be held reversible where the defendant is protected from unnecessary costs.<sup>46</sup> After condemnation another creditor may sell on a *vend. ex.* without having an inquisition on his writ,<sup>47</sup> although the inquisition was held on a *testatum fi. fa.*<sup>48</sup>

Since the act of April 26, 1855, P. L. 313, where real estate has been extended under a prior judgment, a second inquisition is prohibited,<sup>49</sup> as to the real estate extended, but not as to other real estate of the defendant.<sup>50</sup>

This act was held not to apply to a creditor not having notice of the former inquest.<sup>51</sup> A *levari facias* on a mechanic's lien does not come within the act of 1855.<sup>52</sup> The act of 1855, *supra*, provides that there shall be no "second or other inquisition and extent pending the first, upon any writ issued upon any judgment, entered in the court of the proper county at the date of such inquisition; but any plaintiff in a judgment, or other person claiming to have a lien upon said real estate may proceed to collect the same in the manner provided in the fourth section of said act, in the proper court of the city or county in which such real estate is located."

### 12. Form of return.

Inquisition taken at the office of the sheriff of Tioga county [or on the land, where requested by defendant or his agent] on the 12th day of May, A. D., 1910, before Jerome Bosard, sheriff of said county, by virtue of the annexed *fieri facias*, on the oaths of Hugh Young, John Mitchell, Henry Sherwood, Cotton Mather, Mudd Lemont and Guy Hinman, six honest and lawful men of his bailiwick, duly summoned, who upon their oaths and affirmations aforesaid do say that the rents, issues and profits of a certain messuage and tract of land, the estate of the defendant in said writ named, with the appurtenances are [or are not, in case of condemnation] of a clear yearly value, beyond all reprises, sufficient within the period of seven years, to satisfy the debt and damages in said writ mentioned; and [in case of extent] we do further find and appraise the annual value of said estate to be of the sum of — dollars.

In witness whereof, as well the said sheriff as the jurors afore-

<sup>44a</sup> *White v. White*, 5 Rawle, 61, citing *Cluggage v. Swan*, 4 Binney, 150.

<sup>45</sup> *Geisinger v. Applebach*, 6 W. N. C. 557; *Weaver v. Lawrence*, 1 Dallas, 379; P. & L. Dig., vol. 7, col. 11214.

<sup>46</sup> *Miller v. Milford*, 2 S. & R. 35; *McAfoose's Ap.*, 32 Pa. 276.

<sup>47</sup> *Wray v. Miller*, 20 Pa. 111; P. & L. Dig., vol. 7, cols. 11214-15.

<sup>48</sup> *McCormick v. Meason*, 1 S. & R. 92.

<sup>49</sup> *Coolbaugh v. Weisman*, 4 Luz. L. R. 122.

<sup>50</sup> *Curtis v. Cook*, 34 Pa. 244.

<sup>51</sup> *Smuller v. Willson*, 1 Pearson, 134.

<sup>52</sup> *Schmidt v. Stetler*, 2 Luz. L. R. 192.

said, have to this inquisition set their hands and seals the day and year aforesaid.

Jerome Bosard [Seal].

Hugh Young [Seal].  
John Mitchell [Seal].  
Henry Sherwood [Seal].  
Cotton Mather [Seal].  
Mudd Lemont [Seal].  
Guy Hinman [Seal].

### 13. Approval by the court — Rule in Allegheny.

Where the property is condemned as provided by section 61 of the act of 1836, *supra*, the return should be approved by the court, before a *vend. ex.* issues, and if not so approved, it will be set aside on application of the defendant before sale;<sup>1</sup> but only the defendant can object.<sup>2</sup> If there are no exceptions by the defendant the approval of the return is a ministerial act, entered of course by the prothonotary.<sup>3</sup> Parol evidence may be offered to show the date of the inquisition, where the return is blank;<sup>4</sup> or to identify which one of two tracts was condemned, where the question subsequently arose in an action of ejectment;<sup>5</sup> or that the jury intended to condemn when their return was equivalent to an extension.<sup>6</sup>

Although the original judgment waived inquisition, the court will not set aside an extent where defendant has given notice of acceptance.<sup>7</sup> But if it clearly appears that the rents and profits will not pay the debt in seven years, an extent will be set aside.<sup>8</sup> After return of an extent the plaintiff cannot discontinue his *fi. fa.* and take out an alias, without leave of court;<sup>9</sup> but it does not prevent his proceeding on a mortgage given to secure the bonds.<sup>10</sup>

Rule 103, Allegheny county, provides, as follows:

"All inquests by the sheriff on writs of *feri facias* shall be marked confirmed by the prothonotary, unless exceptions be filed within five days after return of the same."

In a note to Digby's Rules of Court, it is stated that these inquests are held on the second Thursday of March, June, September and December.

<sup>1</sup> Flick v. McComsey, 10 Lanc. Bar, 197; Eberly v. Billingfelt, 27 C. C. 258.

<sup>2</sup> Crawford v. Boyer, 14 Pa. 380.

<sup>3</sup> Fuller v. Sherridan, 2 Luz. L. R. 207.

<sup>4</sup> Thomas v. Wright, 9 S. & R. 87.

<sup>5</sup> Shoemaker v. Ballard, 15 Pa. 92.

<sup>6</sup> Hale v. Henrie, 2 Watts, 143.

<sup>7</sup> Strunk v. Foreman, 17 Lanc. L. R. 372.

<sup>8</sup> Hunt v. McClure, 2 Yeates, 387; Harris v. Bower, 9 Lanc. Bar, 73.

<sup>9</sup> McCullough v. Guetner, 1 Binney, 214.

<sup>10</sup> Lyons v. Ott, 6 Wharton, 163.

## CHAPTER XXII.

### INQUISITION UNDER ACT OF 1840.

1. Jury of inquisition.
2. Form of return.
3. Jurisdiction over the fund.

#### 1. Jury of inquisition.

Section 12 of the act of June 13, 1840, P. L. 689, provides:

"When any part of any lands or real estate, which lie in one or more adjoining tracts, in different counties, has been or shall be taken in execution, under any writ of *fiery facias*, or writ of *levary facias*, issued out of any court in either county, it shall be the duty of the sheriff to summon an inquest, for the purpose of ascertaining whether that part of the said land, which has been taken in execution, can be sold separately and apart from the other part of said land, lying in the adjoining county or counties, without prejudice to the whole, or to the interest of the defendant or defendants, or any of his, her or their lien creditors, or other person, who may be interested in the proceeds thereof; and also how much and what part of said lands in such adjoining county or counties, ought to be sold with that part taken in execution as aforesaid, describing the same by metes and bounds; and he shall make a return in due form of law, of the inquisition taken with the writ, and if the said inquest shall find that the part of said lands taken in execution cannot be sold separately from the other part lying in the adjoining counties, or a portion of the same, without prejudice as aforesaid, and the inquisition shall be approved by the court, the plaintiff may have a writ of *venditioni exponas* or writ of *levary facias*, as the case may require (or a writ of alias or *pluries venditioni exponas*, or alias or *pluries levary facias*, as the same may be necessary), to sell lands and real estate, taken in execution; and other part in such inquisition mentioned and described, by virtue thereof, the said lands and real estate shall be exposed to sale — sold and conveyed as in other cases; and the person or persons to whom the said lands and real estate may be sold, shall and may take, hold and enjoy the same as if the same were situate wholly in the county in which such writ issued: *Provided*, That upon the return of the said inquisition the plaintiff shall cause a copy of the docket entry, and the whole proceeding connected with the said writ, to be filed in the office of the prothonotary of the said adjoining county or counties, in which any of the lands mentioned in said inquisition are situate, which shall be entered on the records of such office; and from the date of said entry the judgment on which said writs issued shall be a lien on the lands within the county in which the said proceedings shall be entered, and copies of all subsequent proceedings in the case shall in like manner be filed

and entered in the office of such prothonotary, immediately after the sheriff shall make a return of the sale of said premises: And *provided* also, that notice of the sale shall be given in each county, in which the lands to be sold lie, as is now required to be given in cases of sheriff's sales; and in all cases of a tract or adjoining tracts of land, situate in different counties as aforesaid, in which any writs of execution have been issued, and no sale under the same has been made, it shall be lawful for the plaintiff to issue an alias or *pluries fieri facias*, or alias or *pluries levare facias*, as may be proper; and the like proceedings shall be had thereon, as above provided. In case there shall be any liens on the parts of said lands lying in the adjoining county or counties, in which the above mentioned proceedings are directed to be filed and entered, existing previous to filing and entering such proceedings, the court shall, after the return of the sale, ascertain and determine, in such manner as they may think proper, what proportion of the proceeds of such sale shall be applied in satisfaction of such previous liens."

The inquest is to determine whether the part within the sheriff's bailiwick can be sold, without that which is not in his bailiwick.

The act of 1836, *supra*, must be followed as to time and notice and approval by the court. If the defendant demands it, the inquest must be held on the premises.<sup>1</sup> When approved by the court, prior irregularities are cured.<sup>2</sup> The right of the purchaser and the jurisdiction of the court are not affected by failure to docket in the adjoining county,<sup>3</sup> though this should not be omitted. A jury of twelve seems necessary.<sup>4</sup>

## 2. Form of inquisition upon lands partly in adjoining counties.

Inquisition taken at the office of the sheriff of the county of Columbia on the 11th day of May, A. D., 1910, before Gray Lloyd, sheriff of said county, by virtue of the annexed writ of *levare facias* on the oaths of John Freeze, David Wells, David Harman, Jesse Berry, James Bryson, Henry Opp, Snyder Tobias, William Votz, Edward Tate, Samuel Clark, James Town and William Peet, all honest and lawful men of his bailiwick, duly summoned, who upon their oaths and affirmations aforesaid do say, that the land taken in execution by virtue of said writ, viz.: [describe the land seized] being part of the following described land lying in the said county of Columbia and in the county of Montour adjoining, viz.: [describe entire tract] which part cannot be sold separately and apart from the other part lying in the county of Montour without prejudice to or spoiling the whole; and the inquest aforesaid, on their oaths and affirmations, do further say that the part of said land lying in Montour county ought to be sold with that part lying in Columbia county, taken in execution as aforesaid.

In witness whereof, as well the said sheriff as the jurors aforesaid,

<sup>1</sup> Worthington v. Worthington, 3 Clark, 208.

<sup>2</sup> Hibberd v. Bovier, 1 Grant, 266.

<sup>3</sup> Elliott v. McGowan, 22 Pa. 198.

<sup>4</sup> Enterline v. Miller, 27 Supr. C. 463.



have to this inquisition set their hands and seals the day and year  
aforesaid.

Gray Lloyd [Seal],

*Sheriff.*

Inquest.

{ John Freeze [Seal].  
David Harmon, [Seal].  
James Bryson [Seal].  
Snyder Tobias [Seal].  
Edward Tate [Seal].  
William Peet [Seal].  
David Wells [Seal].  
Jesse Berry [Seal].  
Henry Opp [Seal].  
William Votz [Seal].  
Samuel Clark [Seal].  
James Town [Seal].

### 3. Jurisdiction over the fund.

Section 9 of the act of April 13, 1843, P. L. 233, provides:

"In all cases where sheriff's sales of any debtor's real estate have been or shall be made, in several counties, and one or more liens shall be claimed to exist against the real estate so situate and sold in several counties, the Court of Common Pleas of the county in which the first sale was or shall be made, or in case a special court shall be necessary, then the president judge of any district adjoining the same shall have jurisdiction to decree distribution of the whole of the funds so raised by the said sales: *Provided*, That in case of a special court as aforesaid, the said judge holding the same, before making the final decree of distribution, shall try all the necessary issues in fact in the proper county where the said issues may be formed."

## CHAPTER XXIII.

### EXECUTIONS — LIBERARI FACIAS.

1. Writ of *liberari facias*.
2. Form of writ.
3. Actual delivery of possession.
4. Execution of several writs — priority.
5. Extent as on writs of *elegit*.
6. Sale when other executions issue during extent.
7. Plaintiff on extent to be paid.
8. *Scire facias* for balance on eviction.
9. Election of plaintiff to demise to defendant.
10. Form of election.
11. Payment of rental by defendant.
12. Form of affidavit of non-payment of rental.
13. Distribution of rentals.
14. Form of petition for distribution.
15. Form of order of court.
16. Restitution after satisfaction.

#### 1. *Liberari facias*.

Section 49 of the act of 1836, *supra*, provides:

"Upon the return of such writ, with the inquisition assessing the value of the yearly rents or profits, as aforesaid, the plaintiff may have a writ of *liberari facias*, to deliver the said real estate, with the appurtenances, to him, at the valuation and appraisement aforesaid, to be holden by him, his executors, administrators and assigns, until such debt or damages, with lawful interest thereon, from the day of the judgment rendered, be fully levied thereon, and make return thereof, under his hand and seal, to the court."

To this writ, a *fi. fa.*, levy, inquisition and extent are prerequisites.<sup>1</sup>

#### 2. Form of writ.

— County, ss:

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

Whereas by a writ of *feri facias*, we lately commanded you, that of the goods and chattels, lands and tenements of — —, late of said County, yeoman, in your bailiwick, you caused to be levied and made as well the sum of — dollars, with interest thereon from —, 18—, lawful money of Pennsylvania, which —, before the Judges of the Court of Common Pleas for the said County aforesaid, by the judgment of the same Court recovered against — of debt, as well all costs in that behalf expended, like lawful money which to the said Plaintiff — were adjudged for — costs and damages. Whereof the said Defendant —, convict as

<sup>1</sup> Bank of Penna. v. Bayard, 4 Clark, 191.

appears of record; and that you have those moneys before the Judges of the same Court at —, at the Court there held for the said County on the — Monday of — then next, to render to the said Plaintiff — for — debt and damages. At which day, before our judges you returned, that by virtue of the said writ to you directed, you had seized and taken in execution a certain,

[Describe land as in writ]

with the appurtenances which remained in your hands unsold for want of buyers, and therefore you could not have the moneys in the writ mentioned, at the day and place therein contained, as therein you were commanded, and that the residue of the execution of the said writ appeared in a certain schedule thereto annexed, by which schedule or inquisition it is found, that the rents, issues, and profits of the said messuage, &c., with the appurtenances, are of a clear yearly value, beyond all reprises, sufficient, within the space of seven years to satisfy the debt and damages in the said writ mentioned. *Therefore, We Command You*, that justly and without delay, the said premises with the appurtenances to the said Plaintiff —, you cause to be delivered at the valuation and appraisement, of six honest and lawful men of your bailiwick, to hold the same to him, his executors, administrators and assigns, until the debt and damages aforesaid, with lawful interest thereon from the — day of —, 18—, be fully levied thereat. And how you shall have executed this writ make manifest before our judges at —, at our County Court of Common Pleas, there to be held for the County aforesaid, the — Monday of — next, under your seal and the seals of those by whom you shall make that valuation and appraisement, and have you then and there this writ.

Witness the Honorable —, President Judge of our said Court, the — day of —, in the year of our Lord one thousand nine hundred and —.

*Attest:*

\_\_\_\_\_  
Prothonotary.

#### *Schedule of Inquisition.*

*Inquisition* indented and taken at —, the — day of —, A. D. 18—, before —, Esq., High Sheriff of the County of —, by virtue of the within writ of *liberari facias* to him directed, by the oaths — of six honest and lawful men of his bailiwick who on their oaths — aforesaid, respectively do say, that the messuage lands and tenements in the said writ mentioned, with the appurtenances are of the clear yearly value of — dollars, which said messuage, &c., I, the said Sheriff have caused to be delivered to — in said writ named, to hold to him and his assigns, until the debt and damages in the same writ mentioned, together with the interest thereof, be thereof fully levied: as by the same writ I am commanded. *In testimony whereof*, as well as I, the said Sheriff, as the inquest aforesaid to their inquisition, have inter-

changeably set their hands and seals, the day and year first above written.

\_\_\_\_\_, Sheriff.

\_\_\_\_\_, [Seal].  
 \_\_\_\_\_, [Seal].  
 \_\_\_\_\_, [Seal].  
 \_\_\_\_\_, [Seal].  
 \_\_\_\_\_, [Seal].  
 \_\_\_\_\_, [Seal].

### 3. Actual delivery of possession.

Section 50 of the act of 1836, *supra*, provides:

"On the execution of a writ of *liberari facias* as aforesaid, where the defendant or any person claiming under him by demise or title subsequent to the judgment, is in possession of premises to be extended, the sheriff shall deliver the actual possession thereof to the plaintiff or his agent."

A return of "executed as commanded" is to the effect that the sheriff delivered possession and it precludes an alias.<sup>2</sup> If the interest be a lease for years the return should show the fact specially.<sup>3</sup>

### 4. Execution of several writs — priority.

Section 51 of the act of 1836, *supra*, provides:

"Lands or tenements shall be extended as aforesaid, upon execution, according to the priority of the judgments, in all cases where two or more writs of *liberari facias* issued thereon shall be in the hands of the sheriff, or other officer, at the same time, for execution, but whenever any real estate shall be extended in satisfaction of any judgment, as aforesaid, such extent shall not be disturbed or discharged by virtue of any writ of *liberari facias*, issued upon any other judgment, whether previously or subsequently obtained."

### 5. Extent as on writs of *elegit*.

Section 2 of the act of 1705, 1 Sm. L. 57, which seems to be restored by the act of Oct. 13, 1840, p. 1, P. L. of 1841, repealing sections 52-7 of the act of 1836,<sup>4</sup> provides:

"All those lands, tenements and hereditaments, shall, by virtue of the writ or writs of execution, be delivered to the party obtaining the same, until the debt or damages be levied by a reasonable extent, in the same manner and method as lands are delivered upon writs of *elegit* in England."

So a defendant who files an affidavit making out a *prima facie* case of satisfaction may have a writ of *scire facias ad computandum et rehabendum terram*.<sup>5</sup>

### 6. Sale when other executions issue during extent.

Section 58 of the act of 1836, *supra*, provides:

"If before the expiration of an extent made as aforesaid, any

<sup>2</sup> *Sawyer v. Curtis*, 2 Ashmead, 127.

<sup>3</sup> *McMichael v. McKeon*, 10 Pa. 143.

<sup>4</sup> *Schofield v. Harbison*, 9 Phila. 38.

<sup>5</sup> *Schofield v. Harbison*, 9 Phila. 38.

other debt or damages shall be recovered against the same defendant, his heirs, executors or administrators, which, with what remains due upon such extent, cannot all be satisfied out of the yearly profits of the real estate so extended, within seven years from such recovery, and execution be issued therefor, the sheriff or other officer, shall certify the same, by inquisition, as aforesaid, upon the return of such writ, and thereupon the court may award a writ of *venditioni exponas* to sell such real estate."

#### 7. Plaintiff on extent to be paid.

Section 59 of the act of 1836, *supra*, provides:

"If, before the expiration of an extent as aforesaid, the estate extended should be sold by virtue of any other execution, the plaintiff to whom such real estate shall be delivered, shall justly and equitably account for the rents, issues and profits actually received by him during his occupancy, and the residue of his judgment, with the interest and costs, shall be paid out of the proceeds of the sale as in other cases."

#### 8. Scire facias for balance on eviction.

Section 60 of the act of 1836, *supra*, provides:

"If any real estate delivered to any person by virtue of any *liberari facias*, as aforesaid, shall, upon any lawful title or cause, and without any fraud, collusion, or other default, be recovered or lawfully taken from the possession of such person, his executors, administrators or assigns, before he or they shall have levied and recovered the whole debt or damages for which real estate was delivered in execution, as aforesaid, it shall be lawful for him, his executors or administrators, to have a writ of *scire facias* upon such judgment, against the defendant therein, his executors or administrators, to show cause why the plaintiff should not have execution for the residue of the judgment and costs."

A plaintiff in possession under a *lib. fa.* which has been set aside and restitution ordered has no right to the rents and can not authorize another to collect.<sup>6</sup>

It is for the jury to decide whether after *lib. fa.* the judgment was satisfied by acts of the parties.<sup>7</sup>

#### 9. Election of plaintiff to demise to defendant.

Section 2 of the act of Oct. 13, 1840, p. 1, P. L. 1841, provides:

"Upon the return of a writ of *feri facias* levied upon real estate of the defendant, with the inquisition assessing the value of the yearly rents or profits thereof the plaintiff may, at his election, instead of suing out a writ of *liberari facias* for the purpose of having the said real estate delivered to him at the valuation and appraisement, permit the defendant or defendants, or any other person or persons, claiming under him or them, by demise or title subsequent to the judgment upon which the said *feri facias* issued, to retain the possession of the said real estate at the annual valua-

<sup>6</sup> Barnhart v. Painter, 2 Rawle, 78.

<sup>7</sup> Shewell v. Meredith, 3 P. & W. 13.

tion and appraisement, so as aforesaid made by the inquest. And the said plaintiff or his attorney shall signify his election, so to permit the said defendants, or other persons so claiming, to the sheriff, who may have the said writ of *fieri facias* in his hands for execution [within ten days after the holding of the inquisition], and it shall be the duty of the said sheriff to notify the said defendant, or other person so claiming thereof, within ten days after said notice shall be given to him by the plaintiff. And it shall be the duty of the said defendant, or other person so claiming [within ten days thereafter], to notify the said sheriff of his willingness to retain the said real estate at the annual valuation and appraisement so as aforesaid made in pursuance of the act entitled "An act relating to executions," passed the 16th day of June, 1836, and upon his neglect or refusal to do so, the plaintiff may have a writ of *venditioni exponas* to sell the said real estate, for the payment of his debt. All which notices required by this act shall be in writing, signed by the parties or their attorneys, and shall be served by delivering a copy to the party plaintiff or defendant, or to the person in possession of the real estate, or leaving the same at his residence with an adult member of his family, and of all which the said sheriff shall make return according to law, and be entitled to mileage as in other cases."

By the act of Feby. 10, 1846, P. L. 37, the above was so changed as to provide instead of the "ten days after the holding of the inquisition," "at any time after holding inquisition," and before a writ of *liberari facias* has been issued.<sup>8</sup>

Section 2 of the act of 1846 changes the time for the defendant, etc., to notify the sheriff of accepting the tender to retain possession from ten days to 30 days; and it is *Provided*, That no such notice shall be given in cases where writs of *venditioni exponas* have been or may be issued on account of the said notice not having been given according to law."

Under these acts a *vend. ex.* will be set aside where the defendant had no notice of the plaintiff's election to permit him to remain at the rental value.<sup>9</sup>

#### 10. Form of plaintiff's election to demise to defendant.

Jesse Showers	}	In the Court of Common Pleas of Lycoming
vs.		County.
Emil Shattuck.	}	<i>Fi. fa.</i> No. ——— Term, 1910.

To John Buck, Sheriff:

I, Jesse Showers, the above named plaintiff, hereby, signify my election to permit Emil Shattuck, the defendant in this execution, to retain possession of the real estate levied upon and extended herein, at the appraisement made by the inquest and returned to court.

Jesse Showers.

Oval, Pa., May 10, 1910.

The record must show that the required notice has been regu-

<sup>8</sup> Shields v. Miltenberger, 14 Pa. 76.

<sup>9</sup> Black v. Aber, 2 Grant, 206.

larly served and so returned by the sheriff.<sup>10</sup> After such service of notice on the defendant by the sheriff, it becomes the duty of the defendant to give formal notice of his acceptance of the demise, which must be done in 30 days and may be in form as follows:

To ———, Esq., Sheriff:

Please take notice that I, Willis Bordwell, defendant in the execution wherein Gertrude Bordwell is plaintiff, accept the said plaintiff's election to permit me to remain in possession of the premises extended by the inquest at the semi-annual rental fixed therein by said inquest and subject to the terms of the acts of assembly in such case provided.

Willis Bordwell.

May 9, 1910, Bear Lake, Pa.

Failure to notify the wife of such election where her property has been extended, on a joint judgment against her and her husband is fatal.<sup>11</sup> The acceptance of notice by attorney for defendant binds him<sup>12</sup> and notice of the plaintiff's election may be signed by plaintiff's attorney.<sup>13</sup> Where the plaintiff retains the property, the rental value is not conclusive; he is bound to account for the actual rents and profits and credit the defendant,<sup>14</sup> and the attorney's or agent's commissions for collection cannot be charged to him.<sup>15</sup>

#### 11. Payment of rental by defendant.

Section 3 of the act of 1840, *supra*, provides:

"If the said defendant or defendants, or other person claiming the said real estate, as aforesaid, shall signify his or their willingness to retain the same at the valuation and appraisement in pursuance of the first section of this act, he or they shall thereby become liable to pay to the plaintiff the amount of the said annual valuation and appraisement in half-yearly instalments, until the debt, interest and costs of the said *feri facias* be fully paid; the first of said instalments to be paid in six months from the day the defendant, or person claiming, as aforesaid, shall deliver notice to the sheriff declaring his or their willingness to retain the said real estate, which date the sheriff is hereby required to endorse on said notice, and on failure to make payment for a period of thirty days after any half-yearly instalment shall become due, it shall be lawful for the plaintiff, his agent or attorney, upon making affidavit thereof, and filing the same, in the prothonotary's office, to issue a writ of *venditioni exponas*, for the sale of said real estate, as fully and with like effect as though a condemnation thereof had taken place."

The semi-annual payments must be made to the plaintiff wherever he resides.<sup>16</sup> The time for the defendant to pay dates from

<sup>10</sup> *Hanzen v. Kummer*, 9 Lanc. Bar, 6; *Deemer v. Danner*, 1 Lehigh V. L. R. 159.

<sup>11</sup> *Cole v. Kolb*, 5 Kulp, 413.

<sup>12</sup> *Comth. v. Eisenhower*, 1 Schuylkill L. R. 71.

<sup>13</sup> *Shields v. Miltenberger*, 14 Pa. 76.

<sup>14</sup> *Wall v. Lloyd*, 1 S. & R. 320; *McKelvy v. DeWolfe*, 20 Pa. 374.

<sup>15</sup> *Mellon v. Campbell*, 11 Pa. 415.

<sup>16</sup> *McMurtrie v. Frazier*, 26 Pa. 391.

the filing of his acceptance and when the six months have expired, he has thirty days more before a *vend. ex.* may issue against him.<sup>17</sup> As the law fixes this time it cannot be enlarged by the plaintiff.<sup>18</sup> When the defendant pays he should place the receipt upon the record.<sup>19</sup> The plaintiff's election and notice to the defendant to retain must appear on the face of the record and the sheriff's return; it cannot be proven *aliunde*.<sup>20</sup> Failure to issue a *vend. ex.* against a defaulting defendant, in the nature of *elegit* is not satisfaction, nor does it postpone other remedies.<sup>21</sup>

### 12. Form of affidavit of non-payment of rental.

Clay Pipe	}	In the Court of Common Pleas of Cameron County. <i>Fi. fa.</i> No. ____ Term, 1910.
v. John Kern.		

Cameron County, ss:

Clay Pipe, plaintiff above named being duly sworn, says a half-yearly instalment of the annual rental and appraisalment of the real estate extended under the execution in this case, and accepted by John Kern, defendant, was due on the 3d day of April, A.D. 1910, and that the said John Kern has failed for thirty days to make payment thereof.

Sworn to and subscribed	}	Clay Pipe.
May 10, 1910. _____, Prothy.		

### 13. Distribution of rentals.

Section 4 of the act of 1840, *supra*, provides:

"On the return by the sheriff of the notices and proceedings prescribed by the second and third sections of this act, it shall be lawful for the court out of which the *fi. fa.* issued, on the application of any creditor, to make an order directing the manner in which the money arising from such half yearly instalments shall be distributed among the different lien creditors according to the priority of their liens, in the same manner and with like effect as in case of distribution of money arising from sheriff's sales, and it shall be the duty of the defendant or person in possession of said estate to pay said installments to the plaintiff or party entitled to receive the same under such decree, or to his or their agent or attorney, or to the sheriff of the proper county, when such plaintiff or person, his or their agent or attorney, reside out of said county."

A judgment note is not a lien.<sup>22</sup> If the judgment creditor permits his lien to expire the next payment should be made to the next lien creditor.<sup>23</sup> The rentals are applicable to judgments in

<sup>17</sup> Black v. Aber, 2 Grant, 206; Diven v. Windowmaker, 3 Leg. Gaz. 6.

<sup>18</sup> Ritter v. Leshner, 3 Luz. L. Obs. 394.

<sup>19</sup> Myers v. Harris, 3 Luz. L. Obs. 294; 8 Luz. L. R. 240.

<sup>20</sup> Hanzen v. Kummer, 6 Luz. L. R. 169.

<sup>21</sup> Slater's Ap., 28 Pa. 169.

<sup>22</sup> Gregg v. McAllister, 4 C. C. 264.

<sup>23</sup> Reynolds' Ap., 10 W. N. C. 424.



their regular order as in case of sheriff's sale.<sup>24</sup> The owner of a mortgage which would not have been discharged by the sale has no claim on the rentals,<sup>25</sup> nor one whose mortgage is not due at the date of the inquisition.<sup>26</sup> But the plaintiff may claim the amount due him out of the proceeds of sale under a subsequent sale of other land of the defendant on which it was a lien.<sup>27</sup>

#### 14. Form of petition for distribution after extent.

Willis A. Joy }  
v. } In the Court of Common Pleas of Potter County.  
San J. Toy. } *Fi. fa.* No. ——— Term, 1910.

To the Honl. John Ormerod, Judge of said court:

Lois Butterworth, a lien creditor of the above named defendant, respectfully represents that the inquest under the above *feri facias*, having been of the opinion that the clear profits of the real estate, levied upon by virtue of said execution would be sufficient to pay the debt and damages to be levied by the same, together with the costs, beyond all reprises, within seven years, did value the yearly rents and profits of said land beyond all reprises at the sum of three hundred dollars, and the plaintiff having elected to permit the defendant to retain possession of the same at such valuation, whereof the defendant has notified the sheriff of his willingness to accept, and your petitioner therefore prays your honorable court to make an order directing the manner in which the money arising from such half-yearly installments shall be distributed amongst the lien creditors of said defendant.

Sworn to, etc.

Lois Butterworth.

#### 15. Order of court.

And now, May 11, 1910, above petition being presented and considered, it is ordered that the half-yearly rentals, as they accrue, shall be paid by said defendant to the plaintiff in No. —, — Term, 1910, until the same shall be fully satisfied, and then to each lien creditor, including the petitioner in the order of priority of lien as appears by the record.

Per cur.

John Ormerod, Judge.

#### 16. Restitution after satisfaction.

The defendant, where lands were delivered to plaintiff by *liberari facias*, on filing an affidavit of facts showing, *prima facie*, that plaintiff has had satisfaction of his debt, may have his *scire facias ad computandum et rehabendum terram*, which is a writ requiring the plaintiff to show why the defendant should not have an account and re-delivery of the land.<sup>28</sup> Where judgment on the *sci-*

<sup>24</sup> Crandall's Est., 7 Luz. L. R. 183.

<sup>25</sup> Bank of U. S. v. Patterson, 9 Pa. 311.

<sup>26</sup> Weil v. Morgan, 13 Luz. L. R. 20.

<sup>27</sup> Slater's Ap., 28 Pa. 169.

<sup>28</sup> Schofield v. Harbison, 9 Phila. 38; Carlisle v. Cunningham, 1 Dallas, 81.

*fa.* is rendered in favor of the defendant he is entitled to an order for a writ of restitution of the land. Armed with this writ, if the sheriff find a stranger in possession claiming under an independent title, his return of the fact will be sufficient to protect him and his sureties.<sup>29</sup>

The statute of Westminster II (13th Edward I. C. 18), provided for the writ of *elegit*, above referred to, which writ delivered the land to the plaintiff, "*quosque debitum fuerit levatum*" i. e. "until the debt be or might be levied," thus imposing due diligence and care upon the plaintiff to make his debt out of the land and account for the same to the defendant. So, therefore, when the defendant shows that the plaintiff ought to be satisfied,<sup>30</sup> he shall have his *scire facias* the practice upon which assimilates to that in account render, which see.<sup>31</sup>

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<sup>29</sup> Comth. v. Straub, 35 Pa. 137; Heffner v. Betz, 32 Pa. 376.

<sup>30</sup> Corbet's Case, 2 Coke's Rep. 81 (part 4).

<sup>31</sup> McKelvy v. De Wolfe, 20 Pa. 374, Woodward, J.

## CHAPTER XXIV.

### EXECUTION AGAINST LIFE ESTATE.

1. Petition of lien creditor for appointment of sequestrator.
2. Form of application.
3. Order and appointment of sequestrator, form.
4. Acceptance of trust, form.
5. Bond, form of.
6. Form of writ of sequestration.
7. The sequestrator — effect of appointment.
8. Powers of sequestrator.
9. Sequestrator's security and account.
10. Sequestrator to be put in possession.
11. Election of defendant to retain possession.
12. Notice to non-resident life tenant.
13. Meaning of section six, act of 1840, declared.
14. Sequestration or sale.
15. Form of notice to sheriff to appraise.
16. Form of notice of request, to plaintiff.
17. Sale under *vend. ex.*
18. Form of notice to defendant, of application.
19. Practice on application for *vend. ex.*

#### 1. Petition of lien creditor for appointment of sequestrator.

Section 6 of the act of October 13, 1840 (p. 1, P. L. 1841), provides:

"Whenever an estate for life, in any improved lands or tenements, yielding rents, issues or profits, shall hereafter be taken in execution the court shall upon the application of any lien creditor, award a writ to sequester the rents, issues and profits of such estate, and appoint a sequestrator to carry the same into effect."

The petition may be presented any time before the return day.<sup>1</sup>

This act does not apply to a converted estate;<sup>2</sup> nor is a sequestrator necessary where there is an adverse possession or the debtor claims a fee or where the execution creditor believes defendant holds a fee. In such cases defendant's interest may be sold.<sup>3</sup>

Under acts of Oct. 13, 1840 (P. L. 1841) and Jan'y 24, 1849, P. L. 676, a life estate cannot be sold on a *fi. fa.*<sup>4</sup>

#### 2. Form of application for sequestration of life estate.

Stephen Girard } In the Court of Common Pleas of Beaver  
v. } County.  
Laura Belle Irwin. } *Fi. fa.* No. ——— Term, 1910.

To the Honorable Judge of said court:

The petition of Stephen Girard respectfully represents that he

<sup>1</sup> Pentland v. Kelly, 6 W. & S. 483.

<sup>2</sup> Lancaster County Bank v. Stauffer, 10 Pa. 398.

<sup>3</sup> Gordon v. Ingraham, 32 Pa. 214.

<sup>4</sup> Lewis' Est., 170 Pa. 376. (See acts, *infra*.)

is a lien creditor of the above defendant Laura Belle Irwin; that by virtue of the above *fiery facias*, the life estate of said defendant in a certain tract of land, viz.: a messuage, etc., [describing it] was taken in execution by the sheriff; that said real estate is improved land, yielding rents, issues and profits. He therefore prays your honorable court to award a writ to sequester the rents, issues and profits of the said estate and to appoint a sequestrator to carry the same into effect and he will ever pray, etc.

Stephen Girard.

Sworn to, etc.

### 3. Order and appointment of sequestrator.

Now, to-wit: May 12, 1910, the petition foregoing being duly considered, a writ of sequestration is hereby awarded pursuant to law, and the court hereby appoints Dan H. Stone sequestrator, bond in one thousand dollars with approved security to be filed with his acceptance of the trust.

Per cur.

— —, Judge.

### 4. Acceptance.

Stephen Girard	} In the Court of Common Pleas of Beaver
v.	
Laura Belle Irwin.	County
	<i>Fi. fa. No.</i>

— Term, 1910.

Now, May 12, 1910, I hereby accept the office of sequestrator pursuant to within appointment.

Dan H. Stone.

### 5. Bond of sequestrator.

Know all men by these presents that we, Dan H. Stone, James Engel and Henry Votz, all of the County of Beaver, are held and firmly bound to the Commonwealth of Pennsylvania in the sum of one thousand dollars, lawful money of the United States, to be paid to said Commonwealth, her certain attorney or assigns, to which payment well and truly to be made, we do bind ourselves jointly and severally, our heirs, executors, and administrators firmly by these presents: Sealed with our seals and dated the 12th day of May A. D. 1910.

Whereas on the application of Stephen Girard, a lien creditor of Laura Belle Irwin, the said court awarded a writ to sequester the rents, issues and profits of the life estate of the said Laura Belle Irwin, taken in execution under the above writ of *scire facias* and did appoint the said Dan H. Stone sequestrator to carry said writ into effect;

Now the condition of this obligation is such that if the above bounden Dan H. Stone, sequestrator as aforesaid, shall faithfully execute his said trust, as legally thereunto required, then this obligation to be void, otherwise to be in full force and virtue.

Dan H. Stone, [Seal].

James Engel, [Seal].

Henry Votz, [Seal].

Sealed and delivered in presence of  
James Campbell,  
William B. Reed.

### 6. Form of writ of sequestration.

Beaver County, ss:

The Commonwealth of Pennsylvania to Dan H. Stone, of Beaver County, greeting:

Whereas by our writ of *fiery facias* tested the — day of — last past, we commanded the sheriff of Beaver County, that of the goods and chattels, lands and tenements of Laura Belle Irwin, in his bailiwick, he should cause to be levied as well a certain debt of five hundred dollars, lawful money of the United States, which Stephen Girard lately in our Court of Common Pleas, recovered against said Laura Belle Irwin, as also twelve dollars, which to the said Stephen Girard in our same court were adjudged for his damages for the detention of said debt, whereof the said defendant was convict, as appeared of record more fully, and that he should have that money at Beaver, before said court there to be held on a day certain in our said writ contained, to render to the said Stephen Girard for his debt and damages aforesaid; and that he should have then and there that writ; on which said day he to our said court did return, that by virtue of said writ to him directed he had seized and taken in execution a certain messuage, etc., [describing same] wherein said Laura Belle Irwin, defendant, was seised with a life estate; and whereas, upon petition by said Stephen Girard, plaintiff in the *fi. fa.* aforesaid, our said court did on the 12th day of May, A. D. 1910, award this writ and appoint you, the said Dan H. Stone, sequestrator in this behalf.

We therefore authorize and command you to sequester the said estate, rents, issues and profits of said Laura Belle Irwin, defendant as aforesaid, and your doings in the premises, you shall from time to time report to our said court as you are in duty bound.

Witness the Honorable Richard S. Holt, Esq., President Judge of our said court at Beaver, the 12th day of May, A. D. 1910.

\_\_\_\_\_  
Prothonotary.

### 7. The sequestrator — effect.

The appointment of a sequestrator precludes a sale under a *levari facias* on a mechanic's lien.<sup>5</sup> If a *bona fide* claim is made under an adverse title the court will award an examination *pro interesse suo* and appoint a master for this purpose.<sup>6</sup>

Where an application is made for the discharge of the sequestrator on the ground that the defendant was merely a tenant, it must be sworn to.<sup>7</sup> The appointment of a sequestrator does not affect the duty of a plaintiff to keep the lien of his judgment up by revival.<sup>8</sup> A sequestrator will not be appointed where the life estate has been appraised and set apart as exempt.<sup>9</sup>

<sup>5</sup> *Pentland v. Kelly*, 6 W. & S. 483.

<sup>6</sup> *Gordon v. Ingraham*, 32 Pa. 214; *Egerton v. Sullivan*, 2 Lack. Jur. 126.

<sup>7</sup> *Egerton v. Sullivan*, 2 Lack. Jur. 126.

<sup>8</sup> *Holliday v. Bruner*, 153 Pa. 262.

<sup>9</sup> *Sener v. Scherff*, 10 C. C. 529.

The action of the court in appointing or refusing to appoint a sequestrator will not be reviewed.<sup>10</sup>

Where an assignment has been made for the benefit of creditors, a sequestrator will not be appointed;<sup>11</sup> nor where the defendant claims to hold in fee.<sup>12</sup>

#### 8. Powers of sequestrator.

Section 7 of the act of 1840, *supra*, provides:

"The sequestrator, so appointed, shall have power, according to the direction of the court, to rent or sell such lands or tenements, for such term during the life of the persons upon whom such estate therein shall depend, as shall be sufficient to satisfy all the liens against the same; together with all charges for taxes, repairs and expenses which shall be incurred during the said term, and he shall apply the proceeds thereof, under the direction of the court, in the payment of such liens according to their priority."

For Rule of estimating life estate see Dennison's Ap. 1 Pa. 201; and Shippen's Ap. 80 Pa. 391.

#### 9. Sequestrator's security and account.

Section 8 of the act of 1840, *supra*, provides:

"The court shall have power, if they deem it necessary, to require from such sequestrator a bond with sufficient security for the faithful execution of his trust, and to compel him to account from time to time, as they shall think necessary; and they shall make all such orders, allowances and decrees in the premises, and enforce the same in like manner, and as fully and effectually, as a Court of Chancery might do in the like case."

Section 19, act of April 25, 1850, P. L. 569, requires such accounts to be recorded.

#### 10. Sequestrator to be put in possession. Penalty for obstruction.

Section 5 of the act of Jan'y 24, 1849, P. L. 676, provides:

"It shall be the duty of every sheriff or coroner, acting as sheriff, in all cases where a sequestrator of rents, issues and profits of a life estate in lands, has been or hereafter shall be appointed, upon requisition upon him in writing for that purpose made by such sequestrator, with the sanction of any one of the judges of the courts of the county, and as often as so required, to put and keep such sequestrator, his vendees or lessees in full and undisturbed possession of the lands and tenements, with the appurtenances levied on; and in such cases the sheriff or coroner shall have the same powers and privileges, and be entitled to the same fees, as in executing writs of *habere facias possessionem* and of estrepement; and if any tenant for life, defendant in any such execution, or any other person or persons, shall unlawfully disturb the pos-

<sup>10</sup> Giddings' Ap., 81 \* Pa. 72; Lancaster County Bank v. Stauffer, 10 Pa. 398.

<sup>11</sup> Lewis' Est., 170 Pa. 376.

<sup>12</sup> Lawrence v. Keener, 149 Pa. 402.

session of such sequestrator, his vendee, or lessee, or shall obstruct or molest the sheriff or coroner in the execution of the duties enjoined by this section of this act, he or they shall for every such offence be subject to prosecution by indictment and upon conviction thereof shall be sentenced to pay a fine not exceeding \$100, the costs of prosecution, and imprisonment in the county jail for a term not exceeding six calendar months; and shall also be liable to such damages as such sequestrator, his vendee or lessee, or the plaintiff in such execution, shall have sustained, to be recovered by action of trespass, as damages in actions of trespass are now by law recoverable; and the courts, or any judge or justice of the peace or alderman, may, upon cause shown, require of all such offenders, surety of the peace for the prevention, or against the repetition of such offences."

**11. Election of defendant to retain possession — vend. ex.**

Section 4 of the act of 1849, *supra*, provides:

"It shall be the duty of every sheriff or coroner holding inquisitions on lands yielding rents, issues, or profits, taken in execution, wherein the defendant has only a life estate, where the same shall be condemned, upon request made and notice given to the plaintiff in the writ, his agent or attorney, at least three days before the holding of such inquisition by the defendant, his agent or attorney, or the occupant of the land, to cause the inquest to make an appraisal of the yearly value of such lands, and to return the same with or as part of the inquisition and condemnation, and thereupon, before any writ of *venditioni exponas* shall issue, the plaintiff shall wait thirty days from the date of such inquisition for the defendant, his agent, attorney or occupant of the land, to elect, by notice in writing to the sheriff or coroner, to pay the plaintiff the annual valuation in half-yearly payments; and on failure of the defendant so to elect to pay, or on neglect or failure to pay for thirty days after any half-yearly payment shall be due and payable, the like proceedings may be had as are now directed by law in cases wherein estates of inheritance taken in execution are extended on a sheriff's inquest: *Provided*, That nothing herein contained shall prevent the appointment of a sequestrator on application of any lien creditor under the provisions of the third section of this act, and of the act therein referred to: *Provided further*, That the writ of *venditioni exponas*, as authorized by the third section, shall not be issued in any case wherein the annual rent, found by the jury aforesaid, shall be sufficient to pay the interest on the debts entered of record: *And provided also*, That no such writ shall be issued unless by the direction of the proper court; and on the application of any lien creditor for a writ of *venditioni exponas*, the tenant for life shall have at least ten days' notice of the application for such writ."

**12. Notice to non-resident life tenant.**

Section 4 of the act of January 24, 1849, P. L. 676, *supra*, is amended by the act of June 4, 1901, P.L. 426, as follows:

"That no such writ [*vend. ex.*] shall be issued unless by direction

of the proper court; and on the application of any lien creditor, for a writ of *venditioni exponas*, the tenant shall have at least ten days' notice of the application for such writ: but if the tenant for life be a non-resident of the commonwealth of Pennsylvania, and his whereabouts cannot be ascertained after diligent inquiry, upon the presentation to the court by petition of any lien creditor, setting forth such facts, the court is hereby directed to grant an order of publication, in at least two weekly newspapers in the county where the life estate is located, for a period of four weeks, and the mailing of a copy of each of such publications to the life tenant's last known place of residence, which publications, together with the mailing of copies of the same to the life tenant's last known place of residence, shall have the full force and effect as if the life tenant had received personal notice, and shall entitle any lien creditor to a writ of *venditioni exponas*."

### 13. Meaning of section six of the act of 1840, *supra*.

Section 3 of the act of 1849, *supra*, declares the true intent of the sixth section of the act of 1840, *supra*, to be:

"That sales under executions of life estates yielding rents, issues or profits, may be made in the manner provided by law in the case of estates of inheritance, in all cases where some lien creditor shall not, on or before the return day of the first writ of *venditioni exponas*, whereon a sale shall be advertised, have procured a sequestrator to be appointed."

### 14. Sequestration or sale.

The alternative is thus presented of having sequestration or sale after inquisition and condemnation. But, a life estate contingent upon another estate, and not yet vested in possession has been held not subject to sequestration under the acts of 1840 and 1849.<sup>13</sup>

A lease *pur autre vie* cannot be sold under a *fi. fa.*<sup>14</sup>

Sequestration of a life estate inures to the benefit of the judgment creditor who secures the writ producing the fund, saving the rights of prior lien creditors.<sup>15</sup>

If a sale be made without the application, order and notice required by the act of 1849, *supra*, it will be void and the purchaser will take nothing.<sup>16</sup> If the record is defective as to the order to sell, the sale will be set aside.<sup>17</sup> But where objections are not made in the court below, the appellate court will not notice the defects.<sup>18</sup>

<sup>13</sup> McElroy v. Harris, 21 Leg. Int. 124.

<sup>14</sup> Sharswood, J., in Comth. v. Allen, 2 Phila. 22.

<sup>15</sup> Buchi v. Pund, 9 D. R. 446.

<sup>16</sup> Kintz v. Long, 30 Pa. 501; Snyder v. Christ, 39 Pa. 499; Du Four v. Bubbs, 199 Pa. 107.

<sup>17</sup> Conard v. Edwards (No. 1), 7 C. C. 342.

<sup>18</sup> Cope v. Kidney, 115 Pa. 228.



**15. Form of notice to sheriff to appraise yearly value of life estate.**

Roy Withers } In the Court of Common Pleas of Nor-  
v. } thumberland County.  
Elizabeth Kopenhaver. } *Fi. fa.* No. — Term, 1910.

To ———, sheriff:

You are hereby requested to cause an inquest to be held by you on the lands taken in execution, by virtue of the writ above stated, to make appraisement of the yearly value of the lands so taken by you, in which I, the above defendant, have a life estate, and return the same according to law.

Sunbury, Pa., May 10, 1910.

Elizabeth Kopenhaver.

**16. Form of notice to plaintiff of request, to appraise life estate.**

Roy Withers } In the Court of Common Pleas of Nor-  
v. } thumberland County.  
Elizabeth Kopenhaver. } *Fi. fa.* No. — Term, 1910.

To Roy Withers, Plaintiff:

You are hereby notified that I have requested the sheriff of said county to cause an inquest to be held on the lands taken in execution in above entitled case, in which I, defendant therein, have a life estate, and to make appraisement of the annual value thereof and return as by law provided.

Elizabeth Kopenhaver.

Sunbury, Pa., May 10, 1910.

**17. Sale under *venditioni exponas*.**

If the land is condemned by the inquest, as in other cases, a *venditioni exponas* may be applied for to the court, after ten days' notice to the life tenant if he be a resident, or by publication as required by the act of 1901, *supra*, in case he is a non-resident.<sup>18a</sup> Without notice, no title will pass at the sale.<sup>19</sup>

**18. Form of notice.**

Roy Withers } In the Court of Common Pleas of Nor-  
v. } thumberland County.  
Elizabeth Kopenhaver. } No. — Term, 1910.

To Elizabeth Kopenhaver, the defendant named:

You are hereby notified that application will be made to one of the judges of said court, at Sunbury, Pa., on the — day of —, for a writ of *venditioni exponas* to sell the interest levied upon in this case.

Roy Withers, Plaintiff

May 16, 1910.

[or his agent or attorney].

Such notice may be served on the attorney of record.<sup>20</sup>

<sup>18a</sup> Moyer v. Casper, 7 D. R. 720.

<sup>19</sup> Comth. v. Allen, 30 Pa. 49; Kintz v. Long, 30 Pa. 501; Eyrick v. Hetrick, 13 Pa. 488.

<sup>20</sup> Goodell v. Ehresman, 1 D. R. 662.

### 19. Practice on application.

These proceedings must be taken to sell a widow's interest in land charged in partition;<sup>21</sup> also the interest of a tenant by the curtesy and the proceeding is complete—an *alias vend. ex.* cannot be issued;<sup>22</sup> but the defendant must have an undoubted life estate.<sup>23</sup> It was held the act of 1849 does not apply to a *sci. fa. sur* mortgage where a sale may be had under a *lev. fa.*<sup>24</sup> A mere personal privilege to remain on an estate during life is not such a life estate as comes within the purview of the act.<sup>25</sup>

If the defendant wishes to retain the estate at the annual rental value as provided by the act of 1849, and so requests the sheriff and notifies the plaintiff (see forms, *supra*), the court will order an appraisement nathless the property has been condemned by an inquisition,<sup>26</sup> but without such notice, a sale will not be set aside.<sup>27</sup>

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<sup>21</sup> Kunselman v. Stine, 183 Pa. 1, overruling Diller v. Groff, 11 Lenc. L. R. 73.

<sup>22</sup> Copeland v. Mehaffey, 6 D. R. 167.

<sup>23</sup> De Frehn v. Leitenberger, 7 Leg. Gaz. 69.

<sup>24</sup> Datesman's Ap., 127 Pa. 348.

<sup>25</sup> Marks v. Baker, 2 Supr. C. 167.

<sup>26</sup> Donahue v. Helme, 5 W. N. C. 539.

<sup>27</sup> Conard v. Edwards, 7 C. C. 342.

## CHAPTER XXV.

### EXECUTION — AGAINST CORPORATION.

1. Manner of levying corporate property.
2. *Fi. fa.* against property and franchises.
3. Practice under the various acts.
4. Levy may extend to other counties.
5. Sale of other property than franchises.
6. Sale of real estate.
7. Forfeiture, when not applicable to purchaser.
8. Attachment execution against private corporations.
9. Rights and liabilities of the corporation.
10. Stock attachable, or non-attachable.
11. Mode of distribution.

#### 1. Manner of levying.

Section 72 of the act of 1836, *supra*, provides:

"All executions which shall be issued from any court of record against any corporation, not being a county, township, or other public corporate body, shall command the sheriff, or other officer, to levy the sum recovered, together with the costs of suit, of the goods and chattels, lands and tenements of such corporation, and such execution shall be executed in the manner following, to-wit:

I. The officer charged with the execution of such writ shall go to the banking houses, or other principal office of such corporation, during the usual office hours and demand of the president or other chief officer, cashier, treasurer, secretary, chief clerk, or other officer, having charge of such office, the amount of such execution, with legal costs.

II. If no person can be found on whom demand can be made as aforesaid, or if the amount of such execution be not forthwith paid, in lawful money, after demand as aforesaid, such officer shall seize personal property of said corporation, sufficient to satisfy the debt, interest and costs, as aforesaid.

III. If the corporation against which such execution shall be issued be a banking company, and other sufficient personal property cannot be found, such officer shall take so much of any current coin, of gold, silver or copper, which he may find, as shall be sufficient to satisfy the debt, interest and costs, as aforesaid.

IV. If no sufficient personal property be found, as aforesaid, such officer shall levy such execution upon the real estate of such corporation, and thereupon proceed in the manner provided in other cases for the sale of land upon execution."

#### 2. *Fi. fa.* against corporate property and franchises.

The act of April 7, 1870, P. L. 58, provides:

"In addition to the provisions of the 72d section of the act of June 16, 1836 [*supra*], relating to executions, and in lieu of the pro-

visions or proceedings by sequestration under said act, plaintiff or assigns, in any judgment against any corporation not excepted by said act may have execution—*fi. fa.*, issued from the court wherein said judgment is entered, which shall command the sheriff or other officer to levy the sum of said judgment, with interest and costs of suit, of any personal, mixed or real property, franchises and rights of such corporation, and thereupon proceed and sell the same, excepting lands held in fee, which latter shall be proceeded against and sold in the manner provided in cases for the sale of real estate; the proceedings on judgment under the aforesaid provisions of this supplement shall be without stay of execution: *Provided*, That the purchaser or purchasers of any or all of said property, real, personal or mixed, together with the franchises and rights, shall take the same clear of all encumbrances, excepting any mortgage or mortgages which may legally exist at the time of levy thereupon, the lien of which shall not be affected in any manner by said sale.”

### 3. Practice under these acts.

Before this special execution can issue an ordinary *fi. fa.* must first issue and be returned unsatisfied either in whole or in part.<sup>1</sup> Demand at the principal office is also a prerequisite to the first *fi. fa.*<sup>2</sup> A corporation created by the joint act of the legislatures of this and another state, a part only of its property being in Pennsylvania, cannot be sold out under a *fi. fa.*<sup>3</sup> The franchises and the property ordinarily used in the exercise thereof must be levied and sold together.<sup>4</sup> “Lands held in fee” are such as are necessary thereto and must be sold under the act of 1836.<sup>5</sup> Where the franchises *et cetera* are sold under the common *fi. fa.* the right to object may be lost by laches.<sup>6</sup>

The prior demand at the principal office required as a prerequisite may be made by the sheriff of the county in which the *fi. fa.* issues, at such principal office in any county in the state, and he is entitled to fees and mileage as in other cases. This demand must be made on an ordinary *fi. fa.* and if refused and a return of “no goods” is made, then the special *fi. fa.* authorized by the act of 1870, *supra*, may issue.<sup>7</sup> The return of “no goods” is *prima facie* evidence of insolvency.<sup>8</sup>

The irregularity in the sale cannot be raised on *quo warranto* against the new corporation.<sup>9</sup> But the previous demand is indis-

<sup>1</sup> *Guest v. Lower Merion Water Co.*, 142 Pa. 610.

<sup>2</sup> *Hassall v. Union Canal Co.*, 2 C. C. 147.

<sup>3</sup> *Graham's Ex. v. P. & O. Canal Co.*, 3 Pitts. 341.

<sup>4</sup> *Longstreth v. P. & R. R. Co.*, 11 W. N. C. 309; *Fire Ins. Patrol v. Boyd*, 19 Phila. 266.

<sup>5</sup> *Greensburg Fuel Co. v. Irwin N. G. Co.*, 162 Pa. 78.

<sup>6</sup> *Lusk's Ap.*, 108 Pa. 152.

<sup>7</sup> *Smith v. Altoona, Etc., R. Co.*, 182 Pa. 139.

<sup>8</sup> *Flagg v. Farnsworth*, 12 W. N. C. 500; *P. & B., Etc., R. Co.'s Ap.*, 70 Pa. 355; *Valle v. Arnold, Etc., Co.*, 17 C. C. 33; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626.

<sup>9</sup> *Comth. v. Keystone, Etc., Co.*, 2 Dauphin Co. 1, reversed on another point, 193 Pa. 245.

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pensible to a sale.<sup>10</sup> A return of *nulla bona* will not be inquired to in the appellate court.<sup>11</sup> The act of 1870, *supra*, does away with sequestration.<sup>12</sup>

#### 4. Levy may extend to other counties.

Section 2 of the act of April 7, 1870, provides:

"By virtue of any execution issued under this act the levy may extend to the property, franchises and rights of said corporation, in any and every county of this commonwealth, wherein the same may be, and shall be endorsed on said writ; the levy and sale thereof shall be as effective as though all said property, franchises and rights were located, used, levied upon and sold in the county wherein said writ of execution was issued, and shall fully divest the defendants of all interest therein."

Such sale dissolves the corporate entity in law.<sup>13</sup> It was held that this execution must be levied in the county where the writ issues.<sup>14</sup> If the general office is in said county, the personal property incident to the office is sufficient to extend the levy to other counties.<sup>15</sup> The act of 1870 precludes a *testatum fi. fa.* as to corporations.<sup>16</sup> Under these acts the property in ordinary use of the corporation cannot be sold separate from its franchises;<sup>17</sup> i. e., such property as is necessary to perform the duties for which it was incorporated, according to the circumstances.<sup>18</sup>

It has been held not to apply to an inter-state corporation.<sup>19</sup> A stock-holder's petition to set aside a sale for irregularities will not be heard, as the injury if any, is to the corporation itself.<sup>20</sup> A fund derived from a sale under the act of 1870, *supra*, will be distributed *pro rata*, as in other cases of insolvency.<sup>21</sup>

#### 5. Sale of other property than franchises.

The personal property of a private corporation has been held liable to sale under an ordinary *fi. fa.* even if necessary and useful to the corporation when sold without protest.<sup>22</sup>

The proceeds of sale of property not necessary to the exercise

<sup>10</sup> *Mausell v. N. Y., Etc., R. Co.*, 171 Pa. 606.

<sup>11</sup> *Reid v. Northwestern R. Co.*, 32 Pa. 257.

<sup>12</sup> *P. & B. R. Co.'s Ap.*, 70 Pa. 355; *Bayard's Ap.*, 72 Pa. 453.

<sup>13</sup> *Reifler v. H. & D., Etc., Co.*, 1 C. C. 64.

<sup>14</sup> *Hassall v. Union Canal Co.*, 2 C. C. 147.

<sup>15</sup> *Chester, Etc., Co. v. Saltsburg Gas Co.*, 8 D. R. 427; *Beaver, Etc., Co. v. Wilson*, 83 Pa. 83.

<sup>16</sup> *Root v. Oil, Etc., R. Co.*, 31 Leg. Int. 285.

<sup>17</sup> *Longstreth v. P. & R. R. Co.*, 11 W. N. C. 309; *Margo v. Penna. R. Co.*, No. 2, 213 Pa. 468; *Intl., Etc., Co. v. Penna. R. Co.*, 15 D. R. 225.

<sup>18</sup> *Boyd's Ap.*, 2 Mona. 399; *East Side Bank v. Columbus Tanning Co.*, 170 Pa. 1; *P. & L. Dig.*, vol. 7, col. 11288.

<sup>19</sup> *Graham v. P. & O. Canal Co.*, 3 Pitts. 341.

<sup>20</sup> *South W., Etc., Co. v. Fayette, Etc., Co.*, 145 Pa. 13.

<sup>21</sup> *Bayard's Ap.*, 72 Pa. 453; *Hogg's Ap.*, 88 Pa. 195; *P. & L. Dig.*, vol. 7, col. 11290.

<sup>22</sup> *Valle v. Arnold, Etc., Co.*, 17 O. C. 33; *East Side Bank v. Columbus Tanning Co.*, 170 Pa. 1; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626; 175 Pa. 437. (See *Hopkins' Ap.*, 90 Pa. 69.)

of its franchises will be distributed according to the priority of liens.<sup>23</sup>

#### 6. Sale of real estate.

Prior to the acts of 1836 and April 30, 1844, P. L. 532, the real estate of a corporation was subject to execution when separate and distinct from the realty essential to the exercise of its franchise.<sup>24</sup> And since their passage, it is so of corporations other than public corporations.<sup>25</sup> But the act of 1870 excepts land held in fee from sale under a special *f. fa.* and directs it to be sold as other real estate. If necessary to its corporate use it must be sold under the act of 1870.<sup>26</sup>

#### 7. Forfeiture, does not apply to purchaser, when.

Section 2 of the act of April 30, 1844, P. L. 532, provides:

"In all cases where the real estate of any corporation shall be sold at sheriff's sale, for the payment of *bona fide* debts, the purchasers shall receive titles discharged from any right of forfeiture to the commonwealth, by reason of misnomer, limitation or defect of power in the said corporation to purchase and hold said lands; and the purchase money shall be distributed according to priority among the lien creditors, as in other cases."<sup>27</sup>

#### 8. Attachment execution against private corporations.

Section 4 of the act of March 20, 1845, P. L. 188, provides:

"So much of the act of assembly passed June 16, 1836, entitled "An act relating to executions, as provides for the levy and recovery of stock, deposits and debts due to defendants, by process of attachment and *scire facias*, is hereby extended to all cases of attachments to be issued upon judgments against corporations (other than municipal corporations) and from and after the passage of this act, all such process, which hereafter may be issued, may be proceeded in to final judgment and execution, in the same manner, and under the same rules and regulations, as are directed against corporations, by the provisions of the act of June 16, 1836, relating to executions; and so much of the 36th section of the act of June 16, 1836, as requires service of the attachment on any defendant be and the same is hereby repealed, except where the defendant is a resident of the county in which the attachment issued."

Prior to this courts differed as to whether an attachment execution would lie as to a corporation.<sup>28</sup>

Such an execution will not lie against a railroad company to

<sup>23</sup> Second Natl. Bank, Etc., v. Gibbs, Etc., Co., 13 W. N. C. 174; Fairmount, Etc., Co.'s Ap., 14 W. N. C. 214; P. & R. R. Co.'s Ap., 3 Atl. 838.

<sup>24</sup> Ammant v. New, Etc., Road Co., 13 S. & R. 210.

<sup>25</sup> Plymouth R. Co. v. Colwell, 39 Pa. 337; Greensburg Fuel Co. v. Irwin, Etc., Co., 162 Pa. 78; First Natl. Bank v. New York, Etc., Co., 137 Pa. 601.

<sup>26</sup> Bell v. Wood, 181 Pa. 175.

<sup>27</sup> First Natl. Bank v. N. Y., Etc., Co., 137 Pa. 601.

<sup>28</sup> Ridge Turnpike Co. v. Peddle, 4 Pa. 490.

attach the money in the hands of its agent from the sale of tickets,<sup>29</sup> but it was held that the funds of an insolvent canal company might be attached in the hands of its banker.<sup>30</sup>

The act of March 29, 1819, 7 Sm. L. 217,<sup>31</sup> was not repealed by section 32 of the act of 1836, *supra*, where the stock is held in defendant's own name,<sup>32</sup> nor by sections 33 and 34, when held in the name of another.<sup>33</sup>

These remedies are not exclusive, and the plaintiff may elect between them.<sup>34</sup> Under the act of 1819, *supra*, stock pledged to another was not attachable.<sup>35</sup> Under section 33 of the act of 1836, when the stock stands in the name of another, it is not necessary to serve the defendant with process;<sup>36</sup> nor will a subsequent attachment served on defendant acquire priority.<sup>37</sup> The person in whose name the stock stands must be summoned as garnishee.<sup>38</sup> Where the garnishee admits the possession of stock but avers it is pledged as security for a debt due him, the court will award an execution to sell it subject to the claim of the garnishee.<sup>39</sup>

In levying upon such stock, where the plaintiff hands a list to the sheriff and he does not take manual possession, but goes to the owner and inquires whether the list is correct and being informed that it is, states to the owner that he levies upon it, the levy will hold against an assignment for creditors made later on the same day.<sup>40</sup> Where the stock stands in the name of another, who claims it, a sale will be void where the affidavit and recognizance required by section 32 of the act of 1836 are not filed,<sup>41</sup> which are prerequisites<sup>42</sup> in such cases, but not where the stock stands in the owner's name.<sup>43</sup> Before corporate stock in the name of the decedent may be attached in a judgment against the remainderman, in the hands of the executor, such affidavit and recognizance are requisite.<sup>44</sup> Where the stock is in the name of one person but belongs to another, although not transferred on the books it cannot be sold as the property of the first.<sup>45</sup> The stock of a foreign corporation, owned by a non-resident, where the certificates are held merely as collateral, is not attachable.<sup>46</sup>

<sup>29</sup> Fowler v. Pitts., Etc., R. Co., 35 Pa. 22.

<sup>30</sup> Reed v. Penrose's Ex., 36 Pa. 214.

<sup>31</sup> *Supra*, ch. 13.

<sup>32</sup> Lex v. Potters, 16 Pa. 295.

<sup>33</sup> First Natl. Bank, Etc., v. Kountz, 6 C. C. 249. (For practice and forms, see *supra*.)

<sup>34</sup> Weaver v. Huntingdon, Etc., R. Co., 50 Pa. 314; Evans v. Brownscombe, 8 C. C. 456.

<sup>35</sup> McKee v. Moore, 1 W. N. C. 112; Early's Ap., 89 Pa. 411.

<sup>36</sup> Cowden v. West Branch Bank, 7 W. & S. 432.

<sup>37</sup> Geddes v. Geddes, 7 C. C. 660.

<sup>38</sup> Evans v. Brownscombe, 8 C. C. 456.

<sup>39</sup> Freeman v. Simons, 7 Phila. 307; Zurfleeh v. Sossong, 3 Lack. Jur. 7.

<sup>40</sup> Braden's Est., 165 Pa. 184.

<sup>41</sup> Eby v. Guest, 94 Pa. 160; Walker v. Reynolds, 5 Lack. Jur. 246; 6 Lack. Jur. 139.

<sup>42</sup> Chown v. Russell, 1 Del. Co. 16.

<sup>43</sup> Betts v. Towanda Gas Co., 97 Pa. 367.

<sup>44</sup> First Natl. Bank, Etc., v. Trainer, 209 Pa. 387.

<sup>45</sup> Oerther v. First Natl. Bank, Etc., 1 Leg. Rec. 69.

<sup>46</sup> Weaver v. Manville, 21 C. C. 318. (See Foreign Attachment, vol. 1.)

The attachment execution binds the stock from the time of service on the garnishee regardless of service or non-service on the defendant.<sup>47</sup>

The attachment is properly issued in the county wherein the garnishee resides.<sup>48</sup> When a *fi. fa.* issues, it should be against the original defendant and not the corporation, though the stock is held by the latter as collateral.<sup>49</sup> Unless there is proof of malicious misuse of process, the attaching creditor is not liable to the garnishee for depreciation of the stock *pendente lite*.<sup>50</sup>

#### 9. Rights and liabilities of the corporation.

A corporation gets no lien for a debt accruing after service of the attachment.<sup>51</sup> But for debts due by the holder prior thereto, it may have a lien by its charter,<sup>52</sup> which is unaffected by the attachment.<sup>53</sup> But a debt due the holder will not prevent judgment and execution.<sup>54</sup> If a corporation garnishee does not protect the rights of an assignee of its stock, when it has notice of the assignment, it will be liable to such assignee.<sup>55</sup>

#### 10. Stock attachable, or non-attachable.

It has been held that the stock of a national bank may be levied upon, under these acts;<sup>56</sup> but not stock owned by and in possession of a bank;<sup>57</sup> nor bank stock belonging to another than the defendant though standing in his name.<sup>58</sup> Where stock is pledged as collateral, including stock of a third party an issue may be awarded to determine the question of title.<sup>59</sup> In a contest between two mortgages, the owner of the second may not require the stock to be applied to the defendant's indebtedness to attaching creditors;<sup>60</sup> nor can the attachment be defeated by a subsequent election to apply the stock to the mortgage.<sup>61</sup> But the rights of the mortgagee to apply the stock assigned as collateral, to the mortgage cannot be affected by the attachment.<sup>62</sup>

#### 11. Mode of distribution.

Section 74 of the act of 1836, *supra*, provides:

"The court shall distribute the net proceeds thereof among all

<sup>47</sup> National Bank, Etc., v. Natl. Bank, Etc., 11 Montg. Co., 64; Geyer v. Western Ins. Co., 3 Pitts. 41.

<sup>48</sup> Cowden v. West Branch Bank, 7 W. & S. 432.

<sup>49</sup> Stoever v. Stoever, 3 W. N. C. 169.

<sup>50</sup> Sargent v. Fuller, 132 Pa. 127.

<sup>51</sup> Geyer v. Western Ins. Co., 3 Pitts. 41.

<sup>52</sup> Sewall v. Lancaster Bank, 17 S. & R. 285.

<sup>53</sup> West Branch Bank v. Armstrong, 40 Pa. 278.

<sup>54</sup> Lanahan v. Collins, 28 W. N. C. 287.

<sup>55</sup> Telford, Etc., Co. v. Gerhab, 22 W. N. C. 175.

<sup>56</sup> Braden's Est., 165 Pa. 184; Natl. Bank, Etc., v. Natl. Bank, 11 Mont'g, 64.

<sup>57</sup> Hawley v. Lumberman's Bank, 10 Watts, 230.

<sup>58</sup> Comth. v. Watmough, 6 Wharton, 117.

<sup>59</sup> First Natl. Bank, Etc., v. Beaver, 10 Montg. Co. 174.

<sup>60</sup> Harris' Ap., 18 W. N. C. 14.

<sup>61</sup> Central Bldg. Assn. v. Schmitt, 12 W. N. C. 239.

<sup>62</sup> Hemperly v. Tyson, 170 Pa. 385.



the creditors of such corporation, according to the rules established in the case of insolvency of individuals."

This provision remains in force and applies equally under the act of April 7, 1870, *supra*.<sup>63</sup>

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<sup>63</sup> Bayard's Ap., 72 Pa. 453; Hopkins' Ap., 90 Pa. 69.

## CHAPTER XXVI

### PROCESS OF ATTACHMENT AGAINST OFFICERS OF A PRIVATE CORPORATION.

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|-------------------------------------|------------------------------------|
| 1. Petition and affidavit required. | 6. Form of sheriff's return.       |
| 2. Form of petition, etc.           | 7. Form of recognizance to appear. |
| 3. Order for citation — form.       | 8. Form of bail bond.              |
| 4. Interrogatories — form of.       | 9. Order for commitment — form.    |
| 5. Attachment for contempt — form.  |                                    |

#### **1. Attachment of officers of private corporations — citation — interrogatories — attachment for contempt — sequestration — plea in bar.**

Section 1 of the act of April 14, 1828 (10 Sm. L. 213), provides that:

“Whenever a judgment may be rendered in any court of record against any private corporation within this commonwealth, in any civil action, and a writ of *fiery facias* shall be issued on such judgment, and the sheriff to whom the same may be directed shall make a return of *nulla bona* on the same, it shall and may be lawful for the plaintiff in such action to apply by petition and affidavit, to the court in which such judgment has been rendered, stating that no property of the defendants can be found on which an execution may be levied and that the party making the application verily believes that the effects of the corporation are concealed for the purpose of avoiding the payment of their debts, whereupon the said court may issue a citation, directed to the president, secretary, treasurer or other officers and members of the said corporation, commanding him or them to appear in court on a day certain and answer such interrogatories as may be put to them touching the effects of the corporation, which citation shall be served by the sheriff: and it shall be the duty of the plaintiff to file interrogatories to be put to such officer or member, at least fifteen days before the return day of such citation, in the office of the prothonotary of such court, and the person or persons to whom the said citation shall be directed, shall on or before the return day thereof, file his or her answers to such interrogatories, upon oath or affirmation, in the office of the prothonotary; and if any person to whom such citation may be directed, shall neglect or refuse to file his answers as aforesaid, or shall file answers which, in the opinion of the court shall be unsatisfactory, it shall be lawful for the court to issue an attachment for contempt against the person so refusing to answer, or answering unsatisfactorily. And if upon the answers to such interrogatories it shall appear that any effects of the said corporation are in the possession or power of any member of the

corporation, or of any other person or persons, it shall and may be lawful for the court to issue an order, in the nature of an order of sequestration, which being served by the sheriff on the person or persons in whose possession or power such effects are alleged to be, shall have the same force and effect as if he or they had been summoned as garnishees in a foreign attachment, and the like proceedings shall thereafter be had against him or them, as may be had against such garnishees, after judgment rendered against the defendant in a foreign attachment; and any debtor of the said corporation may plead such sequestration and proceedings against him, in bar of any action brought by such corporation, exactly as the garnishee in a foreign attachment may plead the proceedings in the same in bar of an action by the defendant in the same."

Under this act if the respondent answers an attachment will issue for unsatisfactory answers, without filing exceptions, but upon the rule to show cause why an attachment should not issue.<sup>1</sup>

## 2. Petition for citation under act of April 14, 1828.

Thomas P. Duffy

<p style="text-align: center;">v.</p> <p>Prince Amadeus of Turin Aviglianese Society.</p>	}	<p>In C. C. P. Lackawanna County. No. 414, January Term, 1909.</p>
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To the Honorable the judges of said court:

The petition of Thomas P. Duffy respectfully represents that he is the plaintiff in the above entitled action.

That the defendant is a private corporation, incorporated under the laws of the state of Pennsylvania: that a *fiery facias* has issued on the above entitled judgment and the sheriff has made a return of "*nulla bona*" on said writ; that no property of the defendants can be found on which an execution may be levied and he verily believes that the effects of the corporation are concealed for the purpose of avoiding the payment of their debts.

Therefore he requests this honorable court to issue a citation to the president, secretary and treasurer of said corporation, commanding them to appear in court on a day certain and answer such interrogatories as may be put to them touching the effects of the corporation, and he will ever pray, etc.

Thomas P. Duffy.

[Affidavit appended.]

## 3. Order of court.

Now, the 24th day of March, 1909, upon consideration of the foregoing petition and affidavit and upon motion of J. F. Gilroy, Esq., attorney for plaintiff, it is ordered that a citation issue directed to Vito Samele, president, Giambattista Sileo, secretary, and Domenico Nigro, treasurer, of the defendant corporation commanding them to appear in court on the 14th day of April, 1909, and answer such interrogatories as may be put to them touching the effects of the corporation.

By the Court.

<sup>1</sup> Carondelet Co. v. Fairmount Ins. Co., 15 W. N. C. 125; Gude v. Universal, Etc., Co., 15 W. N. C. 438.

**4. Interrogatories filed March 29, 1909.**

Thomas Duffy

v.

Prince Amadeus of  
Turin Aviglanese Society.

No. 414,

January Term, 1909.

*Interrogatories to Vito Samele, President of Defendant Corporation.*

I. Are you the president of the defendant corporation, and if so when were you elected, and for what term?

II. At the time you were elected how much money was in possession of the defendant corporation?

III. How much money was in the possession of the corporation on March 12, 1908, when judgment was obtained?

IV. What money had the defendant corporation in its hands when the *fiery facias* was served by the sheriff on the — day of —?

V. How much money was in the hands of the defendant corporation when the citation was served in the above entitled case?

VI. What property other than money has this corporation?

VII. What are the monthly receipts of said defendant corporation?

VIII. How many members in good standing had the defendant corporation at the time the citation was served upon you?

IX. How much money is received monthly from the members by said defendant corporation?

X. What money and property had the defendant corporation at the time citation was issued? State the nature of the property.

XI. In what bank or banks is the money of the defendant corporation deposited and in whose name?

XII. What other securities has the defendant corporation? State character and amount?

J. F. Gilroy, P. Q.

**5. Attachment for contempt.**

Failing to answer the interrogatories an attachment for contempt issued on motion of plaintiff's counsel.

*Form of Attachment.*

Lackawanna County ss.

The Commonwealth of Pennsylvania.

To the sheriff of Lackawanna County, Greeting:

We command you that you attach Vito Samele and Domenico Nigro, late of your county, if they be found in your bailiwick and them safely keep, so that you have them before our judges at Scranton, at our County Court of Common Pleas there to be holden for the county aforesaid to answer us in contempt in not appearing and answering certain interrogatories filed in this case as directed by citation issued from this court March 24, 1909, in the case wherein Thomas Duffy is plaintiff and Prince Amadeus of Turin Aviglanese Society is defendant.

Witness the Hon. H. M. Edwards, President Judge of our said court at Scranton, the 27th day of April, 1909.

[Seal.]

W. M. Bunnell, Prothonotary.

**6. Return of sheriff.**

Lackawanna County ss.

April 28, 1909, the body of the within named Vito Samele, in my custody, together with the day and cause of his being taken and detained, I have ready, as within I am commanded. And April 28, 1909, I made attempt to produce the said Domenico Nigro, within named, before the court as I am commanded, but on finding him so sick, weak and infirm that without great danger of his death, he could not be moved. So answers,

Sheriff's costs, \$4.40.

P. F. Calpin, Sheriff.

**7. Recognizance to appear.**

Lackawanna County, ss.

Thomas Duffy

v.

Prince Amadeus, etc.

} Court of Common Pleas of said County.  
No. 414, January Term, 1909,

*Charge of Contempt.*

Vito Samele and Vincenzo Vaccaro, each *tent* in \$500 *sub con.* that the above Vito Samele shall be and appear at said court on May 3, 1909, to be holden in and for said county, to answer such charges as may be preferred against him and not depart the court without leave.

Taken and acknowledged before me this 28th day of April, 1909.  
Newcombe, J.

**8. Bail bond.**

County of Lackawanna, ss.

We, Vito Samele and Frank Santoria, do acknowledge ourselves to owe and stand indebted to the commonwealth of Pennsylvania in the sum of five hundred dollars to be levied of our several goods and chattels, lands and tenements, on condition that the said defendant shall appear in court May 10, 1909, at 9 A. M.; then the above recognizance to be null and void, otherwise to be and remain in full force and virtue.

Taken, acknowledged and  
subscribed before me this  
3d day of May, A. D. 1909.

} Vito Samele,  
Frank Santoria.

W. M. Bunnell, Prothy.

**9. Order for commitment.***[Title of Case.]*

Now, May, 3, 1909, Vito Samele, president of defendant society, having been brought into court April 28, 1909, upon attachment to compel him to answer plaintiff's interrogatories heretofore filed and further proceedings having been then continued at his request until this date and now, being again in court and still neglecting and refusing to answer as required and showing no reason why he should not make answer, it is accordingly ordered, and adjudged that he the said Vito Samele is in contempt and that he be committed to the county jail until he purge himself of such contempt according to law. It is further ordered that he pay the costs of the attachment.

By the Court.

Certified from the records this 3d day of May, 1909.

W. M. Bunnell, Prothy.

## CHAPTER XXVII.

### EXECUTIONS — CAPIAS AD SATISFACIENDUM.

- |                                    |  |
|------------------------------------|--|
| 1. Issuance of writ.               | 6. <i>Testatum ca. sa.</i>                     |
| 2. Effect of showing property.     | 7. <i>Alias ca. sa.</i> when allowed.          |
| 3. Time and manner of issuance.    | 8. Effect of defendant's arrest and discharge. |
| 4. Privilege from service.         |  |
| 5. Duty of sheriff and his return. |  |

#### 1. Issuance of writ.

The writ of *capias ad satisfaciendum*, since the act of July 12, 1842, P. L. 339, is quite limited in its application to particular cases, excepted under said act.<sup>1</sup> Even where the ground of action is deceit, if in form of assumpsit no *ca. sa.* can be maintained.<sup>2</sup> A defendant in tort, although an incident of contractual relation is liable to a *ca. sa.*,<sup>3</sup> so it may issue in behalf of an employee against an employer for negligence in not furnishing safe appliances to work with;<sup>4</sup> or for deceit in the fraudulent satisfaction of a judgment.<sup>5</sup> If the tort for which judgment is obtained is distinct, although it may be incidental to a contract, a *ca. sa.* will lie.<sup>6</sup> So a *ca. sa.* will lie on a judgment against an attorney for neglect to pay over money collected for his client;<sup>7</sup> or against a trustee for money found in his hands for his *cestui que trust*, in account render;<sup>8</sup> but not against a clergyman for money received to the use of testator;<sup>9</sup> nor for costs in an amicable action of ejectment,<sup>10</sup> though it will lie for costs in an action of ejectment proper which is an action *ex delicto*;<sup>11</sup> or on a judgment for mesne profits;<sup>12</sup> but not for costs in a judgment for defendant in trespass.<sup>13</sup> It may issue on a judgment in replevin, where the security becomes worthless.<sup>14</sup> It will not lie to enforce alimony,<sup>15</sup> or maintenance in case

<sup>1</sup> See *Capias*, vol. 1, p. 407; *Connolly v. Evans*, 4 C. C. 300; P. & L. Dig., vol. 7, col. 11258.

<sup>2</sup> *Howard v. McKee*, 82 Pa. 409; *Fleming v. Maguire*, 14 W. N. C. 210.

<sup>3</sup> *Kalbfus v. Rundell*, 134 Pa. 102; *Dungan v. Read*, 167 Pa. 393.

<sup>4</sup> *Romberger v. Henry*, 167 Pa. 314.

<sup>5</sup> *Rife v. Sharp*, 7 Lanc. L. R. 65.

<sup>6</sup> *Tryon v. Hassinger*, 1 Clark, 184.

<sup>7</sup> *Wills v. Kane*, 2 Grant, 60.

<sup>8</sup> *Harris v. Sheldon*, 1 Mona. 188.

<sup>9</sup> *Emerich v. McDevitt*, 6 D. R. 567.

<sup>10</sup> *Lang v. Finch*, 166 Pa. 255.

<sup>11</sup> *Selden v. Cozad*, 2 D. R. 664.

<sup>12</sup> *Hopkinson v. Cooper*, 8 Phila. 8; *Comth. v. Bowman*, 3 D. R. 74.

<sup>13</sup> *Meace v. Crump*, 12 W. N. C. 534.

<sup>14</sup> *List v. Firth*, 15 W. N. C. 548.

<sup>15</sup> *Elmer v. Elmer*, 150 Pa. 205.

of desertion,<sup>16</sup> the remedy being by attachment in either case, nor will it lie on a transcript in trover, from a justice of the peace.<sup>17</sup>

A *ca. sa.* must follow the judgment, and if in assumpsit before a justice of the peace, no *ca. sa.* can issue.<sup>18</sup>

## 2. Effect of showing property.

It is provided by section 5 of the act of April 13, 1807, 4 Sm. L. 476, that no writ shall issue where the defendant has real or personal property to satisfy the demand, but under the act of 1836 (section 28, P. L. 755) it may issue but not be executed on the person, when defendant shows property at the time of service,<sup>19</sup> and where a levy on land is made, the defendant can not be arrested.<sup>20</sup> But defendant must not delay until other proceedings result.<sup>21</sup>

## 3. Time and manner of issuance.

A *ca. sa.* must issue and be in the hands of the sheriff four days before the return day, or it will be set aside.<sup>22</sup> Where the writ has been issued illegally or irregularly the defendant's remedy is by petition to the court, setting up the grounds, and asking for his discharge;<sup>23</sup> but if the proceedings are before a justice of the peace he may be heard on a writ of habeas corpus in the Common Pleas.<sup>24</sup> A defendant cannot plead discharge in bankruptcy until after final discharge.<sup>25</sup>

## 4. Privilege from service.

Public officers on public business are generally exempt from service with a *capias*, but it has been held otherwise when on private business.<sup>26</sup> A member of congress is exempt while in attendance, but his bail must surrender him within four days after the session ends.<sup>27</sup> One in attendance at court as a suitor is not privileged from arrest under a *ca. sa.*<sup>28</sup> A bankrupt is not privileged before final discharge;<sup>29</sup> nor an insolvent on a *ca. sa.* issued on a judgment obtained after his discharge.<sup>30</sup>

A female is absolutely exempt from arrest on civil process<sup>31</sup>

<sup>16</sup> Comth. v. Steiger, 10 Lanc. L. R. 11; 2 D. R. 493.

<sup>17</sup> Wheeler, Etc., Co. v. Moore, 6 W. N. C. 270.

<sup>18</sup> Griffin v. Davis, 6 Supr. C. 481.

<sup>19</sup> Hecker v. Jarrett, 3 Binney, 404.

<sup>20</sup> Bank of Penna. v. Latshaw, 9 S. & R. 9.

<sup>21</sup> Stout v. Quinn, 9 Supr. C. 179; Winder v. Smith, 6 W. & S. 424.

<sup>22</sup> Welsh v. Mead, 9 Phila. 261.

<sup>23</sup> Comth. v. Lecky, 1 Watts, 66; Comth. v. Clemons, 18 C. C. 447.

<sup>24</sup> Connolly v. Decker, 1 Wilcox 133; Comth. v. Keeper, Etc., 14 Phila. 396.

<sup>25</sup> Shulze v. Fleischer, 1 Clark, 7.

<sup>26</sup> Morgan v. Eckart, 1 Dallas, 295. (See vol. 1, *Capias*, 410.)

<sup>27</sup> Coxe v. McClenachan, 3 Dallas, 478.

<sup>28</sup> Starret's Case, 1 Dallas, 356; Hannum v. Askew, 1 Yeates, 25.

<sup>29</sup> Pesoa v. Passmore, 4 Yeates, 139.

<sup>30</sup> Tryon v. Hassinger, 1 Clark, 184.

<sup>31</sup> Vol. 1, p. 413, acts, Feb'y 8, 1819, 7 Sm. L. 150; June 13, 1836, P. L. 573.

and a married woman by act of June 8, 1893, P. L. 344, for her tort.<sup>32</sup>

#### 5. Duty and return of sheriff.

In executing a *ca. sa.* the sheriff acts for the plaintiff and if he takes bail without notice to the plaintiff and his authority, or sanction, he will be liable for the debt.<sup>33</sup> Having collected the debt he must pay it over to the real and not the nominal plaintiff.<sup>34</sup> Where the defendant is wrongfully discharged under habeas corpus, the sheriff may re-arrest on the same writ.<sup>35</sup>

If the *ca. sa.* is not accompanied by a *fi. fa.* it will not be quashed nor the defendant be discharged unless he pays, or shows property or privilege.<sup>36</sup> But the writ will be quashed where the claim arose *ex contractu*.<sup>37</sup>

The sheriff need not specify the day of the arrest in his return<sup>38</sup> and a return of "served and delivered to court" has been held sufficient in a suit against his sureties for escape.<sup>39</sup> The proper form of return of the body is: "Served as within commanded and *cepi corpus*." A return of *cepi corpus* cannot be amended in an action for escape unless it is shown that it was made under mistake of fact.<sup>40</sup> But facts may be proven by parol consistent with the return.<sup>41</sup>

#### 6. Testatum *ca. sa.*

It is not necessary to issue a *ca. sa.* in the county where the judgment is, before a *testatum ca. sa.* may be issued.<sup>42</sup> The sheriff of the county to which the *testatum* is sent performs his duty by arresting the defendant and committing him to the jail of his bailiwick. If the defendant gives bond to take advantage of the insolvent law he will present his petition to the court in the county where arrested.<sup>43</sup>

#### 7. Alias *ca. sa.*, when allowed.

In case the defendant has given bond to become an insolvent and fails to do so, an *alias ca. sa.* may be issued.<sup>44</sup> Where a *fi. fa.* is issued and defendant's lands are condemned an *alias ca. sa.* is irregular, but if the defendant submits and is discharged thereon, a sale under the *fi. fa.* is irregular.<sup>45</sup>

Where the sheriff permits the defendant to go, on the claim of the

<sup>32</sup> Comth. v. Keeper, Etc., 14 Phila. 396; Vocht v. Kuklence, 119 Pa. 365.

<sup>33</sup> Dowdel v. Hamm, 2 Watts, 61.

<sup>34</sup> Zantzinger v. Old, 2 Dallas, 265.

<sup>35</sup> Hecker v. Jarret, 3 Binney, 404.

<sup>36</sup> Stofflet v. Kinsel, 24 Montg. 26.

<sup>37</sup> Watson, Etc., Co. v. Smith, 56 Pitts. 114.

<sup>38</sup> Dolan v. Briggs, 4 Binney, 496.

<sup>39</sup> Beale v. Comth., 7 Watts, 183.

<sup>40</sup> Scott v. Seiler, 5 Watts, 235.

<sup>41</sup> Jordan v. Minster, 3 Clark, 457.

<sup>42</sup> Fulton v. Irwin, Addison, 19.

<sup>43</sup> Avery v. Seeley, 3 W. & S. 494.

<sup>44</sup> Palethorpe v. Leshar, 2 Rawle, 272.

<sup>45</sup> Young v. Taylor, 2 Binney, 218.



latter's attorney, and the writ is stayed by the plaintiff's attorney, an alias will not be quashed;<sup>46</sup> but if the plaintiff orders the release of defendant an alias will be quashed.<sup>47</sup>

#### 8. Effect of defendant's arrest and discharge.

The effect of arresting and detaining defendant under a *ca. sa.* is to let go his lien on defendant's real estate, so that it may be sold by other judgment creditors<sup>48</sup> but it does not release the debt, unless the defendant is discharged with the consent of the plaintiff,<sup>49</sup> which also releases the surety on an insolvent bond.<sup>50</sup> A part payment and the giving of notes for the balance, and a discharge thereon, with plaintiff's consent, works complete satisfaction under the 31st section of the act of 1836.<sup>51</sup> But a conditional assent to discharge, on payment of costs and without prejudice to his right to collect the debt and interest.<sup>52</sup> A bond to surrender is enforceable.<sup>53</sup> The defendant will not be relieved of the costs due the officer.<sup>54</sup> Where defendant gives bond for insolvency he cannot, pending the proceedings, be again arrested on a *ca. sa.* in the same suit.<sup>55</sup> After the sheriff's return of discharged on petition for insolvency his duty and liability are ended.<sup>56</sup>

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<sup>46</sup> Long v. Cherington, 161 Pa. 248.

<sup>47</sup> McCauley v. Kelly, 2 W. N. C. 30.

<sup>48</sup> Freeman v. Rushton, 4 Dallas, 214.

<sup>49</sup> Sharpe v. Specknagle, 3 S. & R. 463.

<sup>50</sup> Palethorpe v. Leshner, 2 Rawle, 272.

<sup>51</sup> McCauley v. Kelly, 2 W. N. C. 30.

<sup>52</sup> Jackson v. Knight, 4 W. & S. 412.

<sup>53</sup> Holdship v. Jaudon, 16 S. & R. 307.

<sup>54</sup> Bamford v. Keefer, 68 Pa. 389.

<sup>55</sup> Shorthouse v. Carothers, 3 Yeates, 182.

<sup>56</sup> Keim v. Saunders, 120 Pa. 121.

## CHAPTER XXVIII.

### EXECUTION — ATTACHMENT IN.

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65. Right and duty to defend.
66. Liability for interest.
67. Set-off.
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69. Effect of attachment execution.
70. Discharge of attachment execution.
71. Attachment execution as a defense.
72. Effect of death of the defendant.

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|--|------------------------------------|
| 73. Effect of bankruptcy.                | 76. Costs of attachment execution. |
| 74. Payment into court and interpleader. | 77. Counsel fees.                  |
| 75. Trial — burden of proof — evidence.  | 78. Rules in Allegheny county.     |

### 1. Nature of writ.

It was said by Chief Justice Lowrie:<sup>1</sup>

"It is an execution against the effects of the defendant in the hands of the garnishee, rather than an action against the garnishee. \* \* \* They are collateral processes to the regular actions between the parties for the same debt or duty and are not incompatible with them, except so far as they actually interfere with their enforcement, or endanger the rights of some other parties. As collateral processes they are under the control of the court, as in other cases where several remedies are employed for the same debt or injury."

Being final process as to the defendant, he is not required to file an affidavit of defense,<sup>2</sup> nor is it subject to local acts fixing return days for original process.<sup>3</sup> But as to the garnishee it is in the nature of original process and may be served in the same manner; as, for example, under the act of May 13, 1889, P. L. 198, a writ attaching a defendant's claim against an insurance company, issued in the county where the loss occurred may be served upon the company in any county of the state.<sup>4</sup> It is not "a civil suit or action" so as to bring within the compulsory arbitration law, on a plea of "*nulla bona*" by the garnishee.<sup>5</sup> It can only issue on a personal judgment and not on one obtained on a *scire facias* against executors and *de terris* as to the devisees;<sup>6</sup> nor as against the rents where the lien is restricted,<sup>7</sup> nor on a transcript from another county of a judgment against a lunatic, filed subsequent to his lunacy;<sup>8</sup> nor on a judgment against the legal representative of a debtor, to hold a chose in action belonging to the estate;<sup>9</sup> nor against an administrator for receipts of liquor license transferred to him by his decedent for the use of the estate.<sup>10</sup> Nor is it the remedy for fraudulent sales in bulk under the act of March 28, 1905, P. L. 62; but by *fi. fa.*<sup>11</sup>

### 2. Levy on stocks, debts, etc.

Section 32 of the act of June 16, 1836, P. L. 755, provides:

<sup>1</sup> Kase v. Kase, 34 Pa. 128. (See also Wray v. Tammany, 13 Pa. 394.)

<sup>2</sup> Carter v. Wallace, 9 Phila. 221.

<sup>3</sup> Sheaffer v. Wilson, 1 Chester Co. 161.

<sup>4</sup> Huber v. Ritter, 1 C. C. 323; McDonald v. Stear, 7 D. R. 190. (But see Shipton v. Fees, 1 D. R. 331. See act of 1909, as to service on insurance companies, vol. 1.)

<sup>5</sup> Stranahan v. Stranahan, 146 Pa., 44.

<sup>6</sup> Heermans v. Griffin, 3 Luz. L. R. 223.

<sup>7</sup> Tripp v. Miller, 4 Kulp, 515.

<sup>8</sup> Harmstead v. Kingsley, 3 W. N. C. 64.

<sup>9</sup> Strouse v. Lawrence, 160 Pa. 421; P. & L. Dig., vol. 7, col. 10956.

<sup>10</sup> Ashenbach v. Carey, 224 Pa. 303.

<sup>11</sup> Schmucker v. Lawler, 38 Supr. C. 578.

"The proceedings to levy an execution upon stock, debts, and deposits of money belonging or due to the defendant, shall be as follows, to-wit:

In the case of stock, if it shall be held in another name than that of the real owner thereof, the plaintiff shall file in the office of the prothonotary of the court an affidavit, stating that he verily believes such stock to be really the property of the defendant, and shall enter into a recognizance with two sufficient sureties, conditioned for the payment of such damages as the court may adjudge, to the party to whom such stock shall really belong, in case such stock should not be the property of the defendant."

The affidavit and recognizance are prerequisites in any case.<sup>10</sup>

Where the stock is held in the name of the defendant the procedure may be under this act<sup>11</sup> or under act of March 29, 1819. 7 Sm. L. 217.

### 3. Attachment with clause of sci. fa.

Section 33 of the act of 1836, *supra*, provides:

"Upon the filing of such affidavit and recognizance, it shall be lawful for the prothonotary to issue process, in the nature of an attachment, against such stock, with a clause of summons to the person in whose name the same may be held, in the nature of a writ of *scire facias* against garnishees in a foreign attachment, and thereupon the plaintiff may proceed to judgment, execution and sale of the said stock, in the manner allowed in cases of foreign attachment against personal estate.<sup>12</sup>

Such attachment is properly commenced in the county where the garnishee resides.<sup>13</sup> The act must be followed.<sup>14</sup> The recognizance has been held to be necessary only where a person claims to hold as against the defendant.<sup>15</sup> The attaching creditor is not liable for depreciation of the stock pending the attachment when there is no malicious abuse of process shown.<sup>16</sup>

Section 4 of the act of May 13, 1889, P. L. 197, providing for the mortgaging of royalties in coal and other minerals, provides for enforcement by action of assumpsit and attachment execution against defendant with grantees as garnishees.

### 4. Stock held by defendant but claimed by another.

Section 34 of the act of 1836, *supra*, provides:

"The like proceedings may be had against stock owned by a defendant, and held in his own name, without the affidavit and recognizance aforesaid; and if any person shall claim to be the owner of such stock, he may, upon filing an affidavit that the stock is really his property, and entering into a recognizance, with two

<sup>10</sup> Chown v. Russell, 1 Del. Co. 16; Mulford v. Weisgerber, 3 Luz. L. R. 99.

<sup>11</sup> Weaver v. Huntingdon, Etc., R. Co., 50 Pa. 314.

<sup>12</sup> See For. Att., vol. 1.

<sup>13</sup> Cowden v. West Branch Bank, 7 W. & S. 432.

<sup>14</sup> Eby v. Guest, 94 Pa. 160.

<sup>15</sup> Betts v. Towanda, Etc., Co., 97 Pa. 367.

<sup>16</sup> Sargent v. Fuller, 132 Pa. 127.

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sufficient sureties, conditioned for the payment of such damages as the court may adjudge to the plaintiff, if such stock should really belong to the defendant, the court shall admit him to become a party upon the record, and take defense, in like manner as if he were made garnishee in the writ.

#### 5. Stock held in another's name.

Section 3 of the act of March 29, 1819, P. L. 217, provides:

"Whenever any plaintiff or creditors shall file an affidavit with the prothonotary of the court, alderman or magistrate, in which or before whom such plaintiff or creditors has instituted or is about to institute a suit, stating that he verily believes such stock to be really and *bona fide* the property of the debtor against whom such suit has been, or is about to be brought, and also shall enter into a recognizance with two sufficient sureties, conditioned for the payment of such damages, as such court, alderman or magistrate may adjudge to the party or parties to whom such stock shall really belong, in case such stock should not be the property of such debtor, it shall and may be lawful for such court, alderman or magistrate to cause to be issued process in the nature of a foreign attachment against such stock, and to summon as garnishee the person or persons in whose name or names the same shall be held, and proceed against the said stock, and such garnishee, in all respects in the same manner, as by the laws of this commonwealth proceedings now are or hereafter may be prescribed in cases of foreign attachments, against personal estate, and upon judgment being had in favor of the plaintiff in any such suit, execution may issue immediately for the sale of such stock, in the same manner that goods and chattels are sold on writs of *fiери facias*: *Provided*, That in case of a judgment before a justice of the peace or alderman, where the amount in controversy shall exceed five dollars and thirty-three cents, an appeal shall be allowed to the Court of Common Pleas, agreeably to the same rules and regulations now or hereafter to be prescribed for granting appeals in other cases cognizable before a justice of the peace."

#### 6. Form of præcipe to levy stock in the name of another but alleged to be defendant's.

Nevin Napoleon v. Wyclyffe Luther.	}	In the Court of Common Pleas of Centre County. No. ——— Term, 1910. Judgment docket —, date —. Debt \$300. Interest from March 1, 1908. Costs, etc.
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Issue process in the nature of attachment upon said judgment, against the defendant, to levy ten shares in the capital stock of Ginseng Company, held in the name of Mudd Winters, with a clause of summons to the said Mudd Winters, in the nature of a *scire facias* against the garnishee: returnable next term.

J. K. Johnstone, P. Q.

To ———, Esq.,  
Prothy.

**7. Form of affidavit for attachment (supra).**

Centre County, ss:

Nevin Napoleon, the plaintiff in the above execution, being duly sworn, says that he verily believes that the above mentioned ten shares of capital stock of Ginseng Company held in the name of Mudd Winters, is really the property of Wycliffe Luther, the defendant above named.

Nevin Napoleon.

Sworn to, etc

**8. Form of recognizance accompanying above.**

Centre County, ss:

We, Nevin Napoleon and William J. Mallory, severally acknowledge ourselves to be indebted to the Commonwealth of Pennsylvania in the sum of five hundred dollars, lawful money of the United States, to be levied of our respective goods and chattels, lands and tenements, and to be void on this condition, that the said Nevin Napoleon shall pay such damage as the court may adjudge to the party to whom the stock shall really belong in case it is determined to belong to another than the defendant above named.

Taken and acknowledged } Nevin Napoleon,  
this — day of —, 1910. } William J. Mallory.

**9. Attachment of debts due, etc.**

Section 35 of the act of 1836, *supra*, provides:

"In the case of a debt due to the defendant, or of a deposit of money made by him, or of goods or chattels pawned, pledged, or demised, as aforesaid, the same may be attached and levied in satisfaction of the judgment, in the manner allowed in the case of a foreign attachment,<sup>1a</sup> but in such case a clause, in the nature of a *scire facias* against a garnishee in foreign attachment, shall be inserted in such writ of attachment, requiring such debtor, depositary, bailee, pawnee or person holding by demise as aforesaid, to appear at the next term of the court, or at such other time as the court from which such process may issue shall appoint, and show cause why such judgment shall not be levied of the effects of the defendant in his hands."

An attachment execution does not lie on a judgment against a decedent, against his debtor as garnishee, the Orphans' Court having exclusive jurisdiction.<sup>1a</sup> Nor can money in the hands of a receiver of a corporation appointed in another state be attached in this state.<sup>1b</sup> A judgment for personal injuries where a new trial has been granted is not attachable.<sup>1c</sup>

**10. Service of writ.**

"Section 36. It shall be the duty of the officer charged with the execution of such writ to serve a copy thereof upon the defendant

<sup>1a</sup> See For. Att., vol. 1.

<sup>1a</sup> Beaton v. Gorman, 18 D. R. 257.

<sup>1b</sup> Somerset Coal Co. v. Steel Co., 224 Pa. 217.

<sup>1c</sup> Beeble v. Railways Co., 57 Pitts. L. J. 253.

in such judgment and upon every person and corporation within his proper county, named in the said writ of attachment, in the manner provided for the service of a writ of summons in a personal action."<sup>17</sup>

#### 11. Effect of attachment.

"Section 37, act of 1836, *supra*:"

From and after the service of such writ all stock belonging to the defendant in the corporation upon which service shall be so made, and all debts and all deposits of money, and all other effects belonging or due to defendant, by the person or corporation upon which service shall be so made, shall remain attached in the hands of such corporation or person in the manner heretofore practiced and allowed in the case of foreign attachment."

#### 12. Service upon nonresident, not necessary.

By section 4 of the act of March 20, 1845, P. L. 188, service upon a defendant not a resident of the county was made unnecessary.

A return of *nihil habet* as to such defendant is conclusive as to his non-residence.<sup>18</sup>

#### 13. Rule in Philadelphia.

Section 1 of rule 7, Philadelphia, provides:

"Writs of attachment execution under the act of June 16, 1836, section 36, entitled 'An act relating to executions' may be made returnable at any return day, as in the case of writs of summons."

Section 2. "In cases of attachment execution, where the defendant interposes a defense, he shall set forth the grounds thereof particularly, by affidavit, before or at the time of filing his plea; and in case he shall not file such affidavit, the plea shall, on motion, be stricken off."

Section 3.

"The proceedings on an attachment execution shall be the same as on a foreign attachment under rule 20."

#### 14. On what judgments attachment execution lies.

As seen above attachment execution will lie only on personal judgments, but it may issue on such a decree in equity.<sup>19</sup> Where a judgment note is given as collateral to a lease an att. ex. may issue on the judgment without first issuing a *sci. fa.* on the lease to determine the amount due. The lessee can depend on the *sci. fa.* clause of the attachment.<sup>20</sup>

It will lie on a judgment entered in the Court of Common Pleas upon a transcript of a justice of the peace, alderman or magistrate and it is not necessary to issue a *sci. fa.* first in the Common Pleas.<sup>21</sup>

<sup>17</sup> See act of 1901, vol. 1.

<sup>18</sup> Bencke v. Frick, 1 T. & H. Pr., section 1197.

<sup>19</sup> Westwater v. Ferguson, 22 C. C. 582.

<sup>20</sup> Busch v. Ely, 11 D. R. 681.

<sup>21</sup> Hitchcock v. Long, 2 W. & S. 169; Webster v. Clendennin (No. 2), 25 Lanc. L. R. 129.

But to sustain it for the costs the exemplification must contain a copy of the bill or a record of the taxation. If a second exemplification be taken it is equivalent to an abandonment of the first.<sup>22</sup> Unless the full record has been correctly exemplified the attachment may be quashed.<sup>23</sup> Under the act of June 24, 1885, P. L. 160, which provides that no execution shall issue on the transcript judgment without a previous return of "*nulla bona*," the same rule applies to attachment executions.<sup>24</sup> But since the act of May 9, 1889, P. L. 176, no such return is required on judgments for more than \$100.<sup>25</sup> Where an attachment execution issued before a justice of the peace and a certiorari was taken, without making the garnishee a party thereto, it was held that the affirmance of the judgment did not bind the garnishee.<sup>26</sup>

The writ may issue upon a judgment which is more than five years old without a previous or concurrent *sci. fa.* to revive, inasmuch as the defendant may have his day in court, if he will.<sup>27</sup> The act of May 19, 1887, P. L. 132, applies only to an execution against personal property and not to attachment executions.<sup>28</sup> But no such process can issue on a judgment after 20 years without a *sci. fa.* since it is presumed to have been paid.<sup>29</sup>

It will lie on a decree in equity for the payment of costs, where the rules provide that decrees may be enforced as in assumpsit;<sup>30</sup> and to enforce a decree for alimony in divorce under the act of April 15, 1845, P. L. 455;<sup>31</sup> and upon judgments on reports of county auditors under the act of April 15, 1834, P. L. 537.<sup>32</sup>

It will not lie against a wife's judgment for personal injuries on a judgment against the husband, although she recovered in their joint suit.<sup>32a</sup>

### 15. Synchronous and alias writs.

A number of writs against different garnishees may issue and be out at the same time<sup>33</sup> but an alias cannot issue against the same garnishee whilst the first is pending and will be quashed.<sup>34</sup> The plaintiff may abandon his first attachment and issue another, notwithstanding the costs on the first have not been paid.<sup>35</sup>

<sup>22</sup> Potts v. Potts, 27 C. C. 540.

<sup>23</sup> Detrich v. Sutton, 31 C. C. 392.

<sup>24</sup> Hoffman v. Hinnershitz, 4 C. C. 207. (See Swanger v. Snyder, 50 Pa. 218, under the act of March 20, 1810, which applied to sums of \$100 or less; P. & L. Dig., vol. 7, col. 10960.)

<sup>25</sup> Miller v. Stone, 14 C. C. 352; Hartman v. Weitmeyer, 8 D. R. 223.

<sup>26</sup> Rineheimer v. Weiss, 4 Kulp, 279.

<sup>27</sup> Acts of Mar. 20, 1845, P. L. 188; April 16, 1845, P. L. 538; Ogilsby v. Lee, 7 W. & S. 444; Gemmill v. Butler, 4 Pa. 232.

<sup>28</sup> Bohan v. Reap, 7 Supr. C. 167.

<sup>29</sup> Wheeler v. Phillips, 140 Pa. 33.

<sup>30</sup> Scholl v. Schoener, 1 Woodward, 134.

<sup>31</sup> Bouslough v. Bouslough, 68 Pa. 495.

<sup>32</sup> Pike County v. Quick, 1 C. P. R. 29.

<sup>32a</sup> Jeans v. Davis, 3 Clark, 60.

<sup>33</sup> Pontius v. Nesbit, 40 Pa. 309; P. & L. Dig., vol. 7, col. 10966.

<sup>34</sup> Rutter v. Ely, 4 Kulp, 348; Purdon v. Purdon, 2 Miles, 173.

<sup>35</sup> Grundy v. Winner, 1 Phila. 400; P. & L. Dig., vol. 7, col. 10966.



16. Form of *præcipe* and writ.

Following is a form of *præcipe*:

Emil Nodine	} In the Court of Common Pleas of Venango	
v.		County.
Ernst Nageotte.	No. —	— Term, 1910.

Issue writ of attachment execution against the defendant to attach and levy in satisfaction of said judgment, all debts and dividends due to the defendant by Charles Kightlinger, and all other debts, deposits, goods and chattels in his possession due or belonging to said defendant and insert in said writ a clause of summons in the nature of a *scire facias* against said Charles Kightlinger, as garnishee, requiring him to appear at the next term of said court and show cause why said judgment shall not be levied of the goods and effects of the defendant in his hands.

Q. D. Hastings, P. Q.  
May 12, 1910.

To — — —, Esq.,  
Prothonotary.

## FORM OF WRIT.

Venango County, ss:

The Commonwealth of Pennsylvania to the sheriff of said county, greeting:

We command\* you that you levy upon and attach the goods and chattels, debts, moneys, estates and effects of —, late of your county, in satisfaction of a certain judgment obtained in our Court of Common Pleas, at suit of —, against the said defendants — to — D. No. —, Term, 1—, for the sum of — with interest from — and costs.

And also, by honest men of your bailiwick you make known to the said defendant — and to —, and to all other persons in whose hands or possession the said goods and chattels, rights, debts, credits and moneys, or any of them may be attached so that they be and appear before our said court at Franklin, the — Monday of — next, to show if anything they have to say why the said judgment, beside costs of suit, should not be levied of the effects of the said defendant — in the hands of the above named garnishee — and also that you summon the said —, as garnishee — and have you then and there this writ.

Witness the Hon. George S. Criswell, President Judge of our said court, at Franklin, the — day of —, 19—.

\_\_\_\_\_  
Prothonotary.

## 17. Parties to writ, etc.

Whilst it is best to name the person or persons who are to be made garnishees both in the *præcipe* and in the writ (which follows it), when the garnishee is not named, he attaches the goods, etc. "in whose hands or possession soever they may be."<sup>36</sup> So names of garnishees may be added after the writ issues;<sup>37</sup> and the names of several

<sup>36</sup> Judge v. Reinhart, 3 D. R. 202.

<sup>37</sup> McCambridge v. Barry, 29 W. N. C. 92.

garnishees may be joined in the same process.<sup>38</sup> The making of an administrator or executor garnishee binds the interest of the defendant in the estate without specifying the capacity in which the representative is summoned,<sup>39</sup> as against an assignment by the defendant;<sup>40</sup> or in case of misnomer of the testator.<sup>41</sup> But designating the executor as of one estate will not bind as to another estate as against a valid assignment.<sup>42</sup> Slight variances in names are immaterial so long as the identity of the parties is preserved.<sup>43</sup> But if the abbreviation is such as to mislead, the party making the error must abide by the consequences.<sup>44</sup> Summoning the defendant as well as the garnishee is an irregularity only.<sup>45</sup>

The writ need not particularize the property. It is sufficient if it follows the act.<sup>46</sup>

The writ may be made returnable next term or to a monthly return day.<sup>47</sup>

### 18. Service of writ.

The manner of service is the same as a summons<sup>48</sup> and it need not be served on a non-resident defendant; a return of *nihil habet* being conclusive as to his non-residence.<sup>49</sup> No return as to the defendant has the same effect, *prima facie*.<sup>50</sup>

If one writ be returned "*nihil*" as to defendant and an alias is served, the two constitute one continuous process.<sup>51</sup> Service cannot be made on the agent of a non-resident garnishee;<sup>52</sup> nor can service be made upon a limited partnership, except upon the chairman, secretary or treasurer, as the law requires.<sup>53</sup> A return of *non est inventus*, however, has been held to be insufficient, as it is not equivalent to *nihil habet*—which is held to mean non-residence.<sup>54</sup> But defendant cannot appeal from judgment against the garnishee—on this ground. His residence should be pleaded specially;<sup>55</sup> now under notice of special matter.

The privilege of exemption from service, which non-resident suitors and witnesses have, when in attendance at court has been held not to apply to an attachment execution against them as executors,

<sup>38</sup> *Cornelius v. Simpson*, 3 Phila. 35.

<sup>39</sup> *Baltz Co. v. Livingston*, 14 W. N. C. 143.

<sup>40</sup> *Brunswick, Etc., Co. v. Brown*, 19 Phila. 445.

<sup>41</sup> *Bentley v. Kaufman*, 3 W. N. C. 352; 86 Pa. 99.

<sup>42</sup> *Smith's Ap.*, 108 Pa. 508.

<sup>43</sup> *Paul v. Johnson*, 9 Phila. 32; *McCready's Est.*, 29 Pitts. L. J. 432.

<sup>44</sup> *Burr v. Alten*, 2 Lack. Jur. 178.

<sup>45</sup> *Layman v. Beam*, 6 Wharton, 181.

<sup>46</sup> *Layman v. Beam*, *supra*.

<sup>47</sup> *Huber v. Ritter*, 1 C. C. 323; *Schober v. Mather*, 49 Pa. 21.

<sup>48</sup> *Struemple v. Sausser*, 8 D. R. 53.

<sup>49</sup> *Schroeder v. Reynolds*, 17 Lanc. L. R. 300; act Mar. 20, 1845, P. L. 188, *supra*.

<sup>50</sup> *Mulholland v. Mix*, 24 C. C. 143.

<sup>51</sup> *Fairchild v. Mensch*, 1 Kulp, 13; *McDonald v. Stear*, 7 D. R. 190.

<sup>52</sup> *Boos v. Wanbaugh*, 3 Lanc. L. R. 329.

<sup>53</sup> *Pottsville Bank v. Vandusen*, 2 Leg. Rec. R. 7.

<sup>54</sup> *Hains v. Viereck*, 2 Phila. 40; *Henaughan v. Golden*, 4 Kulp, 195.

<sup>55</sup> *Wachter's Case*, 1 Walker, 267.

administrators or sureties on their bonds under act of March 27, 1854, P. L. 214, which permits service beyond the county.<sup>56</sup> It is held otherwise as to a witness in the Orphans' Court.<sup>57</sup> Prior to the act of 1901, it was held that service on a corporation as garnishee might be made on the principal officer at his usual place of business;<sup>58</sup> or upon the manager or director, while passing through the county, although its place of business was in another county.<sup>59</sup> A return of service upon the principal officer is sufficient;<sup>60</sup> but the bookkeeper is not such officer.<sup>61</sup> Service on the receiver of a corporation is good.<sup>62</sup>

But under the act of May 4, 1852, P. L. 574, service on an agent of an insurance company in any other county than that in which the chief office of the company was kept, was held insufficient.<sup>63</sup> When service is made on a foreign corporation which has an office in this state, it cannot plead to the service, after general appearance and answers filed.<sup>64</sup>

#### 19. Execution of writ by levy.

Under section 35 of the act of 1836, *supra*, the writ is executed as a writ of foreign attachment<sup>65</sup> which requires the sheriff at the time of the seizure to declare in the presence of one or more credible persons of the neighborhood that he attaches the goods and effects of the defendant in the garnishee's hands.<sup>1</sup> In his return the sheriff must specify the goods attached.<sup>2</sup> If the property is not movable, the requirement of declaring in the presence of one or more credible persons of the neighborhood is dispensed with.<sup>3</sup> In cases where the effects are incapable of seizure service may be accepted by the garnishee by himself or attorney.<sup>4</sup> Where a note held by a debtor is pledged as collateral, the sheriff's return of service should state that the note was attached.<sup>5</sup>

If the only property in possession of the defendant is not in the state, there is nothing for the attachment to hold.<sup>6a</sup>

#### 20. Amendments.

The writ may be amended by the præcipe where the prothonotary failed to follow it, as to the return day.<sup>6</sup> It may be amended as to

<sup>56</sup> *Schroeder v. Reynolds*, 17 Lanc. L. R. 300.

<sup>57</sup> *Piatt v. Sutton*, 12 Luz. L. R. 437.

<sup>58</sup> *Rineheimer v. Weiss*, 4 Kulp, 279.

<sup>59</sup> *Reynolds v. Lochiel, Etc.*, 11 C. C. 33.

<sup>60</sup> *Rineheimer v. Weiss*, *supra*.

<sup>61</sup> *Riley v. Phillips*, 7 D. R. 398.

<sup>62</sup> *Merchants' Natl. Bank v. Binder*, 6 D. R. 633.

<sup>63</sup> *Lehigh Val. Ins. Co. v. Fuller*, 81 Pa. 398.

<sup>64</sup> *Comth., Etc., Co. v. Brown*, 1 D. R. 583.

<sup>65</sup> See "Foreign Attachment," vol. 1.

<sup>1</sup> *Huber v. Ritter*, 1 C. C. 323; *Boos v. Wanbaugh*, 3 Lanc. L. R. 329.

<sup>2</sup> *Layman v. Beam*, 6 Wharton, 181.

<sup>3</sup> *Purves v. Lex*, 19 W. N. C. 392; *Mesker v. Frothingham*, 1 D. R. 120.

<sup>4</sup> *Cheston v. Fitler*, 13 W. N. C. 78; *Lorenz v. King*, 38 Pa. 93.

<sup>5</sup> *Rhoads v. Megonigal*, 2 Pa. 39.

<sup>6a</sup> *Somerset Coal Co. v. Diamond, Etc., Co.*, 17 D. R. 536.

<sup>6</sup> *Moss v. Herring*, 2 Miles, 93.

mistake of date of the judgment<sup>7</sup> or matters of surplusage, where the rights of *bona fide* purchasers have not intervened;<sup>8</sup> or by adding a designation, as "trustees."<sup>9</sup> Amendment by the sheriff, of his return may be permitted even after considerable time.<sup>10</sup> A mistake of the docket clerk is amendable at any time and error will not lie for such amendment.<sup>11</sup>

## 21. Quashing and setting aside.

If an attachment execution issues pending a rule to open judgment, it will be dissolved, when the rule is made absolute.<sup>12</sup> But where the sheriff was not secured in his levy and the rule to open was discharged the attachment remained.<sup>13</sup> An attachment on a conditional judgment may be set aside on compliance with the conditions and payment of costs.<sup>14</sup> As a general rule it will be set aside, quashed or dissolved only for irregularities on the face and not for matters *dehors* the record.<sup>15</sup>

Where a clerical error is amendable, it will not be quashed.<sup>16</sup> But it will be set aside where a motion for a new trial was made though not docketed.<sup>17</sup> As a rule the sheriff's return is conclusive, but where the service is not legal an extraneous fact may be offered to make this clear.<sup>18</sup> Assignment for creditors is not ground for dissolution.<sup>19</sup> If the plaintiff does not admit the facts as alleged in garnishee's petition and motion to dissolve, the issue will be made up by the garnishee entering a plea of "*nulla bona*." It cannot be dissolved.<sup>20</sup> An affidavit that the debt attached is due for salary is not ground for dissolving the writ,<sup>21</sup> but it may be quashed as to such amount as is exempt.<sup>22</sup> If the defendant does not enter an appearance he cannot move to quash for matters *in pais*.<sup>23</sup> Where money in the hands of an assignee is attached, the assignee's account pending in another court, the attachment will not be quashed, but the case will proceed regularly with rule and interrogatories.<sup>24</sup>

However, where funds in the hands of a master are attached by one claiming under a judgment against a distributee, a motion to dissolve is regular.<sup>25</sup> The claim of an assignee, of priority over an

<sup>7</sup> Canfield v. Breneman, 13 W. N. C. 551.

<sup>8</sup> Smith's Ap., 108 Pa. 508.

<sup>9</sup> Trego v. Jones, 14 W. N. C. 143.

<sup>10</sup> Haskins v. Dill, 7 W. N. C. 258.

<sup>11</sup> Mohr v. Warg, 26 Pa. 100.

<sup>12</sup> Levy v. Kline, 2 W. N. C. 630.

<sup>13</sup> Engle v. Ermish, 1 Kulp, 36.

<sup>14</sup> Scott v. Phillips, 140 Pa. 51.

<sup>15</sup> Lorenz v. Orlady, 87 Pa. 226.

<sup>16</sup> Smith v. McKee, 52 Pitts. L. J. 232.

<sup>17</sup> Parrish v. Lader, 1 W. N. C. 389.

<sup>18</sup> Piatt v. Sutton, 12 Luz. L. R. 437.

<sup>19</sup> Darlington v. Fleischner, 10 W. N. C. 483; Bailey v. Grim, 2 Leg. Rec. R. 270.

<sup>20</sup> Smith v. Hartman, 5 York, 55.

<sup>21</sup> Reed v. Buck, 32 W. N. C. 204.

<sup>22</sup> Miller v. Rush, 25 Pitts. L. J. 72.

<sup>23</sup> United, Etc., Co. v. McCartney, 8 D. R. 110.

<sup>24</sup> Neff v. Love, 2 Miles, 128.

<sup>25</sup> McFillan v. Brown, 15 W. N. C. 416.

attachment can only be considered on the trial.<sup>26</sup> The right to an attachment against an insurance company is not extinguished by its dissolution under the act of May 1, 1876, P. L. 66. The receiver stands for the legal entity, in such case.<sup>27</sup>

Creditors of a defendant cannot object to irregularities in the attachment,<sup>28</sup> but the defendant may.<sup>29</sup> Appearance and answer by the garnishee waive irregularities in the service, a reservation of exceptions being ineffective.<sup>30</sup>

Where an executor is a beneficiary under the will and is made garnishee and no affidavit or recognizance is filed as required by section 32, act June 16, 1836, P. L. 755, and he does not move to quash but pleads *nulla bona*, he cannot object to the irregularity after verdict.<sup>31</sup>

While this is the rule as to irregularities it is not as to void process.<sup>32</sup> A general appearance and a motion to open judgment on original grounds is a waiver of defects in the service<sup>33</sup> and other subsequent attaching creditors are concluded.<sup>34</sup> Service on garnishee after the death of the defendant, on the same day as the death, gives no lien.<sup>34a</sup>

## 22. Form of interrogatories.

.....	}	In the Court of Common Pleas of _____ County, No. _____ Term, 19____.
.....		
.....		
versus		
.....		
.....		
Garnishee.		

### *Interrogatories to the Garnishee Above Named:*

First—Do you know \_\_\_\_\_, of whom you are the Garnishee in this attachment issued at the suit of the above named Plaintiff ?

Second—Have you had any commercial or other transactions with the said \_\_\_\_\_? If yea, what was the state of your accounts on the \_\_\_\_\_ day of \_\_\_\_\_ A.D. 190—? Annex a copy of each amount, to your answers hereto.

Third—Was there, or was there not, a balance in your hands in

<sup>26</sup> Landey v. Hefley, 11 W. N. C. 238.

<sup>27</sup> Pickersgill v. Lycoming Fire Ins. Co., 99 Pa. 602.

<sup>28</sup> Hoopes v. Robinson, 2 Chester Co. 312.

<sup>29</sup> Pottsville Bank v. Vandusen, 2 Leg. Rec. R. 7.

<sup>30</sup> Mulholland v. Mix, 24 C. C. 143; Detrich v. Sutton, 31 C. C. 392; Schober v. Mather, 49 Pa. 21; Lupton v. Moore, 101 Pa. 318; Fox v. Reed, 3 Grant, 81; Keck v. Porter, 8 Kulp, 475; Kohler v. Thorn, 154 Pa. 180.

<sup>31</sup> First Natl. Bank v. Trainer, 209 Pa. 387; Poor v. Colburn, 57 Pa. 415; P. & L. Dig., vol. 7, col. 10986.

<sup>32</sup> Taylor v. Knipe, 2 Pearson, 151.

<sup>33</sup> Skidmore v. Bradford, 4 Pa. 296; Wisecarver v. Braden, 146 Pa. 42;

Lentz v. Stiles, 3 Lehigh Co. 329.

<sup>34</sup> Sonneman v. Gable, 7 York, 107.

<sup>34a</sup> Moore v. Wilcox, 36 C. C. 337.

favor of the said — —, on the — day of —, A. D. 190—, or at any time since, up to the time of your answering these interrogatories? If yea, state the amount particularly.

Fourth—Had you in your possession any goods or merchandise, money or effects of any nature whatever belonging to the said — —, on the — day of —, A. D. 190—, or at any time since? If yea, state the nature, quantity and value of said goods and merchandise.

Fifth—Were you not on the — day of —, A. D. 190—, indebted to the said — — in some and in what way, and in what amount; were you since, and what, and when and how became so indebted.

Donald Glenn,  
Plaintiff's Attorney.

### 23. Rule to answer — form.

And now, the — day of —, A. D. 190—, the Plaintiff files the foregoing interrogatories to the within named Garnishee, and enters a rule upon — to file — answers thereto under oath, in the Prothonotary's office of said county, on or before the — day of — 190—.

To the Prothonotary..

Donald Glenn,  
Plaintiff's Attorney.

A true copy.

Attest:

\_\_\_\_\_  
Prothonotary.

### 24. Service of interrogatories, etc.

The interrogatories, accompanied with the rule to answer, need not be served by the sheriff or any officer—but may be served by the plaintiff or his agent, and although not yet filed.<sup>35</sup> But it is better practice to have them served by an officer and a return of service made. Service has been held sufficient by leaving a copy at garnishee's dwelling with his wife.<sup>36</sup> *Non pros.* cannot be entered for failure to serve copy of interrogatories on the garnishee.<sup>37</sup> The garnishee may rule the plaintiff to proceed.

### 25. Rule to answer.

A rule of court dispensing with the rule to answer is invalid;<sup>38</sup> but the court may make a standing order that such rule shall issue as of course, without motion, to answer on or before a certain day named, not less than ten days after service of such rule.<sup>39</sup>

The rule should state the time and place of answer.<sup>40</sup> The return of service of rule and interrogatories may be inquired into

<sup>35</sup> Ringwalt, v. Brindle, 59 Pa. 51.

<sup>36</sup> Mohr v. Warg, 26 Pa. 106.

<sup>37</sup> Herst v. Beckhaus, 2 D. R. 199.

<sup>38</sup> Ringwalt v. Brindle, 59 Pa. 51.

<sup>39</sup> Dougherty v. Thayer, 78 Pa. 172; P. & L. Dig., vol. 7, col. 10995.

<sup>40</sup> Montanye v. Husted, 3 Kulp, 325.

and if found irregular and that garnishee had no notice to answer, the judgment will be set aside.<sup>41</sup>

A garnishee should not be required to answer before the return day of the writ, but if answers are filed judgment will not be entered thereon before the return day, nor will the interrogatories be stricken out.<sup>42</sup> If, however, the interrogatories show that the cause is not one in which attachment lies, they will be stricken off.<sup>43</sup>

#### 26. Answers to interrogatories.

The answers should be full, direct and responsive to each interrogatory, and if not so may be excepted to for such defects.<sup>44</sup>

The proper practice is to file exceptions, demur or proceed to issue and not to take a rule for more specific answers, as formerly.<sup>45</sup> If the answers are general denials, on exception, the court may order a more specific answer.<sup>46</sup> Generally, he need not annex copies of correspondence.<sup>47</sup> Where he admits that he holds property of a firm of which defendant is a member, it is sufficiently explicit.<sup>48</sup> A married woman may not claim her privilege as wife and refuse to answer interrogatories where her husband is defendant and she garnishee.<sup>49</sup> If the garnishee shows a complete defense and exhaustion of the fund, judgment will not be given against him.<sup>50</sup> Uncontradicted statements of fact in the answers will be taken as true.<sup>51</sup> The efficacy of the answers will not be destroyed by the prothonotary's error in filing them in the wrong attachment.<sup>52</sup>

They may be sworn to before any officer who has the authority to administer oaths.<sup>53</sup> A garnishee's liability cannot be lessened by an indebtedness to the defendant on a building contract made before he answers.<sup>53a</sup>

#### 27. Interrogatories requiring answers.

The interrogatories which a garnishee must answer must relate to the goods, chattels, effects and credits of the defendant in his hands or due from him, and not extraneous matters;<sup>54</sup> or affairs of persons not parties to the record.<sup>55</sup> But a garnishee must answer touching goods, etc., of the wife of defendant in his hands.<sup>56</sup> As

<sup>41</sup> *Miller v. Lent*, 22 *Lanc. L. R.* 212.

<sup>42</sup> *Haupt v. O'Malley*, 2 *Leg. Rec. R.* 386.

<sup>43</sup> *Martin v. P. & R. R. Co.*, 8 *D. R.* 657.

<sup>44</sup> *Lanback v. Black*, 1 *W. N. C.* 314; *Shoemaker v. Fegely*, 14 *D. R.* 850; *Schlayer v. Bowers*, 30 *C. C.* 535.

<sup>45</sup> *Grauer v. Watson*, 3 *D. R.* 641.

<sup>46</sup> *Case v. McDaniel*, 7 *C. C.* 192.

<sup>47</sup> *Lea v. Musser*, 2 *Clark*, 306.

<sup>48</sup> *Rollin v. Blyler*, 12 *W. N. C.* 519.

<sup>49</sup> *Valley, Etc., Bank v. Mylin*, 19 *Lanc. L. R.* 254.

<sup>50</sup> *Schlayer v. Bowers*, 30 *C. C.* 535.

<sup>51</sup> *First Natl. Bank v. Ladd*, 126 *Pa.* 188.

<sup>52</sup> *Templeton v. Shakley*, 107 *Pa.* 370.

<sup>53</sup> *Minhinnick v. Long*, 1 *T. & H. Pr.*, section 1201

<sup>53a</sup> *Bradley v. Miller*, 57 *Pitta. L. J.* 300.

<sup>54</sup> *Corbyn v. Bollman*, 4 *W. & S.* 342.

<sup>55</sup> *Struber v. Klein*, 17 *Phila.* 12.

<sup>56</sup> *Farmer v. Allen*, 14 *W. N. C.* 211.

to relevant matters he cannot refuse to answer though the transaction extended over a period of years;<sup>57</sup> or where it calls for an accounting.<sup>58</sup> He is not bound to answer as to facts from which inferences are to be drawn only.<sup>59</sup> If he thinks the interrogatories improper he may ask instructions from the court.<sup>60</sup> An attorney-at-law as garnishee must answer whether he has received from his client money in trust to pay his client's creditors a percentage.<sup>61</sup> But not as to moneys of the wife received after her divorce by him, on interrogatory of her husband's creditors.<sup>62</sup>

Where the plaintiff takes judgment on the answers he cannot require answers to additional interrogatories.<sup>63</sup> A garnishee who files a plea of "*nulla bona*" need not answer additional interrogatories as to a time subsequent to filing his plea.<sup>64</sup>

### 28. Motion for judgment on the answers.

The right of the plaintiff to move for judgment on the answers depends upon an apparent liability to defendant, made out by them.<sup>65</sup> Where the answers admit the debt but seek to avoid, the reasons must be complete, or judgment will follow.<sup>66</sup> There must be either an absolute admission of indebtedness,<sup>67</sup> or a statement of facts from which indebtedness or possession of assets results as matter of law.<sup>68</sup> In case of doubt the issue is for a jury.<sup>69</sup> But where garnishee answers a prior attachment, judgment will be arrested;<sup>70</sup> and where he avers that the debt was a promissory note which may have been negotiated;<sup>71</sup> in which case the note should be brought into court and deposited with the prothonotary.<sup>72</sup> If he states the note has been negotiated he need not give the name of the party unless the interrogatories demand it.<sup>73</sup> Judgment will not be entered against a bank for funds deposited by defendant as executor;<sup>74</sup> or against a garnishee who answers that his dealings were those of an agent only;<sup>75</sup> or where the funds are held on a contingency;<sup>76</sup>

<sup>57</sup> Biddle v. Gaffney, 12 W. N. C. 534.

<sup>58</sup> Lennig v. Fischer, 12 W. N. C. 338.

<sup>59</sup> Rhine v. Danville, Etc., R. Co., 1 W. N. C. 326.

<sup>60</sup> McCallum v. Morris, 179 Pa. 427.

<sup>61</sup> Jeanes v. Freidenberg, 3 Clark, 199.

<sup>62</sup> Ladner v. Shuster, 1 W. N. C. 85.

<sup>63</sup> Tiers v. Woodruff, 16 Montg. 36; Sweeting v. Wanamaker, 4 D. R. 245; Importers', Etc., Bank v. Lyons, 8 D. R. 675.

<sup>64</sup> Mullin v. Maguire, 1 W. N. C. 331; also 577. (See Excelsior Brick Co. v. Gibson, 21 W. N. C. 32.)

<sup>65</sup> Walker v. Reynolds, 5 Lack. Jurist, 246.

<sup>66</sup> Beyer v. Smith, 22 Lanc. L. R. 78.

<sup>67</sup> Allegheny Savings Bank v. Meyer, 59 Pa. 361; P. & L. Dig., vol. 7, col. 11003.

<sup>68</sup> Fithian v. Brooks, 5 Clark, 121.

<sup>69</sup> Hagy v. Hardin, 186 Pa. 428; Stone v. Rohner, 7 D. R. 313.

<sup>70</sup> Ferguson v. Craig, 1 W. N. C. 153.

<sup>71</sup> Kistler v. Thompson, 3 Lack. Jur. 341.

<sup>72</sup> Bell v. Phila., Etc., Co., 10 Supr. C. 38.

<sup>73</sup> McCallum v. Morris, 179 Pa. 427.

<sup>74</sup> Sheetz v. Leach, 2 W. N. C. 291.

<sup>75</sup> Hought v. Lewis, 2 Kulp, 337.

<sup>76</sup> Kerr v. Diehl, 2 Clark, 325.



or garnishee does not know to whom the fund belongs;<sup>76a</sup> or where only a check was given without consideration;<sup>77</sup> or where an action is pending between defendant and garnishee to determine amount due;<sup>78</sup> or where the Orphans' Court has ordered the money due to be paid into court as owelty under act of March 29, 1832, P. L. 190;<sup>79</sup> or where he answers that his goods were sold by a constable to pay the debt.<sup>80</sup> But judgment will be given where he admits the debt, but sets up an assignment unless it shows that it was made before the attachment was served;<sup>81</sup> or that a bill in equity is pending to settle a dispute between partners as to the validity of the judgment.<sup>82</sup> If the answers are insufficient to sustain a judgment, it will be refused without inquiring into their verity.<sup>83</sup> Where the plaintiff demurs to the answers the plea of "*nulla bona*" is of no effect.<sup>84</sup> A counter-statement on the facts will not support judgment.<sup>85</sup>

Judgment will not be entered for the garnishee on his answers.<sup>86</sup> The next step, after refusal of judgment for the plaintiff, is a rule to plead.<sup>87</sup> The disputed facts can only be resolved by a trial.<sup>88</sup> An order discharging a rule for judgment is interlocutory only and not then appealable.<sup>88a</sup> Judgment may be entered where the defendant admits an amount due payable in trade.<sup>89</sup> But where the thing held is title to a house a judgment cannot be entered for the amount of valuation.<sup>90</sup>

## 29. Judgment for want of appearance.

Under the rules judgment for want of an appearance cannot be taken against a garnishee until four days after the return day.<sup>1</sup> There is no statutory provision on the subject<sup>2</sup> and a general judgment, with execution *de bonis propriis* will be stricken off.<sup>3</sup> It should follow sections 59 and 60 of the act of June 13, 1836, P. L. 568<sup>4</sup> relating to foreign attachment.<sup>5</sup>

This has reference only to a judgment on an attachment of money or a debt due, otherwise it will be only interlocutory and the

<sup>76a</sup> McGeary v. Huff, 31 Supr. C. 401.

<sup>77</sup> Wilson v. Merwine, 11 York, 139.

<sup>78</sup> Ditman v. Oeser, 16 W. N. C. 98.

<sup>79</sup> Atkinson v. Hines, 5 Phila. 16.

<sup>80</sup> Dennison Twp. v. Dempsey, 4 Kulp, 377.

<sup>81</sup> Miner v. Kosek, 2 D. R. 638; Egbert v. De Solms, 218 Pa. 207.

<sup>82</sup> Bank, Etc., v. Munford, 3 Grant, 232.

<sup>83</sup> Lancaster County Bank v. Gross, 50 Pa. 224.

<sup>84</sup> Fox v. Reed, 3 Grant, 81.

<sup>85</sup> Moore v. Moore, 12 Phila. 173.

<sup>86</sup> Hess v. Shorb, 7 Pa. 231.

<sup>87</sup> Pierson v. McCormick, 1 Clark, 260.

<sup>88</sup> Lancaster County Bank v. Gross, 50 Pa. 224.

<sup>88a</sup> Brendlinger v. Riegel, 37 Supr. C. 474.

<sup>89</sup> Collum v. Mason, 1 W. N. C. 298; Gill v. Snyder, 2 W. N. C. 155.

<sup>90</sup> Wilson v. Morrow, 14 W. N. C. 89.

<sup>1</sup> Latshaw v. Robinson, 2 Chester Co. 312.

<sup>2</sup> Jones v. Tracy, 75 Pa. 417.

<sup>3</sup> Mawson v. Goldstone, 9 Phila. 30.

<sup>4</sup> Vol. 1, p. 695.

<sup>5</sup> Layman v. Beam, 6 Wharton, 181; P. & L. Dig., vol. 7, col. 11012.

plaintiff must proceed by writ of inquiry, and assess the value of the specific thing.<sup>6</sup> Judgment cannot be taken for want of an affidavit of defense as it is not required in this proceeding.<sup>7</sup>

### 30. Judgment for default of answer.

If the garnishee makes default by failure to answer the interrogatories a general judgment may be had against him.<sup>8</sup> This is to the effect of an admission that he has sufficient goods or effects of the defendant to satisfy the plaintiff's demand and an execution may issue *de bonis propriis*, for such amount and costs.<sup>9</sup>

Judgment will be opened, when plaintiff gave time but not sufficient, to garnishee.<sup>10</sup>

Where the plaintiff himself is in default under the rule, a judgment for want of an appearance will be opened.<sup>11</sup> Prompt application for relief, with a statement of a good defense will generally secure the opening of the judgment;<sup>12</sup> but if there has been gross negligence the court will not be so easily satisfied.<sup>13</sup> The plaintiff can have but one judgment on the answers of the garnishee.<sup>14</sup>

### 31. Verdict and judgment.

Where the plea is "*nulla bona*" a general verdict is bad and a judgment will be reversed. It must find that the garnishee had the money or effects of defendant in his possession.<sup>15</sup> A verdict which finds moneys of defendant in the hands of the garnishee and that the plaintiff is entitled to a certain amount, has been held, will not sustain a judgment.<sup>16</sup> Where the property is a debt due from the garnishee the jury need not find what goods and effects are in his hands.<sup>17</sup> If the plaintiff is not satisfied with the amount admitted in the answers and goes to trial he must prove a larger sum due.<sup>18</sup> If the verdict is for money when it should have been for goods, a new trial will be granted.<sup>19</sup> The court has considerable latitude in amending verdicts to conform to the issue and justice of the cause.<sup>20</sup> The proper form of a verdict is that the garnishee has in his hands certain goods, effects or credits, to-wit: [naming them] of the value of \$—; or, that the garnishee is indebted to

<sup>6</sup> Longwell v. Hartwell, 164 Pa. 533.

<sup>7</sup> Carter v. Wallace, 9 Phila. 221.

<sup>8</sup> Corbyn v. Bollman, 4 W. & S. 342.

<sup>9</sup> Longwell v. Hartwell, 164 Pa. 533; P. & L. Dig., vol. 7, col. 11013.

<sup>10</sup> Potts v. Harmer, 19 Supr. C. 252.

<sup>11</sup> McFadden v. Millerstown, Etc., Bank, 28 Supr. C. 583; Neilson v. Confer, 5 Montg. Co. 218.

<sup>12</sup> Nicholson v. Fitzpatrick, 2 Phila. 205; Sanborn v. Petry, 3 W. N. C. 170.

<sup>13</sup> Montayne v. Husted, 3 Kulp, 325.

<sup>14</sup> Bradley v. Bradley, 3 Phila. 414.

<sup>15</sup> Bonnaffon v. Thompson, 83 Pa. 460.

<sup>16</sup> Poor v. Colburn, 57 Pa. 415; *contra*, Schwartz v. Kyner, 30 Pitts. L. J. 495.

<sup>17</sup> Krehmer v. Smith, 1 Walker, 310.

<sup>18</sup> Erbs v. Weimer, 32 W. N. C. 204.

<sup>19</sup> Hyatt v. Prentzell, 2 Luz. Leg. Obs. 290.

<sup>20</sup> Keen v. Hopkins, 48 Pa. 445.

the defendant in the sum of \$—; and that the plaintiff have execution of the same or so much thereof as may satisfy his claim, with interest and costs, and if the said garnishee refuses upon proper demand to pay the same or to produce the goods for execution, then the same to be levied of his, the garnishee's goods and lands as for his own proper debt; and that the garnishee thereupon be discharged as against the defendant for the sum so attached."<sup>21</sup>

The same form applies where an installment due on a mortgage is attached in the hands of the *terre-tenant* by a creditor of the mortgagee.<sup>22</sup> Where the defendant claims the exemption, the above form will answer, with the proviso that the sum so attached shall be levied, etc., only to the extent that it exceeds \$300, without prejudice to the right of the defendant to recover the same from the garnishee, or any less sum due when the attachment was served upon him.<sup>23</sup>

A general judgment should not be entered when garnishee files no answers and defendant has claimed his exemptions.<sup>24</sup> But the court will not order the exemption paid to the defendant on garnishee's answers. The defendant has his remedy by action.<sup>25</sup>

### 32. Effect of judgment.

A judgment on garnishee's answers before a justice of the peace, entered in the Common Pleas, is conclusive on the heirs.<sup>26</sup>

The presumption of payment of the original judgment, of itself, does not operate to extinguish the judgment against the garnishee.<sup>27</sup> A verdict and judgment against the garnishee will not preserve the lien of the original judgment as against later incumbrancers. To preserve his priority the plaintiff must revive his judgment.<sup>28</sup> The attachment execution has no relation to the lien of the judgment.<sup>29</sup> The defendant is bound by the judgment on distribution of the garnishee's estate.<sup>30</sup> Judgment against garnishee, where another than defendant claims the debt, the garnishee answering that he owes the defendant will not protect the garnishee from the claim of the third party.<sup>31</sup>

### 33. Property that may be attached.

Unlike foreign attachment, lands are not attachable on an attachment execution, since an execution proper is provided. Only personalty, debts and choses in action are liable.<sup>32</sup>

Some of the things held attachable are these: Money due a

<sup>21</sup> *Bohlen v. Stockdale*, 27 Pitts. L. J. 198; *Barker v. Johnson*, 2 C. C. 414; *Longwell v. Hartwell*, *supra*.

<sup>22</sup> *McLaughlin v. McKee*, 29 Pitts. L. J. 337.

<sup>23</sup> *Jones v. Tracey*, 75 Pa. 417; P. & L. Dig., vol. 7, col. 11017.

<sup>24</sup> *Beck v. Bowman*, 6 Del. Co. 550.

<sup>25</sup> *Friday v. McDowell*, 2 W. N. C. 126.

<sup>26</sup> *Springer's Est.*, 10 York, 45.

<sup>27</sup> *Beidelman's Est.*, 3 Lanc. L. R. 167.

<sup>28</sup> *Cake's Est.*, 186 Pa. 412.

<sup>29</sup> *Esser v. Smith*, 15 Phila. 144.

<sup>30</sup> *Dayton v. Wagner*, 2 Leg. Rec. R. 162.

<sup>31</sup> *Osner v. Dieterle*, 19 W. N. C. 192.

<sup>32</sup> *Evans v. Hamrick*, 61 Pa. 19.

contractor on a municipal claim, from the owner of the premises;<sup>33</sup> negotiable note when due, in the hands of the maker, for the debt of the present holder;<sup>34</sup> plaintiff's bill of costs for witness fees.<sup>35</sup> These are not attachable: Money in hands of railroad company's agent from sale of tickets;<sup>36</sup> sheriff's printing bill for garnishees.<sup>37</sup> fees due an official gauger of oil.<sup>38</sup>

The judgment of a debtor for damages for sale of goods which were exempt, although largely exemplary, may be attached by his creditor.<sup>39</sup> So a verdict based on tort is attachable;<sup>40</sup> but a claim for damages not yet liquidated is not.<sup>41</sup> However, in foreign attachment, it has been held that section 76 of the act of 1836 is still in force,<sup>42</sup> and also that the tort may be waived and the cause proceeded in as in assumpsit.<sup>43</sup> An unliquidated claim against a corporation for entering land without agreeing upon compensation cannot be attached.<sup>44</sup> A claim founded on conversion of money or property is attachable.<sup>45</sup>

A trustee need only respond to the amount of money in his hands and not for unliquidated claims for negligence.<sup>46</sup> Where alimony is a debt of record it is attachable.<sup>47</sup> The commissions of an executor are not attachable in his own hands nor those of his co-executor.<sup>48</sup> A seat in a stock exchange, etc., is non-attachable.<sup>49</sup> Where a loss under a fire insurance policy has been fixed by an award of arbitrators it is attachable.<sup>50</sup> But a life insurance policy, payable to the legal representative at death is non-attachable during the life of the assured.<sup>51</sup> After the death of the assured, an assignee who had no insurable interest in the assured held the fund free from attachment.<sup>52</sup>

#### 34. Debts which are attachable.

A debt due and payable in municipal bonds is attachable and the bonds may be sold under this process;<sup>53</sup> a debt payable in trade

<sup>33</sup> *Hewer v. Richardson*, 3 W. N. C. 274.

<sup>34</sup> *Wetmore v. Price*, 1 T. & H. Pr., section 1183.

<sup>35</sup> *Howard, Etc., Assn. v. P. & R. R. Co.*, 102 Pa. 220.

<sup>36</sup> *Fowler v. Pittsburg, Etc., R. Co.*, 35 Pa. 22.

<sup>37</sup> *Ditman v. Buist*, 125 Pa. 609.

<sup>38</sup> *Hutchinson v. Gormly*, 48 Pa. 270.

<sup>39</sup> *Knabb v. Drake*, 23 Pa. 489.

<sup>40</sup> *Landey v. Hesley*, 11 W. N. C. 238.

<sup>41</sup> *McFillan v. Anderson*, 2 Chester Co. 100.

<sup>42</sup> *Cantor v. Kraft Mfg Co.*, 36 C. C. 105.

<sup>43</sup> *Wight v. Hovey*, 17 D. R. 1019; vol. 1, p. 655.

<sup>44</sup> *Selheimer v. Elder*, 98 Pa. 154.

<sup>45</sup> *Balliet v. Brown*, 103 Pa. 546.

<sup>46</sup> *Grimm v. Sarmiento*, 18 Phila. 318.

<sup>47</sup> *Scheffer v. Boy*, 5 C. C. 158.

<sup>48</sup> *Taylor's Est.*, 5 Phila. 218; *Adams' Ap.*, 47 Pa. 94; *P. & L. Dig.*, vol. 7, col. 11049.

<sup>49</sup> *Pancoast v. Gowan*, 93 Pa. 66; *P. & L. Dig.*, vol. 7, col. 11050.

<sup>50</sup> *Boyle v. Franklin Ins. Co.*, 7 W. & S. 76; *P. & L. Dig.*, vol. 7, col. 11051.

<sup>51</sup> *Day v. New England, Etc., Co.*, 111 Pa. 507.

<sup>52</sup> *Wheeland v. Atwood*, 192 Pa. 237, reversing 7 Supr. C. 86.

<sup>53</sup> *King v. Hyatt*, 41 Pa. 229.

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is attachable;<sup>54</sup> so also advances due under a builder's contract;<sup>55</sup> debts now owing but payable in the future.<sup>56</sup> The attachment binds all funds in garnishee's hands or that shall come into his hands,<sup>57</sup> even after answer filed<sup>58</sup> but not after plea and issue,<sup>59</sup> except where further interrogatories are propounded and the garnishee makes discovery of funds not previously disclosed.<sup>60</sup> Interest coming due after service will be held;<sup>61</sup> also claims for money to be earned which is earned, not otherwise;<sup>62</sup> rent falling due after service, where there is no assignment,<sup>63</sup> as well as rent due at service.<sup>64</sup>

### 35. Some debts not attachable.

An agreement to furnish boarding to another is not attachable;<sup>1</sup> nor a railroad company employee's relief fund;<sup>2</sup> nor a premium on a fire insurance policy, subject to cancellation;<sup>3</sup> contingencies and expectant interests;<sup>4</sup> rent reserved and not due, which passes to an assignee in bankruptcy;<sup>5</sup> rents accruing between a sheriff's sale and acknowledgment of the deed;<sup>6</sup> or payable in advance pending the attachment.<sup>7</sup>

### 36. Interests in trust estates.

The income on property devised in trust is attachable unless there is a provision in the will prohibiting such liability for debts,<sup>8</sup> but the principal cannot be touched;<sup>9</sup> neither principal nor income of a spendthrift trust is attachable;<sup>10</sup> under certain circumstances the interest may be attached for a debt incurred subsequent to the creation of the trust.<sup>11</sup>

<sup>54</sup> *Collum v. Mason*, 1 W. N. C. 298.

<sup>55</sup> *Dauids v. Harris*, 9 Pa. 501; *Kelly v. Snyder*, 5 W. N. C. 39.

<sup>56</sup> *Fulweiler v. Hughes*, 17 Pa. 440; *Kieffer v. Ehler*, 18 Pa. 388; P. & L. Dig., vol. 7, col. 11026.

<sup>57</sup> *Sheetz v. Hobensack*, 20 Pa. 412; *Mahon v. Kunkle*, 50 Pa. 216; P. & L. Dig., vol. 7, col. 11027.

<sup>58</sup> *Benners v. Buckingham*, 5 Phila. 68.

<sup>59</sup> *Brown v. Brown*, 3 Phila. 359; *German, Etc., Bank v. Braddock Mill Co.*, 19 C. C. 18.

<sup>60</sup> *Mullen v. Maguire*, 10 Phila. 435; *Excelsior, Etc., Co. v. Gibson*, 21 W. N. C. 32; *Benners v. Buckingham*, 5 Phila. 68.

<sup>61</sup> *Littlestown Sav. Inst. v. Corwell*, 20 C. C. 145.

<sup>62</sup> *Excelsior, Etc., Co. v. Haines*, 5 C. C. 631.

<sup>63</sup> *Mullen v. Maguire*, 1 W. N. C. 194, 233; *Wells v. Tuck*, 1 Kulp, 154; P. & L. Dig., vol. 7, col. 11029.

<sup>64</sup> *Brolasky v. Wilson*, 26 Leg. Int. 270.

<sup>1</sup> *Peebles v. Meeds*, 96 Pa. 150.

<sup>2</sup> *Kinsloe v. Davis*, 167 Pa. 519.

<sup>3</sup> *Building Assn. v. Laib*, 2 D. R. 473.

<sup>4</sup> *Patterson v. Caldwell*, 124 Pa. 455.

<sup>5</sup> *Evans v. Hamrick*, 61 Pa. 19.

<sup>6</sup> *Third Natl. Bank v. Hanson*, 1 W. N. C. 613.

<sup>7</sup> *Bowman v. Stephens*, 8 Montg. Co. 27.

<sup>8</sup> *Park v. Matthews*, 36 Pa. 28; *Gruver v. Edinger*, 13 C. C. 307; *Bremer v. Mohn*, 169 Pa. 91; P. & L. Dig., vol. 7, col. 11032.

<sup>9</sup> *Still v. Spear*, 45 Pa. 168; *Girard, Etc., v. Chambers*, 46 Pa. 485.

<sup>10</sup> *Prentice v. Pleasanton*, 8 Atl. 842; *Brubaker v. Huber*, 2 D. R. 703; P. & L. Dig., vol. 7, col. 11035; *Seitzinger's Est.*, 170 Pa. 500.

<sup>11</sup> *Rank v. Haldeman*, 31 C. C. 447.

An attachment by the creditor of an heir will not be preferred to the claim of the estate against the heir.<sup>12</sup> A trustee will not be cited to account on the petition of an attaching creditor of the *cestui que trust*.<sup>13</sup> An active trust cannot be attached;<sup>14</sup> nor a legacy given on condition that it shall not be liable for the debts of the legatee;<sup>15</sup> nor a fund payable to the beneficiary at the discretion of the trustee.<sup>16</sup> The attachment must be confined to the income prior to the debtor's death.<sup>17</sup>

A spendthrift trust even protects the fund from attachment for alimony in divorce;<sup>18</sup> all interests are protected.<sup>19</sup> But one cannot create a trust for himself that is proof against attachment.<sup>20</sup> The income of a separate use trust which arose during coverture cannot be attached.<sup>21</sup>

### 37. Debts in suit and judgments.

A debt in suit is attachable. If the creditor secures title to it he may have it marked to his use and proceed.<sup>22</sup>

An unsatisfied judgment is attachable;<sup>23</sup> though an appeal be pending.<sup>24</sup> Where a judgment is in the name of a husband as agent it may be shown that he was agent for her and the moneys due her separate estate.<sup>25</sup> A judgment in the joint names of husband and wife for personal injuries to her is not attachable by the husband's creditor.<sup>26</sup> A debt in judgment in another state may be attached here if service can be made on the garnishee in this state.<sup>27</sup>

Money in the hands of the sheriff cannot be attached, but a debt due may be attached although an execution is out for it and a levy on personal property made,<sup>28</sup> and this up to the time of sale.<sup>29</sup> But an attachment served on the garnishee on the day of sale of land and on the defendant not until six days after, will be quashed as to the proceeds of the sale.<sup>30</sup>

### 38. Partnership interests.

An unsettled interest in a partnership cannot be attached on

<sup>12</sup> De Haven's Est., 5 Dauphin Co. 233. (See 207 Pa. 147.)

<sup>13</sup> Locher's Est., 18 Lanc. L. R. 6.

<sup>14</sup> Osborne v. Soley, 81 \* Pa. 312.

<sup>15</sup> Beck's Est., 133 Pa. 51; Goe's Est., 146 Pa. 431.

<sup>16</sup> Keyser v. Mitchell, 67 Pa. 473.

<sup>17</sup> Comly's Est., 136 Pa. 153.

<sup>18</sup> Thackara v. Mintzer, 100 Pa. 151.

<sup>19</sup> Patterson v. Caldwell, 124 Pa. 455.

<sup>20</sup> Andress v. Lewis, 17 W. N. C. 270; 1 C. C. 293.

<sup>21</sup> Crowe v. Lippincott, 38 Pitta. L. J. 433.

<sup>22</sup> Sweeny v. Allen, 1 Pa. 380.

<sup>23</sup> Crabb v. Jones, 2 Miles, 130.

<sup>24</sup> Woodward v. Carson, 86 Pa. 176.

<sup>25</sup> Bohner v. Cummings, 91 Pa. 55.

<sup>26</sup> Jeanes v. Davis, 3 Clark, 60.

<sup>27</sup> Fithian v. N. Y. & C. R. Co., 31 Pa. 114.

<sup>28</sup> Winternitz's Ap., 40 Pa. 490; P. & L. Dig., vol. 7, col. 11039.

<sup>29</sup> Merwine v. Kresgo, 1 Leg. Rec. R. 267.

<sup>30</sup> Corbit v. Long, 2 Woodward, 118.

a judgment against a partner.<sup>31</sup> The remedy is by act of April 8, 1873, P. L. 65.<sup>32</sup> The attaching creditor cannot maintain a bill in equity for an accounting.<sup>33</sup> Evidence that the partnership was settled and the balance struck may be submitted to a jury.<sup>34</sup> A debt due a partnership is not attachable.<sup>35</sup>

But where the debt on which attachment issues is due from the partnership an attachment of a debt due the partnership will be preferred to an attachment on a partner's debt though issued later.<sup>36</sup> Where the partnership and individual interests are complicated and a bill in equity is pending to untangle them judgment will not be entered on the attachment.<sup>37</sup> Where a bank permits a partner to check out money for his own use it will be held liable to an attaching creditor for the amount so misapplied.<sup>38</sup>

### 39. Money deposited and goods pledged.

Money placed in the hands of another to be returned in the same money is liable to attachment execution.<sup>39</sup> But a deposit of money in bank as "agent" is *prima facie* the money of an undisclosed principal and non-attachable.<sup>40</sup> But money deposited in bank by one person may be proved to belong to another, either by the depositor or an attaching creditor.<sup>41</sup> Trade dollars deposited as security were held liable to attachment and sale under a *fi. fa.*<sup>42</sup> Where chattels deposited with a creditor as collateral security were sold, an attaching creditor has a right to an account of the proceeds.<sup>43</sup> The garnishee's rights as to pledged goods will be protected.<sup>44</sup> Goods merely stored are not liable to attachment execution; <sup>45</sup> nor horses, etc., kept at a livery stable.<sup>46</sup> Chattels left on land by a vendor are subject to a *fi. fa.* not an attachment execution; <sup>47</sup> nor are the contents of a rented safe attachable.<sup>48</sup>

### 40. Attachment of interests in decedent's estates.

Section 10 of the act of April 13, 1843, P. L. 233, provides:

"All legacies given and lands devised to any person or persons,

<sup>31</sup> *Horne v. Petty*, 192 Pa. 32; P. & L. Dig., vol. 7, col. 11041.

<sup>32</sup> *Importers', Etc., Bank v. Lyons*, 195 Pa. 479.

<sup>33</sup> *Alter v. Brooke*, 9 Phila. 258.

<sup>34</sup> *Knerr v. Hoffman*, 65 Pa. 126; *Ryon v. Wynkoop*, 148 Pa. 188.

<sup>35</sup> *Lewis v. Paine*, 1 Leg. Gaz. 166.

<sup>36</sup> *Vanhorn v. Hood*, 1 W. N. C. 359; *Adams v. Hunter*, 42 Leg. Int. 205.

<sup>37</sup> *Allen v. Erie City Bank*, 57 Pa. 129.

<sup>38</sup> *Granby, Etc., Co. v. Lavery*, 159 Pa. 287.

<sup>39</sup> *Rozelle v. Rhodes*, 116 Pa. 129.

<sup>40</sup> *Bank of Northern Liberties v. Jones*, 42 Pa. 536 (also 44 Pa. 253).

<sup>41</sup> *Hemphill v. Yerkes*, 132 Pa. 545.

<sup>42</sup> *Klinefelter v. Whann*, 2 Chester Co. 376.

<sup>43</sup> *Merchants', Etc., Bank v. Baeder Glue Co.*, 164 Pa. 1.

<sup>44</sup> *Lamb v. Vansciver*, 1 Phila. 29.

<sup>45</sup> *Good v. Obertauffer*, 1 T. & H. Pr., section 1182; *Lennig's Ap.*, 9 W. N. C. 503; *Cherry v. Nolan*, 25 W. N. C. 132.

<sup>46</sup> *Buckner v. Croissant*, 3 Phila. 219; *Hall v. Filter Mfg Co.*, 10 Phila. 370.

<sup>47</sup> *Hamilton v. Hitner*, 3 Montg. 195.

<sup>48</sup> *Gregg v. Hilson*, 8 Phila. 91.

and any interest which any person or persons may have in real or personal estate of any decedent, by will or otherwise which are subject to foreign attachment by the act of July 27, 1842, entitled "An act to enable creditors to attach legacies and property in the hands of executors and administrators, and for other purposes," shall be subject to be attached and levied upon in satisfaction of any judgment, in the same manner as debts due are made subject to execution by the twenty-second section of the act of June 16, 1836, entitled "An act relating to executions": *Provided*, That the plaintiff in said judgment shall tender to the garnishee or garnishees, if he or they be executors or administrators, a bond with sufficient security, as is provided by the second section of the act of July 27, 1842; and the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor."

#### 41. Practice in attaching legacies, etc.

Section 11 of the act of April 10, 1849, P. L. 619, provides:

"That under the 10th section of the act of April 13, 1843, and the 22d section of the act of June 16, 1836, the attachment may issue and be served "at any time after the interest which any person or persons may have in the real or personal estate of any decedent shall have accrued by reason of the death of such decedent: *Provided*, That a sale of the aforesaid interest of the defendant in the proceeding by attachment authorized by the aforesaid 10th section of the act of 13th of April, 1843, shall not be compelled by any process of execution, until a year shall have elapsed from the time when the interest aforesaid vested in the defendant, unless the executors or administrators of the decedent shall have sooner filed their account; in all cases when executors, administrators or trustees of the estates of decedents shall have been made garnishees in the process in the nature of attachment \* \* \* they shall be entitled to their costs, as well as the expenses necessarily incurred by them in attending to the proceeding in which they may have been garnishees."

This act changed the construction given the act of 1843, *supra*, so that an attachment may issue before the share is ascertained.<sup>1</sup>

Where the garnishee answers that he has funds in his hands more than sufficient judgment will be entered, but the execution controlled.<sup>2</sup> The execution may lie against the same person as defendant and as garnishee in his representative capacity.<sup>3</sup> Attachment is not the remedy where a testator created a spendthrift trust which fails. The Orphans' Court is the proper forum.<sup>4</sup> Section 10 of the act of April 13, 1843, P. L. 233, is held to apply to a committee in lunacy.<sup>5</sup>

<sup>1</sup> *Lorenz v. King*, 38 Pa. 93; *Chambers v. Baugh*, 26 Pa. 105.

<sup>2</sup> *Adams v. Harland*, 7 W. N. C. 129; *Rhodes v. Kemble*, 12 C. C. 470.

<sup>3</sup> *Becker's Est.*, 13 Lanc. Bar, 22; *Fagan's Est.*, 3 D. R. 181; *Union Natl. Bank v. Fagan*, 34 W. N. C. 20.

<sup>4</sup> *Ellwanger v. Moore*, 206 Pa. 234; *Germantown, Etc., Co. v. Moore*, 206 Pa. 241.

<sup>5</sup> *Handy's Est.*, 9 D. R. 475.



**42. Interests attachable, or nonattachable.**

Any interest in a decedent's estate which is certain, whether converted or unconverted is attachable;<sup>6</sup> but not mere expectancies or contingent ones.<sup>7</sup> Under the act of April 11, 1848, P. L. 536, a married woman's interest was made liable to execution.<sup>8</sup> An undivided interest in household goods subject to common use cannot be attached.<sup>9</sup> A legacy may be attached in "whose hands or possession soever the same may be," and he may be an agent;<sup>10</sup> and the debt may not be directly due the defendant, but to the estate in which he was entitled to a distributive share;<sup>11</sup> but service on the mortgagor will not bind an interest in the estate of the deceased mortgagee.<sup>12</sup> Where there is a dispute as to who is entitled the attachment should not be quashed, but the case be sent to a jury.<sup>13</sup> A fund may be attached for the executor's debt.<sup>14</sup> Attachment will lie against purchase money of land sold by an administrator, *c. t. a.* at suit of a creditor of a legatee;<sup>15</sup> and the voluntary payment of the money into court by the purchaser does not affect the attachment.<sup>16</sup> The same rule applies to legacy paid into court, raised by sale of real estate of decedent.<sup>17</sup>

For various applications see vol. 7, cols. 11,063-4, of Pepper and Lewis' Digest.

A creditor of the decedent cannot gain a preference over other creditors by attaching choses in action, etc.<sup>18</sup>

**43. Attachment of interests in land.**

Under the acts, *supra*, an interest in land may be attached and when served before the entry of judgments will be entitled to priority.<sup>19</sup>

If an attachment issues on a judgment whose lien is allowed to expire, it gets no priority over other creditors.<sup>20</sup> The words "legacies given" and "lands devised" in the acts of April 13, 1843, and April 10, 1849, P. L. 619, are phrases which mean distinct things and where an attachment does not designate "lands devised" it does not bind them where the administrator had nothing to do with them.<sup>21</sup>

<sup>6</sup> Fenton v. Fisher, 106 Pa. 418.

<sup>7</sup> Patterson v. Caldwell, 124 Pa. 455.

<sup>8</sup> Evans v. Cleary, 125 Pa. 204.

<sup>9</sup> Foster's Est., 179 Pa. 610.

<sup>10</sup> Gochenauer v. Hostetter, 18 Pa. 414.

<sup>11</sup> McGrann's Est., 14 Lanc. L. R. 233.

<sup>12</sup> Sturgeon's Est., 6 D. R. 545.

<sup>13</sup> Pleasants v. Cowden, 7 W. & S. 379.

<sup>14</sup> Ross v. Cowden, 7 W. & S. 376.

<sup>15</sup> Brady v. Grant, 11 Pa. 361.

<sup>16</sup> Baldy v. Brady, 15 Pa. 103.

<sup>17</sup> Harper v. Valentine, 4 W. N. C. 38.

<sup>18</sup> Strouse v. Lawrence, 160 Pa. 421; P. & L. Dig., vol. 7, col. 11065.

<sup>19</sup> Straley's Ap., 43 Pa. 89; McCready's Est., 29 Pitts. L. J. 432.

<sup>20</sup> Cake's Est., 186 Pa. 412.

<sup>21</sup> Roth's Ap., 94 Pa. 186; Neely v. Grantham, 58 Pa. 433.

**44. Right of estate to priority.**

Where a legatee or distributee is indebted to the estate to the extent of his share the attachment takes nothing.<sup>22</sup> It can only take what is left after the debt to the estate is paid.<sup>23</sup> A legatee may confess judgment to the executor for a debt though the limitation has run, and it will be valid against the attachment.<sup>24</sup>

But the administrator cannot set up his own claim against the attaching creditor's.<sup>25</sup>

**45. Executors may rule plaintiff to proceed.**

Section 1 of the act of February 28, 1873, P. L. 37, provides:

"Where moneys or other estate of a decedent have been or shall be attached in the hands of executors or administrators, the garnishee may, after the third term, apply by petition to the court out of which the attachment issued, asking the court to grant a rule on the plaintiff and defendant to appear and show cause why the attachment should not be proceeded in within such time as the court may order and direct; and upon hearing had, it shall be lawful for the court, upon neglect or refusal of the plaintiff to proceed as required, to make an order on the record discharging the garnishee and the property in his hands from all liability for such debt or demand: *Provided*, That this act shall not apply where the property sought to be attached shall not be yet due and payable by the garnishee."

**46. Creditor's standing in the Orphans' Court.**

One who has a right to attach a legacy or a distributive share may cite the legal representative to file an account;<sup>26</sup> or petition to sell the land charged with a legacy;<sup>27</sup> but where he could realize nothing he will not be permitted to delay the distribution by demurrer or otherwise.<sup>28</sup> When the attachment proceedings are prosecuted to judgment in the Common Pleas, the Orphans' Court will order payment.<sup>29</sup> The accountant will be directed to hold the fund until final distribution.<sup>30</sup>

The attaching creditor gets no preference by attaching the share of a deceased distributee and it will not be held for the determination of the attachment but paid to the legal representative of such distributee.<sup>31</sup>

**47. Attachment of fund in course of distribution.**

Where a fund is in course of distribution in the Orphans' Court and is attached, distribution will be held in abeyance until the

<sup>22</sup> Schue's Est., 7 York, 178.

<sup>23</sup> Palmer's Est., 2 Del. Co. 180.

<sup>24</sup> Sheppard's Est., 180 Pa. 57.

<sup>25</sup> Lorenz v. King, 38 Pa. 93.

<sup>26</sup> Manigle's Est., 11 Phila. 39; Agnew's Est., 8 D. R. 699.

<sup>27</sup> Luckenbach's Est., 4 Northam. 101; 298.

<sup>28</sup> Beeber's Ap., 20 W. N. C. 94; 99 Pa. 596.

<sup>29</sup> Gready's Est., 11 W. N. C. 418; Godshalk's Est., 20 Montg. Co. 118.

<sup>30</sup> Douglass' Est., 10 D. R. 479.

<sup>31</sup> Carracher's Est., 10 D. R. 185; Luckenbach's Est., 170 Pa. 586.

attachment is decided in the Common Pleas.<sup>32</sup> Where the parties have not submitted the question at issue to the Orphans' Court, the latter will direct the garnishee to withhold a sufficient sum and costs until the cause is ended in the Common Pleas;<sup>33</sup> but where they have submitted to the jurisdiction of the Orphans' Court, the question of whether an assignment was fraudulent, the decree of this court is conclusive upon all;<sup>34</sup> it may, however, on petition for review open the adjudication.<sup>35</sup> The pendency of an attachment will not prevent the Orphans' Court from ordering payment of a legacy to an assignee before attachment as found by the auditor.<sup>36</sup> Where the answer is that the legacy was assigned to a third person, the assignee must be brought in, if he is to be bound.<sup>37</sup>

The attachment must await the settlement in the Orphans' Court, as a rule;<sup>38</sup> but it may be awarded to him if he gives bond to refund on condition that he sustains the attachment.<sup>39</sup> He must sustain his claim by judgment before he can demand it before an auditor and take it out of court;<sup>40</sup> so also as to a master's report.<sup>41</sup> The rights of an attaching creditor cannot be inquired into on a rule to show cause why the money should not be paid over to him.<sup>42</sup>

#### 48. Judgment.

Judgment cannot be entered against executors on their answers where they cannot tell exactly the amount in their hands and must wait until the auditor's report.<sup>43</sup>

Under the act of April 10, 1849, P. L. 619, it is not necessary that the jury should find the amount or what goods and effects are in the hands of the garnishee in a decedent's estate;<sup>44</sup> and it is erroneous to enter judgment against a legal representative *de bonis propriis*.<sup>45</sup> The judgment should be against him as legal representative for the amount of plaintiff's just claim to be levied of the interest of the defendant in the personal estate of the decedent.<sup>46</sup> If the legacy or interest is not yet due the judgment will have a provision staying execution thereon until it shall become due and payable;<sup>47</sup> and if some of the lands are as yet unconverted, it should designate the lands to which it relates.<sup>48</sup>

<sup>32</sup> Valentine's Ap., 3 W. N. C. 471; P. & L. Dig., vol. 7, col. 11077.

<sup>33</sup> Reese's Ap., 116 Pa. 272; Millard's Est., 26 Pitts. L. J. 189.

<sup>34</sup> Otterson v. Gallagher, 88 Pa. 355; Otterson v. Middleton, 102 Pa. 78.

<sup>35</sup> Bucknor's Est., 7 W. N. C. 470.

<sup>36</sup> Lex's Ap., 97 Pa. 289.

<sup>37</sup> Hess' Est., 27 Supr. C. 498.

<sup>38</sup> Merchants', Etc., Bank v. Kern, 8 D. R. 75; 193 Pa. 67.

<sup>39</sup> Cake's Est., 186 Pa. 412.

<sup>40</sup> Bradley v. Prendergast, 2 Del. Co. 527.

<sup>41</sup> McFillan v. Brown, 15 W. N. C. 416.

<sup>42</sup> Patterson's Est., 10 Leg. Int. 114.

<sup>43</sup> Eby v. Draucker, 15 Lanc. L. R. 269.

<sup>44</sup> Bouslough v. Bouslough, 68 Pa. 495; Straley's Ap., 43 Pa. 89.

<sup>45</sup> Lorenz v. King, 38 Pa. 93.

<sup>46</sup> Maurer v. Kerper, 102 Pa. 444.

<sup>47</sup> Natl. Bank, Etc., v. Speakman, 1 Chester Co. 124.

<sup>48</sup> Beeber v. Lowry, 17 W. N. C. 157.

#### 49. Attachment against corporations.

Under the act of March 20, 1845, P. L. 188, an attachment execution will lie against an insolvent canal company and the writ need not be executed as provided by section 72 of the act of June 18, 1836, P. L. 755.<sup>49</sup>

The act of April 7, 1870, P. L. 58, does not repeal the act of March 20, 1845, P. L. 188, authorizing attachment of debts due a corporation under the act of 1836.<sup>50</sup>

When a building association is insolvent a withdrawing member cannot attach a debt due the association.<sup>51</sup> A subsequent dissolution and appointment of a receiver for a mutual insurance company will not affect the prior attachment;<sup>52</sup> nor will a foreign receivership postpone the subsequent attachments in Pennsylvania in the absence of proof of equities entitled to preference.<sup>53</sup> But a foreign creditor does not stand in the same position as a domestic one.<sup>54</sup> An attachment execution against receivers appointed by a U. S. Court will not be dissolved.<sup>55</sup> Money of a corporation deposited in bank is liable to attachment,<sup>56</sup> although appropriated to the payment of certain bonds.<sup>57</sup> But when the property is transferred *bona fide* to a new corporation it is non-attachable by the creditor of the old corporation.<sup>58</sup> The assessments of a mutual insurance company collected by an agent may be attached in his hands.<sup>59</sup>

A balance due on a stock subscription is attachable;<sup>60</sup> but in case of insolvency, unpaid and uncalled subscriptions to its capital stock cannot be attached by a judgment creditor, since attachment execution is not equity process in any event—but strictly a statutory remedy for the sole benefit of the attaching creditor.<sup>61</sup> The attaching creditor can gain no higher right than his creditor.<sup>62</sup> Money or property in the hands of the officers is not liable.<sup>63</sup>

But an account stated in a beneficial association has been held attachable in the hands of the treasurer.<sup>64</sup>

#### 50. Exemption of wages and salaries.

Section 5 of the act of April 15, 1845, P. L. 459, provides:

"The wages of any laborers, or the salary of any person in public

<sup>49</sup> Reed v. Penrose, 36 Pa. 214.

<sup>50</sup> Blake v. Pittsburg, Etc., R. Co., 11 D. R. 151.

<sup>51</sup> Hamney v. Enterprise, Etc., Assn., 16 W. N. C. 450.

<sup>52</sup> Hays v. Lycoming Fire Ins. Co., 99 Pa. 621.

<sup>53</sup> Smith v. Fidelity, Etc., Assn., 4 D. R. 317.

<sup>54</sup> Perkins v. Clear, Etc., Co., 17 Phila. 168.

<sup>55</sup> Patterson v. Penn., Etc., Co., 6 D. R. 419.

<sup>56</sup> Reed v. Penrose, 36 Pa. 214; Fox v. Reed, 3 Grant, 81.

<sup>57</sup> Farmers', Etc., Bank v. Ryan, 64 Pa. 236.

<sup>58</sup> Balliet v. Brown, 103 Pa. 546.

<sup>59</sup> Hays v. Lycoming, Etc., Co., 98 Pa. 184. (See Lane's Ap., 105 Pa. 49, disapproved in Glen Iron Works, 14 W. N. C. 514.)

<sup>60</sup> Peterson v. Sinclair, 83 Pa. 250.

<sup>61</sup> Lane's Ap., 105 Pa. 49.

<sup>62</sup> Reed v. Rank, 1 Lanc. L. R. 393.

<sup>63</sup> Fowler v. Pitts., Etc., R. Co., 35 Pa. 22; P. & L. Dig., vol. 7, col. 11086; First Natl. Bank, Etc., v. Bristol, Etc., Co., 12 C. C. 176.

<sup>64</sup> McDowell v. Smith, 21 W. N. C. 558.

or private employment, shall not be liable to attachment in the hands of the employer."

This act exempts wages of manual labor in any and every form from attachment<sup>65</sup> and this is true of judgments whether before justices or entered in the Common Pleas, by transcript or otherwise;<sup>66</sup> but the captain of a canal boat is not a manual laborer.<sup>67</sup>

Under this act it has been held that the commissions of a traveling salesman are exempt;<sup>68</sup> salary due a singer in a church choir;<sup>69</sup> compensation in procuring testimony;<sup>70</sup> work done as purchase price of land;<sup>71</sup> wages of a miner by contract who employs another to assist him.<sup>72</sup> The profits of a contract for labor have been held attachable.<sup>73</sup>

The assignee of the claim has the same right as the laborer, even if it is in the form of a note or due bill.<sup>74</sup> The exemption of wages inures to the benefit of a non-resident laborer.<sup>75</sup> A waiver of exemption as to an execution does not apply to attachment of wages. This right cannot be waived.<sup>76</sup> But the act does not extend to a proceeding by attachment in another state.<sup>77</sup> This is remedied by a later act. See Exemption, *supra*.

#### 51. Attachment of wages for boarding.

The act of May 8, 1876, P. L. 139, as amended by the act of April 10, 1905, P. L. 134, is as follows:

"All proprietors of hotels, inns, boarding houses and lodging houses in this Commonwealth, in addition to the remedies now provided by law, shall have the right in suits and actions brought before justices of the peace to recover pay for boarding or lodging, or boarding and lodging, furnished, to commence such suits and actions by attachment, and thereon to attach only wages due or owing to such persons as may be indebted to them, or any of them, for boarding or lodging, or boarding and lodging, not exceeding in amount the sum due for four weeks; and any sum so due and so attached shall not be paid to the defendant until the judgment, which may be rendered against the defendant in pursuance of a summons to him or her directed, which shall issue with such attachment for such amount as may be so legally attached, shall be satisfied; and

<sup>65</sup> O'Neill v. Reagan, 12 Luz. L. R. 400.

<sup>66</sup> Jones v. Garoway, 6 Luz. L. R. 17; Catlin v. Ensign, 29 Pa. 264.

<sup>67</sup> Shimer v. Rugg, 7 Northam. 248.

<sup>68</sup> Hamberger v. Marcus, 157 Pa. 133.

<sup>69</sup> Catlin v. Ensign, 29 Pa. 264.

<sup>70</sup> Hartman v. Mitzel, 8 Supr. C. 22.

<sup>71</sup> Scott v. Watson, 36 Pa. 342.

<sup>72</sup> Penna. Coal Co. v. Costello, 33 Pa. 241, distinguishing Heebner v. Chave, 5 Pa. 115.

<sup>73</sup> Smith v. Brooke, 49 Pa. 147; P. & L. Dig., vol. 7, col. 11091.

<sup>74</sup> Kintner v. Phillips, 1 Kulp, 282; Benedick v. Fake, 7 York, 193.

<sup>75</sup> Matson v. Bryan, 8 C. C. 355.

<sup>76</sup> Jones v. Garoway, 6 Luz. L. R. 17; Firmstone v. Mack, 49 Pa. 387; Cunliffe v. Rinehart, 2 W. N. C. 79; Morris, Etc., Co. v. Rossiter, 30 Supr. C. 23; Telike v. Matievith, 13 Luz. L. R. 212.

<sup>77</sup> Morgan v. Neville, 74 Pa. 52; Bolton v. Penna. R. Co., 88 Pa. 261.

justices of the peace shall have jurisdiction of attachment proceedings in such case."

Under this act although suit was brought for six weeks' boarding, if the alderman entered judgment for only four weeks' boarding, with costs of suit, the judgment will not be set aside on certiorari for that reason. But this act does not cover boarding both the defendant and his wife and where the two are not separated, the record will be reversed although no exception was taken on this ground.<sup>1</sup>

If the judgment be taken for more than four weeks' boarding, it is unlawful and cannot be cured by having execution for only four weeks.<sup>2</sup>

The record must show that the plaintiff is proprietor of a hotel, boarding house or lodging house, otherwise the suit cannot be maintained in this form.<sup>3</sup>

Court of Common Pleas No. 1, Philadelphia, recently decided in *Antreason v. Samarsien*, 18 D. R. 335, on the authority of *Vulcanite Etc. Co. v. Rapid Transit Co.* 220 Pa. 603, that the act of 1905, *supra*, conflicts with section 7 of article 3 of the constitution. See also *Jenkins v. Davis*, 18 D. R. 928. But *Endlich, J.*, in *Meilniczak v. Nesuruk*, 19 D. R. 741, holds the contrary.

The act of April 4, 1889, P. L. 23, provides:

"No exemption of property from levy and sale or attachment shall be allowed on judgment obtained for board for four weeks or less."<sup>4</sup>

This act was construed to take the exemption away only where a judgment is obtained first and the attachment execution issued thereon,<sup>5</sup> and the act of 1905 was passed partly to cure this defect. But one such attachment may issue for the same or part of the same debt.<sup>6</sup> It must appear on the record that it is for boarding and also that wages is attached.<sup>7</sup> It was held in one case that where the record shows it was for boarding it will be implied that the claimant keeps a boarding house.<sup>8</sup>

## 52. Attachment of money for wages.

Money due for wages cannot be attached by a judgment creditor, except as above specially provided, although the judgment itself is for wages.<sup>9</sup>

Under the act of March 4, 1887, P. L. 4, it was held that a salary due for clerical services was not within the exemption, when attached for wages of manual labor.<sup>10</sup>

## 53. Exemption of pensions.

Under the federal law of 1873 (Revd. Stat. section 4747) pension money although assigned to the wife of the pensioner is ex-

<sup>1</sup> *Wilhelm v. Mumma*, 33 C. C. 169.

<sup>2</sup> *Hawk v. Rock*, 3 D. R. 374; *Tredennick v. Jones*, 7 C. C. 548.

<sup>3</sup> *Ziegler v. Wolfinger*, 13 Luz. L. R. 43; *Pennell v. Southard*, 7 Del. Co. 345.

<sup>4</sup> *Weisman v. Weisman*, 133 Pa. 89; *McCarty v. Dougherty*, 16 C. C. 86.

<sup>5</sup> *Thomas v. Glasgow*, 13 C. C. 167; *McCarty v. Dougherty*, 16 C. C. 86.

<sup>6</sup> *Coyne v. Slane*, 6 Lack. L. N. 217.

<sup>7</sup> *Liess v. Engard*, 8 D. R. 608.

<sup>8</sup> *Karnes v. McGuire*, 18 C. C. 306.

<sup>9</sup> *Baker v. Harding*, 6 C. C. 21; *Frutchey v. Lutz*, 167 Pa. 337.

<sup>10</sup> *Wilson v. Hasley*, 7 Lanc. L. R. 98.

empt from attachment.<sup>11</sup> But when deposited with a bailee, it is not,<sup>12</sup> although it may not be when the check is deposited in bank for collection and is credited to the pensioner.<sup>13</sup>

Although there are some cases which hold that pension money deposited in bank subject to check of the pensioner is liable to attachment,<sup>14</sup> the sounder view, and in harmony with the spirit of the federal law is that it is not subject.<sup>15</sup>

#### 54. Who may be made garnishee.

The debtor is the person to be named as garnishee, and not one who holds the evidence of the debt.<sup>16</sup> A bonded distillery company may be made garnishee.<sup>17</sup> Money in the hands of a master in partition after final decree may be attached<sup>18</sup> but not before.<sup>18a</sup>

A mortgage can only be attached by making the mortgagor garnishee.<sup>19</sup> An assignee for benefit of creditors can be made garnishee only as to goods, etc., which come into his hands as the property of the assignor.<sup>20</sup> An attorney may be made garnishee as to his client's money in his hands,<sup>21</sup> but not necessarily, where the funds are in the hands of a trustee though awarded to him as attorney;<sup>22</sup> nor where by arrangement the money is deposited.<sup>23</sup> An insolvent National bank may be made garnishee.<sup>24</sup> Balance in the hands of an assignee is subject to attachment for a debt due from the assignor after the assignment.<sup>25</sup> Service on a partner binds the partnership for moneys due the defendant.<sup>26</sup>

#### 55. Public officers as garnishees.

A sheriff who has levied and the money or its equivalent is in his hands cannot be made a garnishee, it being in *custodia legis*;<sup>27</sup> nor the surplus in a constable's hand after sale under distress for rent,<sup>28</sup> nor after sale on an execution;<sup>29</sup> nor the surplus in the

<sup>11</sup> Clark v. Ingraham, 15 Phila. 646; Holmes v. Tallada, 125 Pa. 133.

<sup>12</sup> Rozelle v. Rhodes, 116 Pa. 129.

<sup>13</sup> Reiff v. Mack, 160 Pa. 265.

<sup>14</sup> McCalla v. Brennan, 14 W. N. C. 513; Minnick v. McDonald, 1 C. C. 191.

<sup>15</sup> Moore v. Marsh, 16 W. N. C. 239.

<sup>16</sup> Rundle v. Scheetz, 2 Miles, 330; Gilmore v. Carnahan, 81 \* Pa. 217; Fourth Natl. Bank's Ap., 123 Pa. 473.

<sup>17</sup> Roudenbush v. Hollis, 21 C. C. 324.

<sup>18</sup> Piper v. Piper, 7 D. R. 135.

<sup>18a</sup> Hays v. Mantua, Etc., Co., 35 W. N. C. 198; P. & L. Dig., vol. 7, col. 11109.

<sup>19</sup> Taylor v. Huey, 166 Pa. 518.

<sup>20</sup> Driesbach v. Becker, 34 Pa. 152; P. & L. Dig., vol. 7, col. 11103.

<sup>21</sup> Riley v. Hirst, 2 Pa. 346.

<sup>22</sup> Fenton v. Fisher, 106 Pa. 418.

<sup>23</sup> Lieberman v. Hoffman, 102 Pa. 590.

<sup>24</sup> Comth. v. Chestnut St. Natl. Bank, 139 Pa. 606.

<sup>25</sup> Moody's Est., 2 Dauphin Co. 252.

<sup>26</sup> Judge v. Reinhart, 3 D. R. 202.

<sup>27</sup> Fretz v. Heller, 2 W. & S. 397; Worrell v. Vandusen Oil Co., 1 Leg. Gaz. 53.

<sup>28</sup> Comfort v. Taylor, 1 T. & H. Pr., section 1184.

<sup>29</sup> Crossen v. McAllister, 1 Clark, 257.

hands of the sheriff after execution of a *testatum fi. fa.*;<sup>30</sup> but it is different as to a judgment confessed fraudulently.<sup>31</sup> Jury fees cannot be attached in the hands of county commissioners;<sup>32</sup> nor other moneys held by them officially.<sup>33</sup> A state supervisor of public works cannot be made garnishee as to the wages of an employee;<sup>34</sup> nor the state treasurer as to salary due a public officer;<sup>35</sup> nor a state loan in the hands of the agent;<sup>36</sup> nor a school teacher's salary in the hands of the treasurer,<sup>37</sup> nor as to any public moneys in the hands of a school board;<sup>38</sup> nor funds in the hands of a prison warden belonging to a prisoner.<sup>39</sup> A trustee appointed by the Orphans' Court, not being a public officer, may be made a garnishee as to proceeds of sale of lands, for a distributive share found by the auditor to be due.<sup>40</sup> An assignee in bankruptcy cannot be made garnishee as to funds in his hands.<sup>41</sup>

Nor fees due a constable in the hands of the clerk of the Court of Quarter Sessions;<sup>42</sup> nor money received by a justice of the peace in satisfaction of a judgment before him;<sup>43</sup> nor a federal officer who has moneys for disbursement officially.<sup>44</sup>

#### 56. Municipalities.

A municipality cannot be made garnishee;<sup>45</sup> nor can money be attached in its hands by a creditor's bill.<sup>46</sup> A township is a municipality coming under this rule of public policy;<sup>47</sup> so also a borough<sup>48</sup> and a county;<sup>49</sup> and a department of a city government;<sup>50</sup> and the officers of a municipality as such.<sup>51</sup>

#### 57. Foreign corporation.

A foreign corporation, registered, may be made garnishee;<sup>52</sup> also, as to a debt due a non-resident;<sup>53</sup> also a foreign insurance company.<sup>54</sup>

<sup>30</sup> Bentley v. Clegg, 1 Clark, 411.

<sup>31</sup> Sullivan v. Tinker, 140 Pa. 35.

<sup>32</sup> Simons v. Whartenaby, 2 Clark, 438.

<sup>33</sup> Schwartz v. Kyner, 30 Pitts. L. J. 495.

<sup>34</sup> Pierson v. McCormick, 1 Clark, 260.

<sup>35</sup> Mervine v. Wood, 1 T. & H. Pr., section 1186.

<sup>36</sup> Morrel v. Bank of Penna., 2 Phila. 61.

<sup>37</sup> Bulkley v. Eckert, 3 Pa. 368.

<sup>38</sup> Taylor v. Knipe, 2 Pearson, 151.

<sup>39</sup> Davies v. Gallagher, 17 Phila. 229.

<sup>40</sup> Fenton v. Fisher, 106 Pa. 418.

<sup>41</sup> Lloyd v. Brisben, 1 W. N. C. 230.

<sup>42</sup> Mackin v. Bingham, 1 W. N. C. 118.

<sup>43</sup> Rockey v. Carson, 4 C. C. 543; Corbyn v. Bollman, 4 W. & S. 342.

<sup>44</sup> Raub v. Seaman, 5 Kulp, 398.

<sup>45</sup> Greer v. Rowley, 1 Pitts. 1; Erie v. Knapp, 29 Pa. 173.

<sup>46</sup> Phila., Etc., Co. v. Douglass, 14 C. C. 234.

<sup>47</sup> Slattery v. Murphy, 1 Leg. Rec. R. 103.

<sup>48</sup> Van Valkenburgh v. Earley, 1 Kulp, 216.

<sup>49</sup> Pettebone v. Beardsley, 1 Kulp, 180.

<sup>50</sup> Laughlin v. Nevilling, 1 C. C. 370; Fairbanks Co. v. Kirk, 12 Supr. C. 210.

<sup>51</sup> Greer v. Rowley, 1 Pitts. 1.

<sup>52</sup> Barr v. King, 96 Pa. 485.

<sup>53</sup> Fithian v. New York, Etc., R. Co., 31 Pa. 114.

<sup>54</sup> Kennedy v. Agl. Ins. Co., 165 Pa. 179. (See For. Att., vol. 1.)



### 58. Rights of attaching creditor.

The attachment is a virtual legal assignment of the fund attached, from service, and a subsequent assignee takes it subject to such right of the attaching creditor.<sup>55</sup> Where rights of other creditors have not come in, a judgment creditor may take an assignment of a debt due his debtor and issue an attachment without re-assignment.<sup>56</sup> Parties who might intervene but do not, are concluded.<sup>57</sup> An attachment issued to bind a fund prospectively, which does not come into the hands of the garnishee, takes nothing.<sup>58</sup>

If the debtor is a corporation and it is claimed that the fund attached was improperly diverted from such corporation, the burden of proving that the act was *ultra vires* and fraudulent is upon the one who attaches it.<sup>59</sup>

An assignment before the attachment is served places the attachment in a subordinate position.<sup>60</sup> The creditor's rights attach at the time of service upon the garnishee and not the defendant.<sup>61</sup> Where the garnishee admits effects in his hands he cannot after judgment against him, set up a prior assignment to himself.<sup>62</sup> It seems that a notice to the sheriff without affidavit of claim of assignment, is insufficient to open judgment against the garnishee.<sup>63</sup> In attachments, fractions of a day are considered the rule being first in time, first in right.<sup>64</sup> Where there is a *bona fide* assignment the attaching creditor is bound by it the same as the assignor.<sup>65</sup> The assignment of a judgment as security for attorney fees is valid to the extent of such fees and the attaching creditor is entitled to the balance.<sup>66</sup>

### 59. Funds particularly assigned.

The rights of the creditor can rise no higher than those of his debtor and when the fund attached has been equitably assigned in whole or part he is bound to the same extent.<sup>1</sup> But such appropriation must be complete and specifically made, a mere unexercised power or expressed intention being insufficient.<sup>2</sup> But a positive direction to pay is enough.<sup>3</sup> The mere drawing of a check on a fund is not appropriation such as would shut out an attachment;<sup>4</sup> but

<sup>55</sup> *Malvin v. Sweitzer*, 1 Kulp, 5.

<sup>56</sup> *Develin v. Ford*, 19 Supr. C. 381.

<sup>57</sup> *Cashen v. Martin*, 2 Leg. Gaz. 12.

<sup>58</sup> *Penn. Bank's Ap.*, 31 Pitts. L. J. 192.

<sup>59</sup> *Howard, Etc., Co. v. Hughes*, 12 Supr. C. 311.

<sup>60</sup> *Ramsay v. Myers*, 6 D. R. 468; *Jarecki Mfg Co. v. Hart*, 5 Supr. C. 422; *P. & L. Dig.*, vol. 7, col. 11116.

<sup>61</sup> *Natl. Bank, Etc., v. Natl. Bank, Etc.*, 11 Montg. Co., 64.

<sup>62</sup> *Baker's Ap.*, 3 Atl. 766.

<sup>63</sup> *Barker v. Johnson*, 2 C. C. 414.

<sup>64</sup> *Malvin v. Sweitzer*, 1 Kulp, 5.

<sup>65</sup> *First Natl. Bank v. Ladd*, 126 Pa. 188.

<sup>66</sup> *Fithian v. New York, Etc., R. Co.*, 31 Pa. 114.

<sup>1</sup> *Patten v. Wilson*, 34 Pa. 299; *Morris v. Weeber*, 12 D. R. 621.

<sup>2</sup> *Johnson v. Ogilbee*, 2 Phila. 79; *Burger v. Burger*, 135 Pa. 499.

<sup>3</sup> *Riddle v. Etting*, 32 Pa. 412.

<sup>4</sup> *Kuhn v. Warren Savings Bank*, 20 W. N. C. 230; *Roberts v. Boyle*, 8 York, 13; *Schram v. Cartwright*, 4 D. R. 632.

when done in pursuance of a prior parol assignment of the fund it will be binding.<sup>6</sup>

So of a draft accepted by the garnishee by promise.<sup>6</sup> A fund in the hands of an assignee under a void assignment is liable.<sup>7</sup> A vendee who assumes certain debts on conveyance is protected against an attachment so far as those debts are concerned.<sup>8</sup> A creditor, who for a valid consideration agrees to the transfer of a debt due his debtor to a third party is concluded.<sup>9</sup>

#### 60. Assignment for the benefit of creditors.

A valid assignment for the benefit of creditors shuts out an attachment execution as to all property so assigned.<sup>10</sup> Whether an assignment or an attachment on the same day has priority as to time is a question of fact for a jury.<sup>11</sup> When an assignment has been recorded the attachment is too late.<sup>12</sup>

A general assignment for creditors will embrace the interest of the assignor in an estate, although the assignee has filed an account not including it<sup>13</sup> under the peculiar circumstances. But if the assignment is void or unrecorded the attachment will hold,<sup>14</sup> but the real debtor of defendant garnishee.<sup>15</sup> An unpaid dividend under a void assignment is liable;<sup>16</sup> also the proceeds of land fraudulently conveyed;<sup>17</sup> and of goods transferred in fraud of creditors.<sup>18</sup> But there is a case holding that where the plaintiff claims the unpaid purchase money of a conveyance, he is estopped from proving that it was fraudulent.<sup>19</sup>

On the allegation of fraud it is immaterial that the garnishee was not aware of it.<sup>20</sup> The garnishee is liable for the full value of the goods which came into his hands, even if he did transfer a part to another or the whole to an auctioneer to be sold.<sup>21</sup> Whether or not the conveyance was fraudulent is a question for the jury.<sup>22</sup> But where one witness is flatly contradicted by two the court may give binding instructions.<sup>23</sup> A bond or note assigned *bona fide* before attachment is not liable to it, although it is not done under the act

<sup>6</sup> Hemphill v. Yerkes, 132 Pa. 545.

<sup>6</sup> Hyatt v. Prentzell, 20 Leg. Int. 133.

<sup>7</sup> Mitchell v. Stiles, 13 Pa. 306.

<sup>8</sup> Vincent v. Watson, 18 Pa. 96.

<sup>9</sup> Boyd v. Smith, 128 Pa. 205.

<sup>10</sup> Truby's Ap., 43 Leg. Int. 252. (See "Assignment and Bankruptcy.")

<sup>11</sup> Smethurst v. Oppenheimer, 7 W. N. C. 146.

<sup>12</sup> Plank's Est., 10 Lanc. L. R. 201.

<sup>13</sup> Bloom v. Miller, 1 D. R. 87.

<sup>14</sup> Hennessy v. Western Bank, 6 W. & S. 300; Stewart v. McMin, 5 W. & S. 100; Stewart v. Warden, 1 W. N. C. 111; Driesbach v. Becker, 34 Pa. 152.

<sup>15</sup> Raiguel v. McConnell, 25 Pa. 362.

<sup>16</sup> Mitchell v. Stiles, 13 Pa. 306. (See Taylor v. Hulme, 4 W. & S. 407.)

<sup>17</sup> Heath v. Page, 63 Pa. 108; Dicken v. Hays, 7 Atl. 58.

<sup>18</sup> French v. Breidelman, 2 Grant, 319.

<sup>19</sup> Sayers v. Kent, 3 Central R. 610.

<sup>20</sup> Allen v. Erie City Bank, 57 Pa. 129.

<sup>21</sup> Tams v. Richards, 26 Pa. 97.

<sup>22</sup> First Natl. Bank, Etc., v. Cathers, 164 Pa. 343.

<sup>23</sup> Skiles v. Dickson, 147 Pa. 117.

of May 21, 1715, 1 Sm. L. 90;<sup>24</sup> and in case of a negotiable note, notice of the attachment must be given to the payee and indorsers.<sup>25</sup> The *bona fide* holder of a voluntary transferred check is protected.<sup>26</sup>

#### 61. Attachment of judgments.

An attaching creditor who has attached a judgment may have special leave of court to issue a *sci. fa.* to revive and extend the lien of the judgment.<sup>27</sup> If an execution has issued the attaching creditor secures the same relative position as the defendant in his judgment had as plaintiff in the execution against the garnishee<sup>28</sup> and a surety for stay discharged by reason of an agreement to open the judgment is discharged as to the attachment.<sup>29</sup> But if he oppose the opening of the judgment the lower court will not be reversed for protecting his right to intervene.<sup>30</sup> The attaching creditor should be given an opportunity to be heard in such cases.<sup>31</sup>

#### 62. Execution on judgment in attachment.

Section 38 of the act of 1836, *supra*, provides:

"If judgment shall be given for the plaintiff in such attachment, it shall be lawful for him to have execution thereof as follows, to-wit:

I. If the property attached be stock in a corporation, as aforesaid, the execution shall be by a writ of *fi. fa.* against the original defendant, by virtue of which such stock, so much thereof as shall be necessary to satisfy the judgment and costs, may be sold by the sheriff, as in other cases.

II. If the property attached be a deposit in money, or a debt due as aforesaid, execution shall be had in the manner allowed in the case of effects in the hands of a garnishee in foreign attachment.<sup>1</sup>

#### 63. Rights of the defendant.

The defendant has a right to show that the judgment is void, on which the attachment is based;<sup>2</sup> or that the service on the garnishee is irregular;<sup>3</sup> and when he appears both he and the garnishee must be ruled to plead to issue.<sup>4</sup> The defendant may appeal from a judgment against the garnishee for insufficient answers to interrogatories, although he had not pleaded, but filed a petition for dissolution of the attachment on the ground that the fund attached

<sup>24</sup> Pellman v. Hart, 1 Pa. 263.

<sup>25</sup> Kieffer v. Ehler, 18 Pa. 388; Hill v. Kroft, 29 Pa. 186; Day v. Zimmerman, 68 Pa. 72. (See act of 1901.)

<sup>26</sup> Fulweiler v. Hughes, 17 Pa. 440.

<sup>27</sup> Phillips v. Muncy Natl. Bank, 4 Walker, 348; Wherry v. Wherry, 179 Pa. 84.

<sup>28</sup> Baldwin's Est., 4 Pa. 248.

<sup>29</sup> Corson v. McAfee, 44 Pa. 288.

<sup>30</sup> Gallagher v. Miller, 4 W. N. C. 165, commenting on Corson v. McAfee, *supra*.

<sup>31</sup> Rogers v. Gilmore, 12 W. N. C. 420.

<sup>1</sup> See For. Att., vol. 1.

<sup>2</sup> Hugus v. Dithridge Glass Co., 96 Pa. 160.

<sup>3</sup> Pottsville Bank v. Vandusen, 2 Leg. Rec. R. 7.

<sup>4</sup> Rawling v. Phillips, 1 T. & H. Pr., section 1202; Schwartz v. Kynar, 30 Pitts. L. J. 495.

did not belong to him but to another.<sup>5</sup> His pleas will not be stricken out and when he pleads payment and release it must be tried out.<sup>6</sup> Where the garnishee answers funds in his hands and the defendant sets up reasons against judgment, it should not be entered on the answers<sup>7</sup> and where the defendant avers the sum due is for wages, the plaintiff must file a replication, as this introduces new matter in bar<sup>8</sup> and a general judgment cannot be taken against the garnishee.<sup>9</sup> The defendant however cannot prevent a judgment against the garnishee for want of an appearance;<sup>10</sup> nor may he contradict the answers of the garnishee so as to prevent judgment upon them,<sup>11</sup> nor can he appeal from judgment on his answers.<sup>12</sup>

Neither can he rule the garnishee to plead.<sup>13</sup> A case of "snap judgment" is reported in which the defendant was precluded from having his rule to open judgment which was marked satisfied, the defendant not having been served although a resident of the county.<sup>14</sup> Under the old practice when special pleading was an art, he was obliged to plead his residence and non-service specially.<sup>15</sup> The issues between the plaintiff and the defendant and between the plaintiff and the garnishee are distinct<sup>16</sup> and, therefore, judgment in favor of the garnishee is no bar to the proceeding by the defendant against the garnishee.<sup>17</sup> If a debt is wrongfully attached, it has been held that the one to whom it is due has his remedy against the attacher.<sup>18</sup> How far laches of the attacher resulting in loss to the defendant will affect the revival of the judgment seems undetermined.<sup>19</sup>

#### 64. Rights and liabilities of the garnishee.

As has been seen in Foreign Attachment (Vol. 1, p. 678) the garnishee is the third party to the suit, and to protect his rights as against his creditor he should notify him and take all proper steps legally, so that the debt may not be unjustly taken from his creditor.<sup>20</sup> The proceedings as against the garnishee are similar to those in foreign attachment and reference is made to that subject, where all the details and forms of procedure are carefully worked out.

Where the garnishee answers that the title to the property is in dispute judgment will not be entered against him.<sup>21</sup> Where there

<sup>5</sup> *McGeary v. Huff*, 31 Supr. C. 401.

<sup>6</sup> *Carter v. Wallace*, 1 W. N. C. 74. (See also 63.)

<sup>7</sup> *Haupt v. O'Malley*, 2 Leg. Rec. R. 386.

<sup>8</sup> *Cunningham v. O'Keefe*, 3 C. C. 471.

<sup>9</sup> *Jones v. Jones*, 9 Luz. L. R. 195.

<sup>10</sup> *Jones v. Tracey*, 75 Pa. 417.

<sup>11</sup> *Cole v. Bowden*, 5 W. N. C. 296.

<sup>12</sup> *Wachter's Case*, 1 Walker, 267.

<sup>13</sup> *Wood v. Miller*, 1 Phila. 226; *Hart v. Carlisle*, 2 Leg. Gaz. 223.

<sup>14</sup> *McCalla v. Brennan*, 14 W. N. C. 513.

<sup>15</sup> *Wachter's Case*, 1 Walker, 267.

<sup>16</sup> *McCormac v. Hancock*, 2 Pa. 310.

<sup>17</sup> *Ruff v. Ruff*, 5 W. N. C. 181 (85 Pa. 333).

<sup>18</sup> *Kelly v. Downs*, 3 Luz. L. R. 232.

<sup>19</sup> *McAndrews v. Owens*, 5 Law Times (N. S.), 75; *Owens v. Molserd*, 1 W. N. C. 431.

<sup>20</sup> *Noble v. Thompson Oil Co.*, 79 Pa. 354.

<sup>21</sup> *Importers', Etc., Bank v. Lyons*, 195 Pa. 479.

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are conflicting claims the plaintiff may be required to proceed.<sup>22</sup> A garnishee is not entitled to a stay of execution under sections 3 and 4 of the act of June 16, 1836, P. L. 755;<sup>23</sup> and where, on an irregular judgment before a justice of the peace, he obtains time, by promising the constable to pay, he cannot afterwards object to the irregularity.<sup>24</sup> He is bound by his waiver of a right.<sup>25</sup>

Where there are conflicting claims, including an attachment, and a settlement is made without taking cognizance in it of such attachment, it may be lost in the shuffle.<sup>26</sup> The garnishee cannot be held for what he does not owe<sup>27</sup> and is entitled to all just credits.<sup>28</sup> Where judgment has been entered against the garnishee, he cannot move to strike it off and have the attachment dissolved where both plaintiff and defendant have gone into bankruptcy. Only the trustee of the defendant can do that.<sup>29</sup> On a plea of *nulla bona* by the garnishee, it may be shown by parol that a prior assignment was held only as collateral security.<sup>30</sup> The garnishee cannot set up an alleged settlement reducing the amount of the judgment.<sup>31</sup>

#### 65. Right and duty to defend.

A garnishee owes good faith to his creditor and must avail himself of such legal defenses as the creditor would have;<sup>32</sup> otherwise he will remain liable to him.<sup>33</sup> He can make no defence which would not have availed the defendant after judgment against him;<sup>34</sup> nor one personal to the defendant.<sup>35</sup> If he gives notice to the defendant to protect his interests and the defendant neglects to do so, the garnishee is protected.<sup>36</sup>

#### 66. Liability for interest.

A garnishee is not liable for interest on the fund in his hands, pending the controversy, where he has not been in default or ruled to pay the money into court.<sup>37</sup> If the attachment is unwarranted and unreasonable the plaintiff is liable for it.<sup>38</sup> Interest is suspended from the service of the attachment until judgment is entered against the garnishee<sup>39</sup> notwithstanding the money is drawing in-

<sup>22</sup> Pretz v. Northampton Bank, 1 T. & H. Pr., section 1191.

<sup>23</sup> Woolston v. Adler, 1 Phila. 284.

<sup>24</sup> Heiler v. Spangler, 1 Lanc. Bar, No. 16.

<sup>25</sup> Humphrey v. O'Donnell, 165 Pa. 411.

<sup>26</sup> Hunter's Ap., 72 Pa. 343.

<sup>27</sup> Custer v. Nice, 12 W. N. C. 268.

<sup>28</sup> Mitchell v. Gipple, 2 Pearson, 276.

<sup>29</sup> Lamorelle v. Nass, 30 Supr. C. 190.

<sup>30</sup> Leighton v. House, 15 D. R. 684.

<sup>31</sup> Kristopeck v. Hudson, 56 Pitts. L. J. 88.

<sup>32</sup> Scottish, Etc., Assn. v. Union Trust Co., 195 Pa. 45; May v. Newingham, 17 Supr. C. 469; Weaver v. Manville, 21 C. C. 318.

<sup>33</sup> Schempp v. Fry, 165 Pa. 510; P. & L. Dig., vol. 7, col. 11144.

<sup>34</sup> Bank, Etc., v. Munford, 3 Grant, 232.

<sup>35</sup> Reed v. Penrose, 36 Pa. 214.

<sup>36</sup> Swanger v. Snyder, 50 Pa. 218.

<sup>37</sup> Irwin v. Pitts., Etc., R. Co., 43 Pa. 488; Parker v. Oil, Etc., Co., 47 Pitts. L. J. 306; 186 Pa. 294.

<sup>38</sup> Farmers', Etc., Bank v. Yarnall, 7 Del. Co. 221.

<sup>39</sup> Allegheny Sav. Bank v. Meyer, 50 Pa. 361.

terest on deposit or otherwise.<sup>40</sup> But if the debt is not yet due, interest is suspended only when it becomes due.<sup>41</sup> The suspension of interest is only on so much as is necessary to satisfy the attachment with interest and costs.<sup>42</sup> If the garnishee has notice of an equitable assignment of the fund, his only protection against interest is to pay the money into court.<sup>43</sup>

#### 67. Setoff.

The service of an attachment execution does not change the relative rights of the garnishee to his creditor, and his right to set-off as well as other defences, remains the same;<sup>44</sup> but it must be restricted as of the time of the service of the attachment, and not subsequent thereto.<sup>45</sup> But any payments made or liabilities assumed before the attachment is served on him, he may set off against it;<sup>46</sup> however, not where he induces the plaintiff to hold off his attachment;<sup>47</sup> nor can he set off uncertain and contingent claims against a certainty.<sup>48</sup>

#### 68. Lien of attachment execution.

As between several attachment executions served on the same day there is no priority of lien;<sup>1</sup> but it takes precedence as to a later assignment on the same day.<sup>2</sup> An attachment will hold a sum due in a case pending when the attachment is served.<sup>3</sup> This lien does not cease with the lien of the judgment on which it is based, by the expiration of five years.<sup>4</sup> It binds not only money due defendant from the garnishee individually but also as a member of a partnership;<sup>5</sup> and money as proceeds of goods sold in another state;<sup>6</sup> but it will not bind an executor as garnishee, as to a fund subsequently coming into his hands from another source.<sup>7</sup> It binds the entire interest in the lands including the dower charge.<sup>8</sup> Purchase money secured upon the land cannot be disturbed by an attachment execution, neither as to the land nor the unsevered timber.<sup>9</sup> After the money has left the hands of the garnishee no lien is gained by an attachment.<sup>10</sup>

<sup>40</sup> *Miller v. Rhodes*, 3 Montg. Co. 133.

<sup>41</sup> *Jackson v. Lloyd*, 44 Pa. 82.

<sup>42</sup> *Kelly v. Downs*, 3 Luz. L. R. 232.

<sup>43</sup> *Singerly v. Woodward*, 8 W. N. C. 339.

<sup>44</sup> *Myers v. Baltzell*, 37 Pa. 491; P. & L. Dig., vol. 7, col. 11150.

<sup>45</sup> *Pennell v. Grubb*, 13 Pa. 552; *Littlestown Sav. Inst. v. Corwell*, 20 C. C. 145; *Jackson v. Lutz*, 5 Supr. C. 378.

<sup>46</sup> *Coles v. Sellers*, 1 Phila. 533.

<sup>47</sup> *Ashworth v. Brown*, 15 Phila. 207.

<sup>48</sup> *Roig v. Tim*, 103 Pa. 115; P. & L. Dig., vol. 7, cols. 11152-3.

<sup>1</sup> *Baldwin's Ap.*, 86 Pa. 483; P. & L. Dig., vol. 7, col. 11153.

<sup>2</sup> *Malvin v. Sweitzer*, 1 Kulp, 5.

<sup>3</sup> *Lemon v. McCurdy*, 47 Pitts. L. J. 343.

<sup>4</sup> *Wilkinson's Est.*, 30 Pitts. L. J. 401; *Neely v. Grantham*, 58 Pa. 433.

<sup>5</sup> *Judge v. Reinhart*, 3 D. R. 202.

<sup>6</sup> *Merchants', Etc., Bank v. Baeder Glue Co.*, 164 Pa. 1.

<sup>7</sup> *Smith's Ap.*, 108 Pa. 508.

<sup>8</sup> *McCoy v. Frey*, 10 York, 9.

<sup>9</sup> *Stewart v. Coder*, 11 Pa. 90; *Wilson v. Douglass*, 10 W. N. C. 527.

<sup>10</sup> *Lieberman v. Hoffman*, 102 Pa. 590.

### 69. Effect of attachment execution.

As seen above the attaching creditor can gain no rights superior to those of his debtor,<sup>11</sup> but he may attach funds in the hands of an assignee, where the deed of assignment has not been recorded<sup>12</sup> and a judgment in favor of the garnishee does not give him the right to plead it in bar against his creditor or other person.<sup>13</sup> The attaching creditor may not recover usurious interest paid by his debtor, after six months, the limitation as to such suits,<sup>14</sup> nor recover where a debt has been settled by note transferred to another party.<sup>15</sup> In case an assignment in a foreign state has been set aside, as to a particular creditor which by the *lex loci* only affects such creditor, it does not affect an attachment execution in this state, the garnishee having the same rights as if no assignment had been made.<sup>16</sup> The effect as to the garnishee is to hold the money or effects until the attachment is decided, and if he pays out sooner he does so at his own risk.<sup>17</sup>

But it will not operate as an equitable assignment of a bond and mortgage given by garnishee to defendant so as to enable the plaintiff to issue a *sci. fa.* thereon in the name of defendant to his use, or to sue on the bond, before judgment on the attachment.<sup>18</sup>

Attachment of a note is not a bar to suit on the note claimed to be attachable.<sup>19</sup> If the attachment can hold some of the fund it will not be dissolved.<sup>20</sup>

### 70. Discharge of attachment.

Section 1 of the act of April 5, 1872, P. L. 43, provides:

"In all cases where execution attachments have been or which shall hereafter be issued out of any Court of Common Pleas of this commonwealth, attaching debts, moneys, stocks or other property in the hands of any persons or corporation as garnishees, and when, from any cause, proceedings have been stayed on the judgment on which such execution attachments have been issued, it shall be lawful for the defendant or defendants, in the judgment on which said attachments shall have been issued, to file a bond with one or more sureties, to be approved of by the court issuing said attachment, in such amount as the court shall direct, conditioned that the defendant shall pay to the plaintiff, on the determination of the case, whatever amount shall finally be adjudged to be due by the garnishees under the said attachments, if such amount shall be required to pay the judgment and costs; and on filing such bond, approved as aforesaid, the said garnishee or garnishees shall thereupon be discharged from all further liability under said attach-

<sup>11</sup> Mengel v. Conn. Fire Ins. Co., 5 Supr. C. 491.

<sup>12</sup> Driesbach v. Becker, 34 Pa. 152.

<sup>13</sup> Ruff v. Ruff, 85 Pa. 333; P. & L. Dig., vol. 7, col. 11160.

<sup>14</sup> Good v. Grant, 76 Pa. 52.

<sup>15</sup> Riddle v. Etting, 32 Pa. 412.

<sup>16</sup> Bennett v. Campbell, 189 Pa. 647.

<sup>17</sup> Ege v. Koontz, 3 Pa. 109; P. & L. Dig., vol. 7, cols. 11162-3.

<sup>18</sup> Lansdale, Etc., Co. v. Smith, 19 Supr. C. 235.

<sup>19</sup> Young v. Steim, 29 Supr. C. 205.

<sup>20</sup> Huseman v. Bailey, 51 Pitts. L. J. 389.

ment; but the cause may be prosecuted to final judgment, for the purpose of ascertaining the amount due by the garnishee; but the defendant and his sureties in the bond, shall alone be liable to pay such judgment and costs."

#### 71. Attachment execution as a defense.

The fact that a debtor has been served with an attachment execution does not abate the suit nor bar the remedy of his creditor.<sup>21</sup> It goes on the record to enable the court to mould the judgment or govern the execution so as to do justice to all parties, which, if the lower court does not, the appellate court may and will do.<sup>22</sup> The garnishee may pay the money into court and thus protect himself.<sup>23</sup> But one who makes himself garnishee cannot have execution stayed where the defendant recovers against him, unless he pays the money into court.<sup>24</sup>

Under the old practice an attachment execution was pleadable in abatement if served before suit brought against the garnishee and in bar if after, and there is no reason why this should not still be the practice,<sup>25</sup> although it was said it should be set up as special matter, strictly to entitle the garnishee to make proof.<sup>26</sup> Therefore, under the act of 1887, it may be offered under notice of special matter; or set up in the affidavit of defense<sup>27</sup> which is now the refuge of every special plea. The defendant has been held liable for costs of suit notwithstanding an attachment execution.<sup>28</sup> A judgment against the garnishee of itself will not protect him from a suit by the payee of a draft which he does not mention in his answers.<sup>29</sup> If judgment is rendered against him before a justice of the peace he has his remedy by appeal.<sup>30</sup> When the garnishee, after judgment against him in the attachment pays it by draft, he is entitled to credit for so much against his creditor.<sup>31</sup> His payment is a satisfaction of the very judgment on which the attachment was levied as against his creditor.<sup>32</sup> He is liable only when he pays an illegal judgment;<sup>33</sup> not when it is merely irregular and where he gave notice to his creditor thereof so he might take advantage of it.<sup>34</sup> Where an execution is out and an attachment served on the defendant, this does not of itself authorize stay of execution. The sheriff may execute his writ and pay the money into

<sup>21</sup> *Brown v. Scott*, 51 Pa. 357; P. & L. Dig., vol. 7, col. 11165.

<sup>22</sup> *Kase v. Kase*, 34 Pa. 128.

<sup>23</sup> *Ireland v. Stockham*, 14 W. N. C. 126; *Tunstall v. Winton*, 3 Lack. L. N. 206.

<sup>24</sup> *Hanscom v. Chapin*, 27 Supr. C. 546.

<sup>25</sup> *Calhoun v. Logan*, 22 Pa. 46.

<sup>26</sup> *Maynard v. Nekervis*, 9 Pa. 81.

<sup>27</sup> *Pratt v. Kratz*, 2 W. N. C. 521.

<sup>28</sup> *Dean v. Rockwell*, 2 Luz. L. Obs. 187.

<sup>29</sup> *Beaumont v. Lane*, 3 Supr. C. 73.

<sup>30</sup> *Calhoun v. Logan*, 22 Pa. 46; P. & L. Dig., vol. 7, col. 11171.

<sup>31</sup> *Beatty v. Lehigh Valley R. Co.*, 134 Pa. 294.

<sup>32</sup> *Hoobaugh's Ap.*, 122 Pa. 88.

<sup>33</sup> *Skidmore v. Bradford*, 4 Pa. 296.

<sup>34</sup> *Swanger v. Snyder*, 50 Pa. 218.



court.<sup>35</sup> Or the defendant may pay the money into court and have the writ stayed.<sup>36</sup> But the court may, in its discretion stay the execution pending proceedings on the attachment.<sup>37</sup>

### 72. Effect of death of defendant.

The death of the defendant after service of the writ does not abate the attachment nor prevent judgment.<sup>38</sup> Other creditors cannot take advantage of defective service on the garnishee when he appears, the defendant having died after the writ issued.<sup>39</sup>

### 73. Effect of bankruptcy.

Under the federal bankruptcy act of 1898, it has been held that an attachment execution issued within four months of bankruptcy, though the judgment was taken more than four months before, is voidable.<sup>40</sup> But an attachment will not be set aside on the ground of preference, where the U. S. court refused a restraining order.<sup>41</sup>

### 74. Payment into court and interpleader.

Where there are diverse and confusing claims upon the fund, the garnishee may ask leave to pay the money into court, and an interpleader will be ordered.<sup>42</sup>

The real parties to the controversy should be interpleaded and the garnishee ought not to be put to any costs in such cases.<sup>43</sup>

Where a third person interpleads and the garnishee pays the money into court and an issue is awarded, judgment should not be entered on the verdict against the execution plaintiff for a stated sum, but should be for the plaintiff in the interpleader generally the question being one of title.<sup>44</sup>

Where the contest is between the plaintiff and the defendant's assignee, an interpleader will be awarded on request of the garnishee;<sup>45</sup> but not on the petition of a stranger who claims the property,<sup>46</sup> though there is some precedent the other way.<sup>47</sup> If the question can be tried in an issue on the answers of the garnishee a separate issue will not be awarded.<sup>48</sup> If the garnishee sets up agency in his answers the burden of proof is upon him.<sup>49</sup> Where a mortgagor is made garnishee and the rights of the *terre-tenant* are affected

<sup>35</sup> Phelps v. Morgan, 18 Phila. 655.

<sup>36</sup> Fuller v. Bleim, 9 W. N. C. 574.

<sup>37</sup> Paxson v. Sanderson, 1 Phila. 177; Daly v. Derringer, 1 Phila. 324; Herbert v. Williams, 5 Luz. L. R. 62.

<sup>38</sup> Etting v. Moses, 1 Phila. 399; Bieber v. Weiser, 1 Woodward, 473.

<sup>39</sup> Mulholland v. Mix, 24 C. C. 143.

<sup>40</sup> Peck, Etc., v. Mitchell, 8 D. R. 203.

<sup>41</sup> Sharp v. Woolslayer, 50 Pitts. L. J. 44.

<sup>42</sup> Rodgers v. Santa Claus Co., 27 W. N. C. 574; Wright v. McGarry, 2 Chester Co. 467; P. & L. Dig., vol. 7, col. 11179.

<sup>43</sup> Good v. Grant, 76 Pa. 52; Fish v. Keeney, 91 Pa. 138.

<sup>44</sup> Julius, Etc., Co. v. Royal Ins. Co., 24 Supr. C. 527.

<sup>45</sup> Kistler v. Thompson, 3 Lack. Jur. 341.

<sup>46</sup> Allison v. Elbertson, 1 W. N. C. 388; Barker v. Johnson, 2 C. C. 414.

<sup>47</sup> Wilcock v. Neel, 1 Phila. 129.

<sup>48</sup> First Natl. Bank v. Ladd, 126 Pa. 188.

<sup>49</sup> Hartford, Etc., Assn. v. Case, 12 Luz. L. R. 48.

he may be permitted to intervene on payment of the principal of the mortgage into court.<sup>50</sup>

An order adding the name of a third party as garnishee on the record, without an alias or rule or notice is irregular and all the proceedings vicious.<sup>51</sup> The garnishee may have a bill to compel parties to interplead<sup>52</sup> and he may be directed to have the controversy settled by himself filing a bill against the claimants.<sup>53</sup>

A plaintiff in an attachment execution cannot be ruled to file a bill of particulars.<sup>54</sup>

### 75. Trial — burden of proof — evidence.

The right of several garnishees to sever on the trial is discretionary with the court.<sup>55</sup> Where service was had on both defendant and garnishee and the latter has pleaded "*nulla bona*," the jury should be sworn as to the garnishee alone.<sup>56</sup> The question of indebtedness is for the jury<sup>57</sup> as also whether a claim for exemption was lodged with the garnishee.<sup>58</sup> The plaintiff must make out a case which would warrant a recovery in assumpsit, before the burden will shift on the garnishee.<sup>59</sup> An intervenor who claims the fund has the burden of proof, and therefore the right to open and close to the jury.<sup>60</sup> On the question whether the garnishee acquired a counter-demand before he was served, he has the *onus probandi*.<sup>61</sup>

The plaintiff in the attachment being placed in the position of the debtor, he cannot be clothed with any other rights or presumptions.<sup>62</sup> If on the trial it is doubtful whether the garnishee had any money or effects of defendant in his hands, the question is for the jury.<sup>63</sup> If he claims that there was a sale of his property in satisfaction of the judgment he must prove it by the writ or the officer unless he accounts for its loss.<sup>64</sup> The record of a judgment by the defendant against the garnishee is admissible on the offer of the plaintiff, even if an appeal is pending.<sup>65</sup>

The record of one attachment execution is evidence in another against the same defendant.<sup>66</sup> Where the plaintiff introduces evidence to support his judgment, the garnishee may answer it.<sup>67</sup> On an allegation of fraud, declarations, oral or written, of both parties,

<sup>50</sup> Dever v. Rice, 19 W. N. C. 156.

<sup>51</sup> Barnes v. Hays, 129 Pa. 554.

<sup>52</sup> Hamilton v. Hitner, 3 Montg. Co. 195.

<sup>53</sup> Wilbraham v. Harrocks, 14 Phila. 191.

<sup>54</sup> Bender v. Royer, 1 Lanc. L. R. 233.

<sup>55</sup> Peterson v. Sinclair, 83 Pa. 250.

<sup>56</sup> McCormac v. Hancock, 2 Pa. 310.

<sup>57</sup> Krehmer v. Smith, 1 Walker, 310.

<sup>58</sup> Hughes v. McCoy, 1 W. N. C. 113.

<sup>59</sup> Caldwell v. Coates, 78 Pa. 312.

<sup>60</sup> Northampton, Etc., Bank v. Hay, 5 C. C. 232.

<sup>61</sup> Pennell v. Grubb, 13 Pa. 552.

<sup>62</sup> Fessler v. Ellis, 40 Pa. 248; Wily v. Pearson, 2 Woodward, 424.

<sup>63</sup> Klein v. Cohen, 25 Supr. C. 621.

<sup>64</sup> Borne v. Krump, 4 Leg. Gaz. 230.

<sup>65</sup> Woodward v. Carson, 86 Pa. 176.

<sup>66</sup> Hanlon v. Bibles, 9 Phila. 517.

<sup>67</sup> Black v. Nease, 37 Pa. 433.

are admissible.<sup>68</sup> Where the question is narrowed down to one point, it is not error to exclude evidence covering the whole case.<sup>69</sup> Under the plea of *nulla bona*, only evidence is admissible upon the issue of possession of assets by the garnishee, unless there is notice of special matter as required by the rules of court;<sup>70</sup> and the garnishee cannot set off a debt due from the defendant to him;<sup>71</sup> nor can the validity of the original judgment be challenged;<sup>72</sup> and it has been doubted whether an administrator can prove an assignment to him by the defendant, of the property attached in satisfaction of his own judgment.<sup>73</sup>

#### 76. Costs of attachment execution.

The garnishee is generally entitled to costs of suit whenever the issue is decided in his favor;<sup>74</sup> so also where after plea, the plaintiff suffers a nonsuit;<sup>75</sup> or on a plea of *nulla bona*, the jury find a sum due no larger than the amount admitted in his answers.<sup>76</sup> But the act allowing costs to garnishees applies only to courts of record and not to justice's courts.<sup>77</sup>

Where the amount in the garnishee's hands is less than \$300 and is claimed by defendant as exempt, the garnishee is entitled to costs as well as his attorney's fees.<sup>1</sup> If there are no funds in his hands the costs fall on the plaintiff.<sup>2</sup> When an administrator contests an attachment execution without success, the costs do not come out of the fund, and the Orphans' Court may decide whether the estate or he personally shall pay them.<sup>3</sup> If he answers untruthfully as determined by the event he is liable for costs.<sup>4</sup> The defendant in an attachment execution before a justice of the peace is entitled to costs on judgment in his favor.<sup>5</sup> When there are several garnishees those are entitled to costs in whose favor judgment is given.<sup>6</sup> If one of a number of garnishees summoned has a sufficient fund the costs on all the attachments are payable out of it.<sup>7</sup> But one garnishee has no lien on a fund paid into court by another garnishee, for his costs.<sup>8</sup> The court may not divide the costs in an inter-

<sup>68</sup> Sommer v. Gilmore, 160 Pa. 129.

<sup>69</sup> Humphrey v. O'Donnell, 165 Pa. 411.

<sup>70</sup> Allen v. Erie City Bank, 57 Pa. 129.

<sup>71</sup> Reed v. Penrose, 36 Pa. 214.

<sup>72</sup> Githens v. Chester Grocery Co., 2 Del. Co. 452.

<sup>73</sup> Neely v. Grantham, 58 Pa. 433.

<sup>74</sup> Magruder v. Adams, 1 T. & H. Pr., section 925; Irwin v. Pittsburg, Etc., R. Co., 43 Pa. 488.

<sup>75</sup> Hall v. Knapp, 1 Pa. 213.

<sup>76</sup> Newlin v. Scott, 26 Pa. 102; P. & L. Dig., vol. 7, cols. 11195-6.

<sup>77</sup> Julius, Etc., Co. v. Royal, Etc., Co., 24 Supr. C. 527.

<sup>1</sup> Ott v. Odenwelder, 15 D. R. 839; *contra*, Wengert v. Bowers, 8 C. C.

<sup>2</sup> 292; Freeman v. Wanner, 5 Montg. Co. 81.

<sup>3</sup> Warnicke v. Seaman, 5 Kulp, 428.

<sup>4</sup> Milne v. Bucknor, 12 W. N. C. 532; Mitchell v. Gipple, 2 Pearson, 276.

<sup>5</sup> Foyle v. Foyle, 1 Phila. 182; Harris v. Wainwright, 4 Penny. 361; Herring v. Johnson, 5 Phila. 443.

<sup>6</sup> McKinney v. Tingley, 2 Kulp, 454.

<sup>7</sup> Magruder v. Adams, 1 T. & H. Pr., section 925.

<sup>8</sup> Heise v. Reynolds, 9 Lanc. Bar, 134.

<sup>9</sup> Foyle v. Foyle, 1 Phila. 182.

pleader.<sup>9</sup> If the plaintiff be a non-resident the garnishee may rule him to give security for costs under a rule of court;<sup>10</sup> but not where the garnishee's liability is fixed.<sup>11</sup> An appeal will lie from an order as to costs on a feigned issue in attachment execution.<sup>12</sup>

### 77. Counsel fees.

Section 1 of the act of April 22, 1863, P. L. 527, provides:

"Where, in any attachment execution, or *scire facias* on foreign attachment, issued out of any court of record in this state, the garnishee, after issue joined therein, shall be found to have in his possession or control no real or personal property of the defendant, nor to owe him any debt, other than such property or debts as shall have been already admitted by the plea or answers of the garnishee, or in case, without going to trial, the plaintiff shall take judgment against the garnishee for what shall be so admitted in his plea or answer then and in either case, the garnishee shall be entitled, in addition to the costs already allowed by law, to a reasonable counsel fee out of the property in his or their hands, to be determined and taxed, in case of dispute, by the court, or by some person appointed for that purpose."<sup>13</sup>

It has been held under this act that no counsel fee shall be allowed where the case is settled before issue joined and no judgment is taken by the plaintiff.<sup>14</sup> Costs of an administrator as garnishee are to be allowed in the Orphans' Court and not out of the fund attached in the Common Pleas.<sup>15</sup>

If the plaintiff obtains a judgment no greater than the answers admitted, garnishee is entitled to counsel fees;<sup>16</sup> or where judgment by agreement is for more than was admitted to be due;<sup>17</sup> or for defense against an unliquidated sum in his hands.<sup>18</sup> The counsel fee allowed by the act of June 11, 1885, P. L. 107, which was amended by the act of April 29, 1891, P. L. 35,<sup>19</sup> was held to be payable where the plaintiff discontinues,<sup>20</sup> and this in addition to the attorney fee of \$3, as under the fee bill.<sup>21</sup> Since the act of 1891, *supra*, the garnishee may be allowed a fee, even as large as \$250.<sup>22</sup>

Under the act of 1863, garnishee was held entitled to counsel fee,

<sup>9</sup> Black's Ap., 106 Pa. 344. (See "Interpleader.")

<sup>10</sup> Wallace v. Williams, 9 C. C. 14.

<sup>11</sup> Barker v. Johnson, 2 C. C. 414.

<sup>12</sup> Black's Ap., 106 Pa. 344.

<sup>13</sup> See vol. I., For. Att., p. 679, for act April 29, 1891, P. L. 35; also p. 694, par. 83, for interpretation.

<sup>14</sup> Green v. Harris, 5 C. C. 220.

<sup>15</sup> Milne v. Bucknor, 12 W. N. C. 532.

<sup>16</sup> Chambers v. Smith, 2 Chester county, 516; Vandusen v. Schrader, 11 Phila. 132.

<sup>17</sup> Geist v. Hartman, 1 D. R. 109.

<sup>18</sup> Grimm v. Sarmiento, 18 Phila. 318.

<sup>19</sup> Vol. I., Johnson's Practice, p. 680.

<sup>20</sup> Joseph v. Risley, 17 W. N. C. 348.

<sup>21</sup> Schwartz v. Hall, 5 C. C. 112. (But see to the contrary, Beatty v. Duffy, 24 C. C. 559.)

<sup>22</sup> Lummis v. Big Sandy, Etc., Co., 188 Pa. 27.

where he paid the money into court<sup>23</sup> but not where he pleaded *nulla bona*.<sup>24</sup> The counsel fee is not taxable until after discontinuance or final disposition of the case.<sup>25</sup> The attorney's fee must be paid in cash where garnishee admits a sum to be paid in trade.<sup>26</sup> Where there are several garnishees each is entitled to a counsel fee under the act of 1891.<sup>27</sup> Under the rules of Courts of Common Pleas 2 and 4 of Philadelphia, a counsel fee is allowed where the garnishee admits a greater sum due than the amount for which judgment is entered,<sup>28</sup> which may be taken out of the surplus in his hands, it seems.<sup>29</sup>

### 78. Rules in Allegheny county.

Rule 26, Allegheny County, is as follows:

"Attachments in execution may be made returnable at any return day as writs of summons and interrogatories may be filed and served on the garnishee as in foreign attachment."

*Dissolution of Attachment on Default by Plaintiff.*

Rule 27, Allegheny County, is as follows:

"If the plaintiff in an execution attachment does not, within three calendar months from the return day of his writ, rule the garnishee to answer or put the case at issue; or in foreign attachment, within the same time after judgment, does not issue a *scire facias*, or does not, within a like period of time after the return day of the *scire facias* rule the garnishee to answer or put the case at issue, the court on motion will, if no sufficient cause be shown to the contrary, order the attachment to be dissolved at plaintiff's cost."

A judgment of *non pros.* after affidavit filed that no copy of the interrogatories was served on the garnishee, may be stricken off under rule 31, section 133, Philadelphia.<sup>4</sup>

*Liquidation and Entry of Judgment Against Garnishee.*

Rule 27½, Allegheny County, is as follows:

"When a writ of execution attachment with *scire facias* clause against the garnishee is issued, if the plaintiff shall specify in his praecipe the goods which he seeks to attach in the hands of the garnishee and the value thereof, or in case of the attachment of money or a debt due the defendant, shall specify the amount of money or of the debt claimed to be due, said specification shall be noted by the prothonotary on the writ, and by the sheriff on the copy thereof served, and the failure by the garnishee to appear shall be taken as an admission that he has in his hands the goods specified and that they are of the value stated in the writ, or has money of, or is indebted to, the defendant in the sum claimed and judgment may be entered and liquidated upon said admission: *Provided*, That no judgment shall be entered under this rule until after the return day and fifteen days' service of the writ."

<sup>23</sup> Hicks v. People's, Etc., Assn., 12 D. R. 619.

<sup>24</sup> Wanamaker v. Fitzpatrick, 10 D. R. 291.

<sup>25</sup> Swoope v. Brown, 9 D. R. 155.

<sup>26</sup> Gill v. Snyder, 2 W. N. C. 155.

<sup>27</sup> Lummis v. Big Sandy, Etc., Co., 188 Pa. 27.

<sup>28</sup> Brunswick, Etc., Co. v. Brown, 19 Phila. 455.

<sup>29</sup> Maule v. Boyd, 18 Phila. 326. (See Getz v. Smith, 29 W. N. C. 459, as to court No. 1, Phila.)

<sup>4</sup> Herst v. Beckhaus, 2 D. R. 199.

## CHAPTER XXIX.

### SALES OF REAL ESTATE ON VENDITIONI EXPONAS.

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5. *Alias vend. ex.*
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38. Report of auditor, Phila.
39. Judgment and effect — acknowledgment of deed, Phila.
40. Setting aside sale — motion — interest, etc.
41. Grounds of setting aside sale.
42. Other reasons for setting aside a sale.
43. Practice on exceptions or rule to set aside.
44. Imposition of terms upon the parties.
45. Appeal from order of court.
46. Costs of advertising real estate.
47. Sale of land lying in two counties.

#### 1. Nature of writ.

The meaning of the term *venditioni exponas* is "that you expose for sale," and it may issue on præcipe to sell personalty returned levied upon under a *fi. fa.*;<sup>1</sup> but the sheriff may sell on his *fi. fa.* in the first instance, without a *vend. ex.* personal.<sup>2</sup> It was early

<sup>1</sup> Beale v. Comth., 11 S. & R. 299; 7 Watts, 183.

<sup>2</sup> Spang v. Comth., 12 Pa. 358.

held that a *distringas* would lie against the sheriff, directed to the coroner to compel the sheriff to sell goods levied upon.<sup>3</sup>

But a *venditioni exponas* to sell real estate is necessary, unless the inquisition has been waived on the judgment,<sup>4</sup> and this applies to an execution in the hands of a U. S. marshal.<sup>5</sup> However, a lease of land may be sold on a *fi. fa.* as personalty.<sup>6</sup> A *fi. fa.* is a preliminary to the *vend. ex.*, but both constitute one process.<sup>7</sup> No more can be sold on the *vend. ex.* than what was embraced in the grasp of the levy.<sup>8</sup> So if the levy is set aside, there must be a new and valid levy before a *vend. ex.* can issue legally.<sup>9</sup> A *test. vend. ex.*, if issued within five years from the entry of the *test. fi. fa.* is regular, although it be issued more than five years after the original judgment.<sup>10</sup> Where there is no record of a levy and inquisition, a purchaser takes nothing by the sale.<sup>11</sup>

This writ issues on a *præcipe* as in the case of a *fi. fa.*

## 2. Form of writ.

Center County, ss.

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

*Whereas*, By our writ of — *feri facias*, bearing test the — day of — last past, — we commanded you that of the goods and chattels, lands and tenements of — late of your county, yeom. — in your bailiwick, you shall cause to be levied as well a certain debt of — which — lately in our County Court of Common Pleas of the county aforesaid, before our judge at Bellefonte, recovered against — as also — like money, which to the said — in our said court were adjudged for — damages, which — had by occasion of the detention of that debt. And that you shall have those moneys before our judge, at Bellefonte, at our County Court of Common Pleas, there to be held for the County of Center, the fourth Monday of — next, to render the said — for — debt and damages aforesaid, whereof the said — was convict, etc. At which day, before our judge, at Bellefonte, you returned, that by virtue of the said writ, to you directed, you had seized and taken in execution —

[Description].

late the estate of the said — with the appurtenances, which said — of land and premises remained in your hands unsold for want of buyers; so that you could not have the moneys in the said writ mentioned, at the day and place therein contained, to render to the

<sup>3</sup> Zane v. Cowperthwaite, 1 Dallas, 312.

<sup>4</sup> Glancey v. Jones, 4 Yeates, 212; Porter v. Neelan, 4 Yeates, 108; Murphy v. McCleary, 3 Yeates, 405; Gardner v. Sisk, 54 Pa. 506; St. Bartholomew's Church v. Wood, 61 Pa. 96; Springer v. Brown, 9 Pa. 305; P. & L. Dig., vol. 19, col. 33837.

<sup>5</sup> Willing v. Brown, 6 S. & R. 457.

<sup>6</sup> Kile v. Giebner, 114 Pa. 381.

<sup>7</sup> McCormick v. Meason, 1 S. & R. 92; Temple v. Miller, 1 Luz. L. R. 717.

<sup>8</sup> Copeland v. Mehaffey, 6 D. R. 167.

<sup>9</sup> Burd v. Dansdale, 2 Binney, 80.

<sup>10</sup> Neil v. Colwell, 66 Pa. 216.

<sup>11</sup> Buehler v. Rogers, 68 Pa. 9.

said — for — debt and damages aforesaid, as by the said writ you were commanded. And that the residue of the execution of the said writ appeared in a certain schedule thereunto annexed by which schedule or inquisition it appears that the rents, issues and profits of the premises are not of a clear yearly value, beyond all reprises, sufficient, within the space of seven years, to satisfy the debt and damages in the said writ mentioned.

*Therefore, We Command You,* That the said — of land with the appurtenances, so by you seized and taken in execution, you expose to sale, and that you have the money before our judge at Bellefonte, at our County Court of Common Pleas, there to be held the fourth Monday of — next, to render to the said — for — debt and damages aforesaid, and have you then and there this writ.

Witness the Honorable — — —,  
President Judge of our said Court at Bellefonte, the — day of —  
A. D. one thousand nine hundred —.

— — —,  
Prothonotary.

### 3. Sale when inquisition is waived.

Section 1 of the act of March 6, 1820, 7 Sm. L. 255, provides:

"All sales made heretofore, or which hereafter shall be made, under any writs of *venditioni exponas*, in such cases shall be as good and available in law as if such inquest had been held, and the clear profits of such lands and tenements had been adjudged insufficient to pay, within seven years, the debts and damages due thereon, agreeably to the provisions of the act of assembly in such cases made and provided."

### 4. Issuance of venditioni exponas.

Section 61 of the act of 1836, *supra*, provides:

"If the inquest shall find that the clear profits of any real estate, levied as aforesaid, will not be sufficient to satisfy, within seven years, the debt or damages in such execution, and the same shall be approved of by the court, the plaintiff in such writ may have a writ of *venditioni exponas*, to sell such real estate, for and towards the satisfaction of his judgment."

The issuance of this writ generally is tantamount to an approval of the inquisition and condemnation.<sup>12</sup> A previous return of *nulla bona* is not requisite.<sup>13</sup>

Where the plaintiff has a right to a *vend. ex.* he may issue it without first obtaining leave of court;<sup>14</sup> but where part of the goods are claimed by another person, the sheriff has a right to indemnity.<sup>15</sup> A *vend. ex.* should not issue where no title could pass by the sale, though a purchaser may be estopped by his acts from objecting.<sup>16</sup>

<sup>12</sup> *Crawford v. Boyer*, 14 Pa. 380.

<sup>13</sup> *Levan v. Milholland*, 114 Pa. 49.

<sup>14</sup> *Ferguson v. Moore*, 1 Phila. 92.

<sup>15</sup> *Hunt v. Hunt*, 1 Clark, 315.

<sup>16</sup> *Kreamer v. Fleming*, 200 Pa. 414; 191 Pa. 534.



### 5. Alias vend. ex.

Where the first *vend. ex.* falls by setting aside the inquisition, a sale may be supported on a second writ, when a new inquisition was held.<sup>17</sup> But an alias will not be awarded where the first stands unimpeached;<sup>18</sup> or where there is a return by the sheriff of "money made," the remedy being against the sheriff.<sup>19</sup> Where a writ has been lost or is withheld the proper practice is for the prothonotary to apply to court with a statement of the facts, and procure an order of court for a duplicate or restoration.<sup>20</sup>

### 6. Proceedings where sheriff dies, resigns or is removed before sale.

Section 101 of the act of 1836, *supra*, provides:

"If the officer by whom any real estate shall have been taken in execution shall die, resign, be removed from office, or if his term of office shall expire before sale thereof, the proceedings upon such execution shall be continued and completed by his successor in office, and all other necessary and proper writs and process in such case shall be directed to such successor and be executed by him and a deed be made and acknowledged by him, in like manner, and with like effect, as such acts might have been done by the former officer, if he had continued in office."

### 7. Proceedings where sheriff dies, resigns or is removed, after sale.

Section 102 of the act of 1836, *supra*, provides:

"Whenever any real estate shall be sold under any execution, as aforesaid, and the officer who shall make the sale, shall die, resign or be removed from office, or if the term of his office shall expire before any deed shall be executed and acknowledged by him, in due form of law, the Supreme Court or the court in which the judgment was obtained, shall have power, upon the petition of the plaintiff in such judgment, or the purchaser of such real estate, setting forth specially the facts of the case, by an order, to be entered upon their records, to direct the sheriff for the time being to execute a deed of such real estate to the purchaser thereof."

The record of such order must be proved.<sup>21</sup> It will not be presumed or inferred from an acknowledgment by the successor.<sup>22</sup>

### 8. Duty of successor in office.

Section 103 of the act of 1836, *supra*, provides:

"It shall be the duty of the sheriff or other officer to whom any such order shall be directed in pursuance thereof, and after the payment of the purchase money of such real estate, with costs and charges, if any, as may remain unpaid, to the former sheriff, or officer, to execute, deliver and acknowledge such deed or deeds, and

<sup>17</sup> Springer v. Brown, 9 Pa. 305.

<sup>18</sup> Copeland v. Mehaffey, 6 D. R. 167.

<sup>19</sup> Boas v. Updegrove, 5 Pa. 516; Freeman v. Caldwell, 10 Watts, 9.

<sup>20</sup> Hope B. Assn. v. Dunagan, 5 W. N. C. 148.

<sup>21</sup> Woods v. Lane, 2 S. & R. 53.

<sup>22</sup> Seechrist v. Baskin, 7 W. & S. 403.

perform and do such other matters and things as the sheriff or officer who made such sale might, could or ought to have done, in and about the premises, which deed, so executed, shall be as effectual in law as if the title had been completed by the former officer."

It is the duty of the successor to execute all writs left over by his predecessor.<sup>23</sup> But where a sheriff has levied on personalty he may sell even after his term has expired and it is his duty to do so.<sup>24</sup>

#### 9. Notice of sheriff's sales.

The act of July 2, 1895, P. L. 420, provides:

"The officers shall also give notice of every such sale by advertisement describing the real estate to be sold, and the time and place of sale, as aforesaid, in at least two newspapers of general circulation, one of which, except in the city and county of Philadelphia, may, and in counties having a population of one hundred and fifty thousand and upwards, shall be a German paper. If, however, there be no newspaper published in such county, then in the newspaper printed nearest thereto, once a week during three successive weeks previous to such sale, under penalty of fifty dollars to any party aggrieved by such neglect, to be recovered as debts of like amount are recovered: *Provided*, That nothing herein shall debar any party aggrieved from recovering the damages which he may actually sustain by reason of such neglect."<sup>25</sup>

#### 10. Notice by posting, etc.

Section 62 of the act of 1836, *supra*, provides:

"But before any sale of real estate shall be made as aforesaid, the officer shall cause so many written or printed hand-bills to be made, upon parchment or good paper, as the debtor or defendant shall reasonably request, or so many without such request, as may be sufficient to give notice of such sale, and of the day and hour when, and the place where the same will be, and what lands or tenements are to be sold, and the place where they lie, which notice shall be given to the defendant, and one of the said papers or parchments shall be fixed by the sheriff, or other officer, upon the premises, and the others of them in the most public places of the county or city at least ten days before such sale."

Under section 2 of the act of April 22, 1846, P. L. 476, advertisements were prohibited in two newspapers published in any one office or by any one man. This was repealed as to Carbon County by act of April 3, 1852, P. L. 244; Dauphin, April 19, 1864, P. L. 494, and Montgomery, April 27, 1864, P. L. 643.<sup>26</sup>

Unless notice is given by hand-bill the sale will be set aside,<sup>27</sup> the

<sup>23</sup> Leskey v. Gardner, 3 W. & S. 314.

<sup>24</sup> Spang v. Comth., 12 Pa. 358; Shelmire v. Peters, 8 Phila. 89.

<sup>25</sup> McKee v. Kerr, 192 Pa. 164.

<sup>26</sup> See these special acts as to notice: Allegheny, April 6, 1871, P. L. 476; Cambria, April 13, 1872, P. L. 1148; Clinton, April 8, 1873, P. L. 552; Cumberland, April 15, 1867, P. L. 1284; Luzerne, April 18, 1861, P. L. 405, May 31, 1893, P. L. 187; Lycoming, April 10, 1873, P. L. 600; Susquehanna, April 1, 1863, P. L. 198; Union, April 18 1853, P. L. 519.

<sup>27</sup> Mayer v. Spangler, 2 York, 154.

purpose being to bring actual notice to the defendant,<sup>28</sup> but if it appears that he had actual notice he will not be heard to object to irregularities in the notice.<sup>29</sup> The practice is to hand him a copy of the advertisement, but failure to do so is not sufficient cause for stay or setting aside of sale.<sup>30</sup> But the sheriff's return should show that the notices were posted as required by law.<sup>31</sup>

The allegations of a petition to set aside a sale for want of legal notice should be sustained by depositions.<sup>32</sup> Where the sale is adjourned and notice is given and a record made, the sale will not be set aside because the defendant was not present at the sale and had no notice of the adjournment.<sup>33</sup> The notice to the defendant on a *lev. fa.* on a mortgage provided by section 4 of the act of 1705, 1 Sm. L. 57, must be given,<sup>34</sup> but when given, the sale will not be set aside because the writ was not served on him.<sup>35</sup>

Where the owner is a non-resident notice to his tenant is sufficient and it need not be given to the defendant's attorney of record.<sup>36</sup> Nor is the plaintiff or his attorney of record entitled to particular notice.<sup>37</sup>

#### 11. Notice by hand-bills — manner of.

The hand-bills must be posted ten full days before the sale;<sup>38</sup> and posting on the rear door of a barn on the premises has been held a compliance with the law;<sup>39</sup> and if a vacant lot, if laid upon the ground and fastened with a stone.<sup>40</sup> Where there are separate tracts a hand-bill should be put upon each.<sup>41</sup> In an early case it was held that the posting of notices was directory only, but that was before the act of 1836.<sup>42</sup> The defendant himself may post the notices if done in good faith.<sup>43</sup> The affidavit of the person who posted the bills will not be overborne by mere negative testimony that they saw no bill posted.<sup>44</sup>

Where the bills were properly posted but removed by a storm, the sale will not be vitiated.<sup>45</sup> If the sheriff's return does not show that he gave due notice by posting upon the premises and in public places, it may be proved that notice was not properly given.<sup>46</sup>

<sup>28</sup> *Fitzsimmons v. Fitzsimmons*, 2 York, 121.

<sup>29</sup> *Eberly v. Billingsfelt* (No. 2), 20 Lanc. L. R. 111.

<sup>30</sup> *McDonnell v. Winton*, 4 C. P. R. 45.

<sup>31</sup> *Wells v. McCarragher*, 1 Kulp, 191.

<sup>32</sup> *Wood v. Allabach*, 1 Kulp, 91.

<sup>33</sup> *Dalnty v. Riegel*, 1 Woodward, 74.

<sup>34</sup> *Faucett v. Harris*, 7 D. R. 150.

<sup>35</sup> *Louser v. Light*, 202 Pa. 582.

<sup>36</sup> *Evans v. Sidwell*, 9 Lanc. Bar, 113.

<sup>37</sup> *Kern v. Murphy*, 2 Miles, 157.

<sup>38</sup> *Rinehart v. Tiernan*, 1 T. & H. Pr., section 1249.

<sup>39</sup> *Raubenhold's Est.*, 1 Woodward, 378.

<sup>40</sup> *Penna. Co. v. Conrad*, 2 W. N. C. 476.

<sup>41</sup> *Fidelity, Etc., Co. v. Wilson*, 13 Montg. Co. 184.

<sup>42</sup> *Weitzell v. Fry*, 4 Dallas, 207.

<sup>43</sup> *Allentown Bank v. Beck*, 49 Pa. 394.

<sup>44</sup> *Groom v. Overbeck*, 2 W. N. C. 272.

<sup>45</sup> *Norristown Trust Co. v. Haenni*, 21 Mont'g Co. 138.

<sup>46</sup> *Brown v. Lodge*, 1 W. N. C. 443.

The requirement of a hand-bill is not met by posting a sheet of the newspaper containing advertisements.<sup>47</sup> If it is intended to subdivide the tract, the hand-bill should show it.<sup>48</sup> The contents of the advertisements may be shown by parol.<sup>49</sup>

#### 12. Notice by publication in newspapers.

The advertisement during three successive weeks is sufficient, although not made on the same day of the week, and there may not have been twenty-one days between the first publication and the day of sale.<sup>50</sup> The week meant is the ordinary calendar week.<sup>51</sup>

Where the publication is correct in the secular newspapers, a defect in the notice in a legal journal, will not vitiate the sale.<sup>52</sup>

On a sale of a tenancy by the curtesy, which was adjourned without re-advertisement, the court refused to set the sale aside.<sup>53</sup>

#### 13. Notice where unseated lands of nonresidents are sold.

Section 8 of the act of April 14, 1840, P. L. 349, provides:

"In cases of levy by the sheriff, upon unseated lands belonging to the defendants who do not reside in the county where said land lies, it shall not be necessary for the sheriff to fix the notice or advertisement of the day and hour of sale upon the premises levied on, nor give said defendant a copy of said notice; but it shall be sufficient notice, if the other requisites of the 62d section of the act of June 16, 1836, entitled 'An act relating to executions' are complied with."

#### 14. Time of sale.

Section 2 of the act of April 16, 1845, P. L. 538, provides:

"All sales of real estate by sheriffs and coroners shall be made on or before the return day of the writs respectively, or within six days thereafter."

This act ratifying an ancient practice has been adhered to,<sup>54</sup> although the practice of holding off sales until the last day has been characterized as leading to difficulty and litigation.<sup>55</sup> A sale commenced before the hour advertised but not consummated until after, was not set aside.<sup>56</sup>

Where there was a long list of properties, continuing the sale until late at night, the bidders being nearly all gone, a sale will be set aside.<sup>57</sup>

<sup>47</sup> *Clark v. Chambers*, 1 Pitts. 222; *Jane v. Storm*, 6 Kulp, 74; *Lane v. Gray*, 1 T. & H. Pr. 1249.

<sup>48</sup> *Newman v. Callahan*, 1 T. & H. Pr., section 1255; *Hoeckley v. Henry*, 3 Phila. 34.

<sup>49</sup> *Dunkle v. Harrington*, 101 Pa. 462.

<sup>50</sup> *Hollister v. Vanderlin*, 165 Pa. 248; *McKee v. Kerr*, 192 Pa. 164; *Eberly v. Sensenig*, 19 Lanc. L. R. 333.

<sup>51</sup> *Haas v. Fisher*, 10 D. R. 150; *Currens v. Blocher*, 21 Supr. C. 30; *Bucher v. Boyer*, 13 D. R. 229.

<sup>52</sup> *Jones v. Vail*, 5 Lack. Jur. 257.

<sup>53</sup> *Welch v. Murray*, 4 Yeates, 196.

<sup>54</sup> *St. Bartholomew's Church v. Wood*, 61 Pa. 96; *Rhodes v. Barnett*, 196 Pa. 429; *Kelly v. Green*, 53 Pa. 302.

<sup>55</sup> *Lewis' Petition*, 1 Pitts. 537.

<sup>56</sup> *Raubenhold's Est.*, 1 Woodward, 478.

<sup>57</sup> *Greenwood v. Lehigh Coal Co.*, 1 Clark, 393.

### 15. Applications to stay.

The court will only stay a *vend. ex.* when the facts are clear and the hardship or inadequacy of the common law procedure is manifest.<sup>58</sup> This being an equitable appeal, the sheriff is not a proper party, but if he has been joined it is amendable and the appellate court will consider it amended *nunc pro tunc*.<sup>59</sup>

As a general rule the court will not interfere to stay process, but leave the question to be determined in an action of ejectment against the purchaser.<sup>60</sup>

### 16. Manner of conducting sale.

The sale must be public and the sheriff should announce the names of the parties defendant and read the description of the property.<sup>61</sup> Notice need not be given of incumbrances.<sup>62</sup>

He cannot sell property at the same time under different writs issued by different courts against different defendants.<sup>1</sup> If there are several lots on some of which the purchase money is not all paid, these should be sold first. He cannot sell more lots than enough to satisfy the debt, interest and costs.<sup>2</sup> Each parcel or tract should be sold immediately after reading the description.<sup>3</sup> Having once established a rule or order, he must follow it throughout the sale.<sup>4</sup>

There is no definite rule as to how long the sale shall be kept open.<sup>5</sup> Separate tracts or parcels should be sold separately.<sup>6</sup> But there may be good reasons why some properties should be sold together, if a higher price can thus be obtained.<sup>7</sup> A common incumbrance is not a sufficient reason.<sup>8</sup> As a general rule sale in the lump is objectionable.<sup>9</sup> But where the evidence is doubtful the sale will not be disturbed;<sup>10</sup> and it should appear that a higher price could be obtained by a second sale.<sup>11</sup>

<sup>58</sup> Kreamer v. Fleming, 200 Pa. 414.

<sup>59</sup> Natalie, Etc., Co. v. Ryon, 188 Pa. 138.

<sup>60</sup> Reeser v. Johnson, 76 Pa. 313; Posten v. Posten, 4 Wharton, 27; Devenny v. Eisaman, 14 D. R. 29; Field v. Earle, 4 S. & R. 82; P. & L. Dig., vol. 19, col. 33853.

<sup>61</sup> Garrett v. Shaw, 1 T. & H. Pr., section 1253.

<sup>62</sup> Erb's Est., 2 Pearson, 160.

<sup>1</sup> Building Assn. v. Henry, 3 Phila. 34.

<sup>2</sup> Wallace's Est., 2 Pitts. 145.

<sup>3</sup> Hanscom v. Henderson, 1 Phila. 576.

<sup>4</sup> Sergeant v. Goslin, 1 Phila. 301.

<sup>5</sup> Eckman v. Fautz, 9 Lanc. Bar, 65.

<sup>6</sup> Ryerson v. Nicholson, 2 Yeates, 516; Whitehouse v. Stevens, 3 York, 120.

<sup>7</sup> Chartiers Coal Co.'s Case, 1 Pitts. 87.

<sup>8</sup> Baker v. Chester Gas Co., 73 Pa. 116; P. & L. Dig., vol. 19, col. 33886.

<sup>9</sup> Williams v. Klein, 9 Kulp, 442; Wilbur Trust Co. v. Allam, 5 Northam. Co. 357.

<sup>10</sup> Fidelity, Etc., Co. v. Byrnes, 166 Pa. 496.

<sup>11</sup> Hughes v. Calvert, 5 W. N. C. 98; Monument Cemetery Co. v. Potts, 1 Phila. 251.

**17. Notices and announcements.**

The former practice of giving notices of liens and incumbrances is no longer adhered to and neither the plaintiff<sup>12</sup> nor the sheriff<sup>13</sup> is obliged to do so. If the plaintiff does give notice, however, he may be afterwards estopped by it.<sup>14</sup> Where the purchaser knows of an adverse title he is bound to take notice of it.<sup>15</sup> A purchaser may even be charged with notice of an equitable title on proper evidence.<sup>16</sup> A notice read at the sale is sufficient to put the bidder upon his inquiry,<sup>17</sup> and it need not be circumstantial and in detail.<sup>18</sup> A notice consistent with the record title will not put bidders upon inquiry as to a prior equitable title.<sup>19</sup>

A notice by one of two tenants in common is sufficient.<sup>20</sup> A notice that the lots do not belong to the defendant does not charge the bidder with notice of a dedication by defendant.<sup>21</sup> Notice of a specific claim of title estops the one giving it from setting up a different ground,<sup>22</sup> particularly where it affects the price obtained.<sup>23</sup> A wife who makes a claim of exemption is not estopped by renting from the purchaser;<sup>24</sup> but if she gives notice of a resulting trust in her behalf which might be paid out of the proceeds, she is estopped as against the purchaser.<sup>25</sup>

But where one claims a resulting trust and is in possession the fact of possession puts the purchaser on his inquiry.<sup>26</sup> The purchaser may be affected with notice of a debt due the ancestor against a share which he purchases.<sup>27</sup> Notice given at a prior sale will not affect the sale of a husband's interest in the land which stands in his name.<sup>28</sup> Mere notice that the judgment was without authority has no effect; the party must apply to have the judgment opened.<sup>29</sup>

Where notice is given that land is sold subject to a mortgage the purchaser is bound to make inquiry.<sup>30</sup> But a purchaser from the sheriff's vendee is only affected by the record, unless he also had notice.<sup>31</sup>

<sup>12</sup> Carson's Sale, 6 Watts, 140.

<sup>13</sup> Erb's Est., 2 Pearson, 160.

<sup>14</sup> Booth v. Thompson, 21 Montg. Co. 49.

<sup>15</sup> Owens v. Myers, 20 Pa. 134; Knouff v. Thompson, 16 Pa. 357. (For the old cases, see P. & L. Dig., vol. 19, col. 33890.)

<sup>16</sup> Ross v. Baker, 72 Pa. 186.

<sup>17</sup> Ferguson v. Rafferty, 128 Pa. 337.

<sup>18</sup> Barnes v. McClinton, 3 P. & W. 67.

<sup>19</sup> Lance v. Gorman, 136 Pa. 200; Dewaters v. Kuhnle, 199 Pa. 439.

<sup>20</sup> Hill v. Epley, 31 Pa. 331.

<sup>21</sup> Comth. v. Calhoun, 184 Pa. 629.

<sup>22</sup> Eshbach v. Zimmerman, 2 Pa. 313; Brown v. Chambersburg, 3 Pa. 187; Shultze v. Diehl, 2 P. & W. 273.

<sup>23</sup> Power v. Thorp, 92 Pa. 346.

<sup>24</sup> Fillman v. Divers, 31 Pa. 429.

<sup>25</sup> Nickey v. York, Etc., B. Assn., 8 D. R. 438.

<sup>26</sup> McLaughlin v. Fulton, 104 Pa. 161.

<sup>27</sup> Donaldson's Est., 158 Pa. 292.

<sup>28</sup> Lawrence v. Keener, 149 Pa. 402.

<sup>29</sup> Cyphert v. McClune, 22 Pa. 195.

<sup>30</sup> Shryock v. Jones, 22 Pa. 303.

<sup>31</sup> Hottenstein v. Lerch, 104 Pa. 454.

**18. Title which purchaser takes.**

Section 66 of the act of 1836, *supra*, provides:

"All real estate which shall be sold or delivered as aforesaid, by any sheriff, or other officer, with the appurtenances, shall be quietly and peaceably held and enjoyed by the person to whom the same shall be sold or delivered, and by the heirs, successors or assigns of such persons, as fully and amply, and for such estate and estates, and under the same rents and services, as he or they for whose debt or duty the same shall be sold or delivered, might, could or ought to do, at or before the taking thereof in execution."

**19. Purchasers not to hold as joint tenants.**

Section 2 of the act of 1705, 1 Sm. L. 31, provided that purchasers should hold in severalty or as tenants in common, but not as joint tenants.

**20. Title of purchaser not to be affected by reversal of judgment.**

Section 9 of the act of 1705, 1 Sm. L. 57, provides:

"If any of the said judgments, which do or shall warrant the awarding of the said writs of execution, whereupon any lands, tenements or hereditaments have been or shall be sold, shall, at any time hereafter, be reversed for any error or errors, then, and in every such case, none of the said lands, tenements or hereditaments, so as aforesaid taken or sold, or to be taken or sold upon executions, nor any part thereof, shall be restored, nor the sheriff's sale or delivery thereof avoided, but restitution, in such cases, only of the money or price for which such lands were or shall be sold."

This section protects the purchaser in all cases, except where the judgment was void on its face;<sup>1</sup> but if the judgment be entered on a *sci. fa.* the purchaser need not look back to the original.<sup>2</sup>

**21. Sheriff's return of property unsold.**

Section 64 of the act of 1836, *supra*, provides:

"In case the said real estate, so to be exposed, cannot be sold, then the officer shall make return upon his writ that he exposed such real estate to sale, and the same remained in his hands unsold, for want of buyers, and such return shall not make the officer liable to answer the debt or damages mentioned in such writ."

**22. Liberari facias after vend. ex.**

Section 4 of the act of 1705, 1 Sm. L. 57, provided:

"But a writ, called *liberari facias*, shall forthwith be awarded and directed to the officer, commanding him to deliver to the party such part or parts of those lands, tenements and hereditaments, as shall satisfy his debt, damages and interest, from the time of the judgment given, with cost of suit, according to the value of twelve men; to hold to him as his free tenement, in satisfaction of his

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<sup>1</sup> Wilson v. McCullough, 19 Pa. 77; Gibson v. Winslow, 38 Pa. 49; Shannon v. Newton, 132 Pa. 375.

<sup>2</sup> Duff v. Wynkoop, 74 Pa. 300.

debt, damages and costs, or so much thereof as those lands, by the valuation thereof as aforesaid, shall amount to. And if it fall short, the party may afterwards have execution for the residue against [the defendant's body], lands or goods, as the laws of this province shall direct and appoint, from time to time, concerning other executions."

### 23. Effect of failure to make return.

The title of the purchaser will not be affected by the failure of the sheriff to make his return for a long time after acknowledgment of deed. For all purposes, practically, the sheriff's deed is a return;<sup>3</sup> and, therefore, after a lapse of time, supplies the formal return,<sup>4</sup> in the absence of a charge of fraud.<sup>5</sup> Howsoever, this does not relieve the sheriff from his duty to make a proper and timely return.<sup>6</sup> The taking possession of the deed by the sheriff after recording does not affect the title.<sup>7</sup>

### 24. Form and substance of the return.

The return may properly be made by the deputy as follows: "Earl Gray, sheriff, by Willis Wallace, deputy."<sup>8</sup> It need not be sworn to. It has all the clothing of verity without an oath.<sup>9</sup> A failure to return the amount of money made does not invalidate the sale.<sup>10</sup> If the form be intelligible, showing what was done and that it was legally done it is sufficient.<sup>11</sup> If there are special facts the sheriff may return accordingly.<sup>12</sup> If the purchaser backs out, a return of sold to him, naming the amount, but failed to pay the purchase money and the premises remain unsold, is sufficient.<sup>13</sup> Where he sells on two writs he may return fully on one, and upon the other refer to the writ on which is his full return,<sup>14</sup> and this should be the one which first came into his hands.<sup>15</sup> The sheriff may have leave of court to amend his return.<sup>16</sup>

A return on the wrong writ, which is referred to on the proper one, though irregular, is not ground for invalidating the sale after acknowledgment of the sheriff's deed.<sup>17</sup>

### 25. Amendment of return.

When the sheriff has made an error in his return he should promptly apply to court for leave to amend it, which will be given,

<sup>3</sup> *Smull v. Mickley*, 1 Rawle, 95.

<sup>4</sup> *Hinds v. Scott*, 11 Pa. 19.

<sup>5</sup> *Cock v. Thornton*, 108 Pa. 637; *Boyer v. Webber*, 22 Supr. C. 35.

<sup>6</sup> *Gibson v. Winslow*, 38 Pa. 49; 46 Pa. 380.

<sup>7</sup> *Cock v. Thornton*, 108 Pa. 637.

<sup>8</sup> *Emley v. Drum*, 36 Pa. 123.

<sup>9</sup> *Eberly v. Billingsfelt* (No. 2), 20 Lanc. L. R. 111.

<sup>10</sup> *Gantz v. Carpenter*, 8 Lanc. L. R. 286.

<sup>11</sup> *Fox v. Meyer*, 1 Woodward, 50.

<sup>12</sup> *Hyskill v. Givin*, 7 S. & R. 369.

<sup>13</sup> *Zantzinger v. Pole*, 1 Dallas, 419.

<sup>14</sup> *Ruth's Ap.*, 20 W. N. C. 375.

<sup>15</sup> *Strohecker v. Buffington*, 1 Pearson, 124.

<sup>16</sup> *Keyser v. Sutton*, 1 T. & H. Pr., section 1068.

<sup>17</sup> *Fister v. Greenawalt*, 1 W. N. C. 322.



unless rights have arisen which would be prejudiced thereby.<sup>18</sup> He may do this after his term has expired<sup>19</sup> to correct an error in the name.<sup>20</sup> A return may be amended after the term.<sup>21</sup> He may supply what was omitted by accident,<sup>22</sup> even after a second sale.<sup>23</sup> But where he has no interest in having the amendment allowed, he cannot under the lien creditor's act of April 20, 1846, P. L. 430, *infra*, come in three years after, when out of office and have leave to amend.<sup>24</sup> Such amendment is only by grace and not of right and will not be allowed to the prejudice of a party.<sup>25</sup> The court will not rule a sheriff to amend his return,<sup>26</sup> but it may rule him to make a return. The sheriff is responsible for the kind of a return he makes,<sup>27</sup> and the court will not set aside a return regular on its face, on the allegation that it is false — the remedy being by action against the sheriff for a false return.<sup>28</sup>

#### 26. Purchase by lien creditor — Receipt in lieu of money.

Section 1 of the act of April 20, 1846, P. L. 411, provides:

"From and after the passage of this act, whenever the purchaser or purchasers of real estate, at Orphans' Court or sheriff's sale, shall appear from the proper record to be entitled, as a lien creditor, to receive the whole, or any portion of the proceeds of said sale, it shall be the duty of the sheriff, administrator, executor or other person making such sale, to receive the receipt of such purchaser or purchasers, for the amount which he or they would appear, from the record as aforesaid, to be entitled to receive: *Provided*, That this section shall not be so construed as to prevent the right of said sheriff, administrator, executor or other person aforesaid, to demand and receive, at the time of sale, a sum sufficient to cover all legal costs entitled to be paid out of the proceeds of said sale: *And provided, further*, That before any purchaser or purchasers shall receive the benefit of this section, he or they shall produce to the sheriff, or other person so making said sale, a duly certified statement from the proper records, under the hand and official seal of the proper officer, showing that he is a lien creditor, entitled to receive any part of the proceeds of sale as aforesaid."

This act applies only to liens of record, which can be certified.<sup>29</sup>

The sheriff need not make a return unless required by the purchaser.<sup>30</sup>

<sup>18</sup> Keyser v. Sutton, 1 T. & H. Pr., section 1068.

<sup>19</sup> Peck v. Whitaker, 103 Pa. 297.

<sup>20</sup> Rapin v. Dealy, 1 Miles, 339.

<sup>21</sup> Vastine v. Fury, 2 S. & R. 426; Foster v. Gray, 22 Pa. 9.

<sup>22</sup> Insurance Co. v. Ketland, 1 Binney, 499; Hunt v. Hunt, 1 Clark, 315.

<sup>23</sup> Wright's Ap., 25 Pa. 373.

<sup>24</sup> Lowenstein v. Krell, 162 Pa. 267.

<sup>25</sup> Phillippe v. Anstett, 1 Northam. 78.

<sup>26</sup> Wilkes-Barre, Etc., Assn. v. Zeis, 1 Kulp, 153; Cooper v. Wilson, 96 Pa. 409.

<sup>27</sup> Boas v. Updegrave, 5 Pa. 516; Phila., Etc., Soc. v. Purcell, 24 Supr. C. 205.

<sup>28</sup> Hope, Etc., Assn. v. Dunagan, 5 W. N. C. 148.

<sup>29</sup> Gault v. Tilford, 5 Phila. 6; Brinkle v. Wagner, 5 Phila. 452.

<sup>30</sup> Franklin Twp. v. Osler, 91 Pa. 160.

**27. Sheriff's return under lien creditor act.**

Section 2 of the act of 1846, *supra*, provides:

"It shall be the duty of the said sheriff, executor, administrator or other person making the sale as aforesaid, in all cases when he or they shall receive the receipt of the purchaser as aforesaid, to state the fact in the return of the proceedings of said sale, and attach thereto a list of the liens upon the property sold, which said return shall be read in open court, on some day during the term to be fixed by the order of court; and if the right of said purchaser or purchasers, to the money mentioned in said return, shall be questioned or disputed by any person interested, the court shall thereupon appoint an auditor, who, after due notice given to the persons interested, in such manner as the court may direct, shall make a report, distributing the proceeds of such sale, with the facts and reasons upon which such distribution is made, to be approved by the court; or to direct an issue to determine the validity of said lien, and all further proceedings shall be stayed, until the said issue shall be decided; and in case it shall be determined that the said purchaser or purchasers were not entitled to receive said money, it shall be the duty of the proper court to set aside the sale, and direct the real estate to be resold, unless the money is paid to the sheriff, or other person making the sale, within ten days thereafter: *Provided*, That nothing in this act shall be so construed as to prevent the purchaser or purchasers, in case the said real estate, upon the second or subsequent sale, does not bring a sum equal to the amount bid by him or them, from being liable for such deficiency: *Provided*, That before an issue shall be directed upon the distribution of money arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal by such applicant, if the issue be refused, in like manner, as in other cases in which such writ now lies."

The sheriff must follow the manner and form of this act or he will distribute at his own risk.<sup>31</sup> A lien creditor alone is a person interested.<sup>32</sup> An heir of the mortgagor who died before sale is not.<sup>33</sup>

**28. Lien creditor's right to receipt.**

Prior to the act of April 20, 1846, P. L. 411, there was no authority for the sheriff to take the receipt of a lien creditor or anything but money. If he took an attorney's receipt, it was at his risk.<sup>1</sup> This act does not apply to personalty, but in practice, where there are no disputes between creditors, the sheriff may accept the purchaser's receipt for goods he buys.<sup>2</sup>

It was held that one who buys and claims an incumbrance should

<sup>31</sup> Mark v. Osmer, 138 Pa. 1; Krumbhaar v. Yewdall, 153 Pa. 476.

<sup>32</sup> Shaw's Ap., 46 Pa. 407.

<sup>33</sup> Housekeeper's Ap., 49 Pa. 141.

<sup>1</sup> Crawford v. Young, 26 Pitts. L. J. 33.

<sup>2</sup> Hotchkiss v. Homan, 11 D. R. 43; Tisch v. Raisch, 2 Kulp, 131.

pay the money into court and ask leave to take it out.<sup>3</sup> Where a first lien creditor takes all the money realized by the sale he must pay the costs of the sale in cash.<sup>4</sup> He is entitled to give his receipt on complying with the terms of the act.<sup>5</sup> This act does not apply to anyone but a lien creditor, whose lien is of record and capable of certification.<sup>6</sup>

And a mortgagee cannot avail himself of it, when the sale is under a junior lien and there was no stipulation as to the mortgage, although he offers to satisfy it.<sup>7</sup> But where it is sold to satisfy the mortgage the list of liens may be so amended as to show that the purchaser was a holder of a portion of the bonds accompanying the mortgage.<sup>8</sup>

One who holds as trustee but buys as an individual is not entitled to receipt;<sup>9</sup> nor one who by the list of liens does not appear to be entitled to the fund;<sup>10</sup> nor where a mortgage and a judgment were entered on the same day, the point of priority being one the sheriff could not settle.<sup>11</sup> If the list of liens makes clear the purchaser's right the sheriff must accept his receipt.<sup>12</sup> But where other creditors notify the sheriff to pay the money into court and file exceptions, the only safe course of the sheriff is to demand the money.<sup>13</sup> However, where the list of liens shows the purchaser to be the first lien creditor, the sheriff may be compelled by mandamus to accept his receipt, make a special return and let the contending creditors contest the matter in court;<sup>14</sup> or, the sheriff may be ruled to show cause why he should not accept the purchaser's receipt and make the special return under the act of 1846, *supra*.<sup>15</sup>

When the sheriff proceeds under this act he must state in his return that he has accepted the receipt of the purchaser and attach the list of liens, but he is not compelled to make a special return unless requested by the purchaser,<sup>16</sup> for whose benefit alone the act was passed.<sup>16a</sup> If he does not make a special return when he takes the receipt of the lien creditor he will be personally liable to a prior lien creditor whose lien is discharged by the sale.<sup>17</sup> As against suit by the sheriff to recover from the purchaser who gave the receipt the statute of limitations begins to run from the time of giving the

<sup>3</sup> Crawford v. Boyer, 14 Pa. 380.

<sup>4</sup> Drake v. Hayes, 2 Lack. Jur. 297.

<sup>5</sup> Lightner v. Naddeo, 13 Lanc. L. R. 374.

<sup>6</sup> Gault v. Tilford, 5 Phila. 6.

<sup>7</sup> Crawford v. Boyer, 14 Pa. 380.

<sup>8</sup> Comth. v. Knorr, 10 D. R. 535.

<sup>9</sup> Strominger v. Drawbaugh, 10 York, 22.

<sup>10</sup> Furbush v. Brown, 15 Phila. 181.

<sup>11</sup> Strominger v. Drawbaugh, 10 York, 22.

<sup>12</sup> Building Assn. v. Steel, 15 Phila. 142; Lee v. St. Paul's, Etc., Church, 10 Kulp, 512.

<sup>13</sup> Pugh v. Millsbaugh, 4 Law Times (N. S.), 42.

<sup>14</sup> Comth. v. Knorr, 10 D. R. 535; Wheatland v. Light, 23 C. C. 337.

<sup>15</sup> Gray's, Etc., Assn. v. Carre, 15 Phila. 133.

<sup>16</sup> Bastian's Case, 90 Pa. 472, reversing 8 Luz. L. R. 110; Franklin Township v. Osler, 91 Pa. 160.

<sup>16a</sup> Franklin Township v. Osler, 91 Pa. 160.

<sup>17</sup> Mark v. Osmer, 138 Pa. 1; Krumbhaar v. Yewdall, 153 Pa. 476.

receipt and not the time of the discovery of the prior lien.<sup>18</sup> Without a sheriff's return proceedings to distribute the money by an auditor are irregular.<sup>19</sup> The sheriff may be permitted by the court to amend and rectify his return after he has been ruled to pay the money into court.<sup>20</sup> The sheriff's return approved by the court, and supplemented with a deed duly acknowledged, does not preclude a lien creditor whose lien was of record at the sale, but was not included in the list of liens, which embraced only those in the prothonotary's office, from recovering from the sheriff the money he has misapplied by payment to the defendant or otherwise.<sup>21</sup> As a matter of practice the search for liens should include the prothonotary's records, the recorder's records of mortgages and the records of the clerk of the U. S. Circuit Court in the counties where the court sits, as well as the records of recognizances which are made liens by law. Unless the act is strictly followed the proceedings are irregular and the acknowledgment of a deed will be stricken off, and an auditor appointed to make distribution.<sup>22</sup> The sheriff may except to the findings of the auditor and appeal, but if he does not, he is concluded by the final confirmation of his report.<sup>23</sup> The "person interested" who is entitled to question or dispute the return is a lien creditor and not the defendant.<sup>24</sup> The holder of a judgment subsequent to a mortgage by a corporation under which the property and franchises were sold, cannot object on the ground that the mortgage was *ultra vires*, for if it was, the sale divested nothing.<sup>25</sup> Where there are allegations of collusive and fraudulent judgments, backed by depositions, the money will be ordered into court for distribution,<sup>26</sup> but not on mere allegations.<sup>27</sup> But an affidavit supporting a petition averring on information, belief and expectation to prove that the judgment was paid and ought to be satisfied is sufficient.<sup>28</sup> Exceptions which have already been adjudicated will not be considered.<sup>29</sup> The lien creditor purchaser may have his deed by paying enough money into court to meet the claim of the exceptant.<sup>30</sup> In such case the purchaser cannot be enjoined from obtaining possession.<sup>31</sup> Exceptions are not regularly taken when the sheriff reads his return in open court, but when he has filed it in the prothonotary's office, and if he delays he may be ruled to file his return.<sup>32</sup> When on exceptions it is decided that the purchaser was not entitled to receipt, and he

<sup>18</sup> Mark v. Osmer, 138 Pa. 1.

<sup>19</sup> Atkin's Ap., 58 Pa. 86.

<sup>20</sup> Lightner v. Naddeo, 13 Lanc. L. R. 374.

<sup>21</sup> Comth. v. Robinson, 7 Kulp, 253.

<sup>22</sup> Wheatland v. Wheatland, 23 C. C. 246.

<sup>23</sup> Comth. v. Comrey, 174 Pa. 355.

<sup>24</sup> Shaw's Ap., 46 Pa. 407.

<sup>25</sup> Mellon v. Shenango, Etc., Co., 157 Pa. 627.

<sup>26</sup> People's, Etc., Bank v. Mosier, 9 Kulp, 475.

<sup>27</sup> McCahill v. Maguire, 193 Pa. 428.

<sup>28</sup> Furbush v. Brown, 15 Phila. 184; Hoopes v. Devine, 1 W. N. C. 158.

<sup>29</sup> Beisel v. Taggart, 2 Leg. Rec. R. 242.

<sup>30</sup> Schleipman v. Banks, 3 Law Times (N. S.), 133.

<sup>31</sup> Kinback v. Fisher, 3 Law Times (N. S.), 241.

<sup>32</sup> Thomas v. McDonald, 2 Kulp, 33.

fails to pay over his bid, the court may order a resale, and if the purchaser appeals without recognizance, his appeal will not be a supersedeas.<sup>33</sup> The alternative order for resale or payment into court of the amount bid should be made when the auditor's report sustaining the exceptions is confirmed, but it is not reversible error when made at the end of the time when the purchaser should pay over.<sup>34</sup> A proper form is that the purchaser shall pay to the sheriff the full balance of the purchase money within ten days from date, and if he fails, he shall be liable for any deficiency in price on resale of the property.<sup>35</sup> The court may set aside the sale and direct the prothonotary to issue an alias writ to sell,<sup>36</sup> although the execution plaintiff objects.

### 29. Distribution — schedule — practice.

Section 1 of the act of June 4, 1901, P. L. 357, provides:

"When real estate shall be sold by virtue of any writ of execution issued from any court in this commonwealth it shall be lawful for the sheriff to report to said court a schedule of distribution of the proceeds of said sale, according to the list of liens on the land sold, as certified to him from the record by the proper officers, which schedule and list of liens he shall attach to his return of said writ. Whereupon, the said return shall be read in open court, on some day during the term to be fixed by order of the court; and if the said distribution shall not be questioned or disputed within such reasonable time as may be fixed by the court, it shall be final and conclusive, and the sheriff shall proceed to pay out, in accordance therewith, the money mentioned in his return, but if exception to the sheriff's return be made by any person interested therein, within such time, the court shall proceed to hear and determine the same, as now provided by law in case of disputes as to the distribution of the proceeds of sheriff's sales."

### 30. Sheriff's report on distribution in certain counties.

Section 1 of the act of April 10, 1862, P. L. 364, provides:

"When real estate shall be sold, by virtue of any writ of execution issued from any court in the County of Allegheny, it shall be lawful for the sheriff to report to said court a schedule of distribution of the proceeds of the said sale, according to the list of liens on the property sold, as certified to him from the record by the proper officers, which schedule and list of liens he shall attach to his return of said writ; whereupon, the said return shall be read in open court, on some day during the term, to be fixed by order of the court; and if the said distribution shall not be questioned or disputed within such reasonable time as may be fixed by the court, it shall be final and conclusive; and the sheriff shall proceed to pay out, in accordance therewith, the money mentioned in his return; but if exception to the sheriff's return be made by any

<sup>33</sup> *Knebel v. Baumgarten*, 1 Leg. Rec. R. 137.

<sup>34</sup> *Bedell's Ap.*, 87 Pa. 510.

<sup>35</sup> *Wheatland v. Wheatland*, 16 Mont'g Co. 153; *Thomas v. McDonald*, 2 Kulp, 33.

<sup>36</sup> *Fry v. Specht*, 1 Atl. 441.

person interested therein, within such time, the court shall proceed to hear and determine the same, as now provided by law in case of disputes as to the distribution of the proceeds of sheriff's sales." <sup>35</sup>

### 31. Form of receipt by lien creditor as purchaser.

Vye Jay  
v.  
James S. Lewars. } In the Court of Common Pleas of Sullivan  
County.  
Vend Ex. No. — Term, 1910.

I, Philip Sidney, purchaser of the land sold under the above execution and as a lien creditor of James S. Lewars, the defendant, being entitled to receive the sum of one thousand dollars as such lien creditor, out of the proceeds of said sale, do hereby acknowledge to have received from Thomas Mahaffey, sheriff of said county, the sum of one thousand dollars, agreeably to the provisions of the act relating to lien creditors becoming purchasers, dated April 20th, A. D. 1846.

Philip Sidney.

May 12, 1910.

### 32. Form of return of sheriff when lien creditor is the purchaser.

To the Judge of the Court of Common Pleas within named:

I, Thomas Mahaffey, the within named sheriff, do certify and return, that by virtue of the annexed writ, after due public and timely notice of the time and place of sale, I did on the 15th day of April last expose the premises within mentioned to sale by public vendue or outcry, and sold the same to Philip Sidney, of said county for the sum of twenty-five hundred dollars, he being the highest and best bidder and that the highest price bidden for the same; and I do further return that the said Philip Sidney, the above named purchaser, is a lien creditor of the said James S. Lewars, the defendant, entitled as such to receive the sum of one thousand dollars of the proceeds of said sale; that I have the receipt of the said Philip Sidney for all said sum and hereto attach a list of the liens on said real estate so sold as aforesaid; and the remainder of the moneys for which said land was sold I have ready before the judge of said court at the day and place within contained as within I am commanded.

So answers,

Thomas Mahaffey, Sheriff.

### 33. Surplus to be paid to defendant.

Section 93 of the act of 1836, *supra*, provides:

"Whenever the proceeds of a sale upon execution as aforesaid, shall be more than sufficient to satisfy the liens upon the property sold, the officer making such sale, or receiving such proceeds, shall pay the surplus to the debtor, unless the fund shall have been paid into court, and then and not before, such officer shall be discharged thereof, upon record in the court to which he shall make return of his proceedings concerning such executions."

Where the debtor is dead the surplus shall be paid to his legal

<sup>35</sup> See act of 1846, *supra*. Similar act in Schuylkill county April 13, 1868, P. L. 959. extended to Lehigh county, act of May 24, 1871, P. L. 1117. See *Dormer v. Brown*, 72 Pa. 404; *Hartman v. Holstein*, 2 North. Co. 49.

representatives, under section 33 of the act of Feb'y 24, 1834, P. L. 70, the officer taking a bond, conditioned for the proper distribution.<sup>36</sup>

**34. Sheriff's return under creditor's act—rule in Philadelphia.**

Section 3 of rule 36, Philadelphia, provides:

"Returns by the sheriff upon process for the sale of real estate, made in pursuance of the act of assembly of April 20, 1846, entitled: "An act relative to lien creditors becoming purchasers at judicial sales and for other purposes, shall be read and filed in open court on any regular motion day."

**35. Notice of return by sheriff.**

Section 4 of rule 36, Philadelphia, provides:

"The sheriff shall on or before the day when his return is read, give notice thereof to all persons who have notified him that they claim an interest in the proceeds of any real estate returned sold as aforesaid, and any of such persons may, within four days after notice, file exceptions to the right of the purchaser mentioned in the return to the said proceeds or any part thereof; but such exceptions must be founded upon material facts in dispute, the nature and character of which must be set forth and verified by affidavit, or upon some matter of law appearing of record."<sup>36a</sup>

**36. Rule to show cause why the sale should not be set aside.**

Section 5 of rule 36, Philadelphia, provides:

The party filing exceptions as aforesaid, shall thereupon enter as of course, in the office of the prothonotary, a rule upon the purchaser to show cause why the sale should not be set aside, which rule shall be made returnable on the motion day next following the day upon which the exceptions shall be filed as aforesaid, of which rule he shall forthwith give notice to the purchaser or his attorney." (See and compare your rules of court.)

**37. Proceedings on exceptions and rule.**

Section 6 of rule 36, Philadelphia, provides:

"On the return of the rule entered as aforesaid, if the exceptions are deemed sufficient, the court will appoint an auditor to make a report of distribution of the proceeds of the sale, or direct an issue to determine the validity of the lien of the purchaser, if the case shall require it, and thereupon all further proceedings under such rule shall be stayed until the report of the auditor shall be made and approved by the court, or the issue directed as aforesaid shall be determined. If the exceptions are insufficient, the court will dismiss the same and discharge the rule."

**38. Report of auditor.**

Section 7 of rule 36, Philadelphia, is as follows:

"The report of an auditor appointed as aforesaid, shall be subject

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<sup>36</sup> Morrison's Case, 9 W. & S. 116.

<sup>36a</sup> Thompson v. Martin, 11 W. N. C. 481.

to the rules applicable to the reports of auditors distributing the proceeds of sheriff's sales in other cases; and the party in whose favor the verdict, on an issue directed as aforesaid, shall have been rendered, shall be entitled to enter judgment thereon, according to the rules applicable to verdicts in other cases."

### 39. Judgment and effect.

Section 8 of rule 36, Philadelphia, is as follows:

"If it shall be the judgment of the court upon the report of the auditor appointed as aforesaid, or upon the verdict of a jury, that the purchaser is not entitled to receive the proceeds of the sale, or any part thereof, the rule entered as aforesaid shall become absolute, of course, at the expiration of ten days after the report has been confirmed or judgment entered, unless the purchaser shall, within that time, pay or cause to be paid, to the sheriff who made the sale, the whole of the purchase money, or so much thereof as it shall be adjudged he is not entitled to retain."

### 40. Acknowledgment and delivery of deed.

Section 9 of rule 36, Philadelphia, as amended July 22, 1905, is as follows:

"If no exceptions shall be filed as aforesaid, or if the exceptions shall be dismissed by the court, or it shall be otherwise determined that the purchaser is entitled to the proceeds of the sale, or if the purchaser shall pay the purchase money, or such part thereof as may be adjudged to be payable to him, the sheriff shall be allowed to acknowledge and deliver his deed for the real estate sold as aforesaid, unless a motion shall be pending to set aside the sale for irregularity of the proceedings or for some other cause."

### 41. Setting aside sale — motion, interest, etc.

A person who is not a lien creditor<sup>37</sup> or interested in the distribution, has no standing to make a motion to set aside a sale.<sup>38</sup> But one who is *prima facie* a lien creditor has a standing to object to a gross misdescription;<sup>39</sup> and even a bidder's objection may be sustained by an order of court setting aside a sale where there are rights compromised by mistake or fraud.<sup>40</sup> But an unsecured creditor has been held to have no standing.<sup>41</sup> A mortgage creditor who bid in the property is not estopped from making the motion.<sup>42</sup> But it has been held otherwise as to a mechanic's lien creditor who bids at the sale<sup>43</sup> and a defendant who acquiesced in the misdescription;<sup>44</sup> and one whose agent was a bidder, there being no charge of fraud or irregularity.<sup>45</sup> One who fails to comply with his bid

<sup>37</sup> Herr v. Hall, 17 Lanc. L. R. 116.

<sup>38</sup> Wilbur Trust Co. v. Allam, 5 Northam. 357.

<sup>39</sup> Shields v. Kuhn, 1 T. & H. Pr., section 1266.

<sup>40</sup> Connelly v. Phila., 86 Pa. 110.

<sup>41</sup> Schwartz v. Weinsheimer, 2 Northam. 210.

<sup>42</sup> Connell v. Hughes, 1 Phila. 225.

<sup>43</sup> Hughes v. Calvert, 5 W. N. C. 98.

<sup>44</sup> Fisher v. Stokes, 1 T. & H. Pr., section 1271; Eberly v. Billingsfelt, 27 C. C. 258.

<sup>45</sup> Bair v. Reese, 1 Lanc. Bar, No. 39.



cannot move to set aside the second sale for misdescription and inadequacy of price;<sup>46</sup> nor one who has had the question determined against him on a motion to stay the writ;<sup>47</sup> however, where the question is different and the objection to a sale of lots in a lump, he has a standing.<sup>48</sup>

One who has procured a stay for defect in the advertisement, which was corrected accordingly, cannot object for misdescription when sold on an *alias vend. ex.*<sup>49</sup> The defendant cannot be heard to object to his own mistake as to his ability to pay and prevent the sale.<sup>50</sup> One who claims an adverse title has no standing to move to set aside the sale.<sup>51</sup> But the heirs of a mortgagor have a right to intervene and move to set aside the sale and have the judgment on the *sci. fa.* opened.<sup>52</sup> A sale of property as the husband's will not be set aside on motion of the wife who claims the legal title.<sup>53</sup> Where a municipal lien is filed against a fictitious name, the true owner may move to set the sale aside.<sup>54</sup> Where the defendant and the bidder knew of the death of the widow whose dower was charged on the land sold, they are estopped from complaining of inadequacy of price.<sup>55</sup> The motion may be made any time before the acknowledgment of the sheriff's deed, but it should be made at the earliest time possible to be in entire good faith.<sup>56</sup>

When the rule is made absolute on condition that the costs be paid, if the defendant fails to comply, the plaintiff may move to take up the rule and have it disposed of.<sup>57</sup> A vexatious delay will not be tolerated.<sup>58</sup> One who bid on several coal tracts in the lump and fails to comply with his bid cannot move to set aside the sale.<sup>59</sup>

#### 42. Grounds for setting aside sale.

Among the grounds for setting aside a sale of land are these: Failure to describe land properly or mention improvements thereon;<sup>60</sup> failure to identify the land by the description;<sup>61</sup> inadequacy of price in conjunction with misdescription.<sup>62</sup> But where the purchaser meets the exceptant's offer to bid more, the sale will not be set aside.<sup>63</sup> Failure to mention that the land lay in natural gas territory was

<sup>46</sup> Perot v. Scott, 1 W. N. C. 157.

<sup>47</sup> Morse v. Freck, 7 C. C. 456.

<sup>48</sup> Butler v. Patrick, 4 Kulp, 417.

<sup>49</sup> Johnson v. Johnson, 7 Lanc. L. R. 331.

<sup>50</sup> Erb's Est., 2 Pearson, 160.

<sup>51</sup> Faulkner v. Hunter, 10 Lanc. Bar, 29.

<sup>52</sup> Stephens v. Stephens, 1 Phila. 108.

<sup>53</sup> Livingood v. Hix, 2 Woodward, 89.

<sup>54</sup> Board of Health v. Jones, 1 Miles, 28.

<sup>55</sup> Herr v. Draucher, 7 Lanc. L. R. 383.

<sup>56</sup> Young v. Wall, 1 Phila. 69.

<sup>57</sup> Assn. v. Adams, 1 W. N. C. 160.

<sup>58</sup> Penna. Co. v. Scott, 1 W. N. C. 232.

<sup>59</sup> Chartiers Coal Co.'s Case, 1 Pitta. 87.

<sup>60</sup> Light v. Zeller, 195 Pa. 315; P. & L. Dig., vol. 19, cols. 33926-7-8-9; Hoefflich v. Hoefflich, 12 C. C. 370.

<sup>61</sup> Jane v. Storm, 6 Kulp, 74.

<sup>62</sup> Buglehole v. Davis, 10 Kulp, 281.

<sup>63</sup> Louser v. Light, 202 Pa. 582; Hollister v. Vanderlin, 165 Pa. 248.

held no ground, the price being adequate.<sup>64</sup> Where the lands are largely unseated a description by warrantee name was held to be sufficient to identify the tract.<sup>65</sup> There are many cases where the grounds alleged were trivial and the courts refused to set aside the sale. For these see P. & L. Dig. of Dec., vol. 19, cols. 33930-40.

Inadequacy of price alone is no reason to set aside a sheriff's sale, unless it be so gross as to be shocking, so as to demonstrate beyond doubt that it must have proceeded from fraud or deception.<sup>66</sup> The test of inadequacy is what the property will bring at a forced sale.<sup>67</sup> If inadequacy of price is coupled with other circumstances, however, the sale may be set aside,<sup>68</sup> as where such inadequacy is traceable to fraud practiced in the sale, although the purchaser may not be a party thereto;<sup>69</sup> or where the sheriff made an unusual and hard condition not mentioned in the advertisement;<sup>70</sup> or where the debtor's exemption has not been regularly provided for;<sup>71</sup> or a defective record has deterred bidders;<sup>72</sup> or fraudulent statements by the purchaser had the same result<sup>73</sup> or where a lien creditor was misled by statements in an effort to compromise, as to the time of the sale<sup>74</sup> and where the price was grossly inadequate and there were misleading circumstances;<sup>75</sup> or where a larger price is offered.<sup>76</sup>

#### 43. Other reasons for setting aside a sale.

It has been held that where the purchasers would be oppressed by a mistake in law the sale will be set aside;<sup>1</sup> or where they believed that it was sold subject to a mortgage when it was not and the price was inadequate;<sup>2</sup> or where other circumstances misled the purchaser,<sup>3</sup> or where by reason of an application to stay the writ bidders were deterred and the price was inadequate;<sup>4</sup> or where there was a misunderstanding as to the time of adjournment and the property was sold in the absence of the parties who were thereby unable to protect their respective interests;<sup>5</sup> or where by plaintiff's direction it was made subject to prior liens;<sup>6</sup> or where

<sup>64</sup> Carson v. Ambrose, 183 Pa. 88.

<sup>65</sup> Morse v. Freck, 7 C. C. 456.

<sup>66</sup> Timlow v. Heidig, 2 Leg. Op. 103. (See P. & L. Dig., vol. 19, cols. 33941-2.)

<sup>67</sup> Wilbur Trust Co. v. Allam, 5 Northam. 357.

<sup>68</sup> Moore v. Dodd, 2 Lack. Jur. 245.

<sup>69</sup> Moyer v. Nickol, 1 Leg. Rec. 55; Soby v. Pastello, 1 W. N. C. 374; Mayer v. Spangler, 2 York, 154.

<sup>70</sup> Whitaker v. Birkey, 11 Phila. 199; Smith v. Tinicum Fishing Co., 1 Del. Co. 121.

<sup>71</sup> Frey v. Wurtzel, 1 Woodward, 147.

<sup>72</sup> Conard v. Edwards, 7 C. C. 342.

<sup>73</sup> Jackson v. Morter, 82 Pa. 291.

<sup>74</sup> United, Etc., Co. v. Safford, 3 Lack. L. N. 51.

<sup>75</sup> Fidelity, Etc., Assn. v. Uhler, 199 Pa. 417.

<sup>76</sup> Houghtaling v. Megahey, 36 C. C. 212.

<sup>1</sup> Cummings' Ap., 23 Pa. 509; Vincent v. Hunsinger, 7 C. C. 331.

<sup>2</sup> Stroup v. Raymond, 183 Pa. 279.

<sup>3</sup> Shakespeare v. Delaney, 86 Pa. 108; P. & L. Dig., vol. 19, col. 33954.

<sup>4</sup> Ritter v. Getz, 161 Pa. 648; P. & L. Dig., vol. 19, col. 33955.

<sup>5</sup> Welles v. Davis, 3 Kulp, 61.

<sup>6</sup> Dunlap v. Gray, 1 T. & H. Pr., section 1256.

the inquisition was not approved by the court, when the defendant was not guilty of laches.<sup>7</sup>

But where the sale was fair and the exceptions are trivial or mainly technical, not directed at the *bona fides*—a sale will not be set aside.<sup>8</sup>

While an attorney in bidding and buying land acts upon a trust for his client, this fact will not prevent the setting aside a sale to the attorney for the execution plaintiff, in a proper case.<sup>9</sup>

#### 44. Practice on exceptions or rule to set aside.

On a rule to set a sale, the court will require an affidavit of service upon all parties in interest, who do not appear at the hearing or who did not appear at the taking of the depositions.<sup>10</sup> The practice is to present an affidavit averring particularly the grounds and exceptions and asking for a rule to show cause why the sale should not be set aside. The court will thereupon fix a return day in the order for the rule, if allowed, and direct notice to be given to the parties in interest. The applicant will take his rule to take depositions *de bene esse* or otherwise, if the facts relied upon are not in the record and usually service will be accepted by opposing counsel, but if not, this rule and notice of time and place must be served.

Where exceptions are filed to the sheriff's return in time, the affidavit may be filed later.<sup>11</sup> The rule to set aside should not be discharged before the return day, in vacation and without notice.<sup>12</sup> The party *pro* rule has the burden and must open with his exceptions and evidence if he have any.<sup>13</sup> If it is averred that the sheriff has not advertised according to law, it must be proved, as the sheriff is presumed to have performed his duty.<sup>14</sup> It requires more than the affidavit for the rule.<sup>15</sup> Other reasons than those stated in the affidavit may be urged, provided the opposing party has an opportunity to meet them<sup>16</sup> but they must be relevant to the particular sale and not some other<sup>17</sup> and not impugn the judgment alone.<sup>18</sup> Where the defendant on rule to set aside makes an offer of more than was bidden, the purchaser may raise his bid to cover the offer.<sup>19</sup> The refusal to set aside the sale is not conclusive in an action of ejectment.<sup>20</sup> Where a sale is made on a *testatum vend.*

<sup>7</sup> Eberly v. Billingsfelt, 27 C. C. 258.

<sup>8</sup> Faucett v. Harris, 190 Pa. 98; Cake v. Cake, 156 Pa. 47; Long v. Miller, 10 C. C. 586; Westmoreland, Etc., Co. v. Nesbit, 21 Supr. C. 150; P. & L. Dig., vol. 19, cols. 33959-60; Blake v. Blake, 25 Mont'g Co. 167.

<sup>9</sup> Pearson v. Morrison, 2 S. & R. 20.

<sup>10</sup> Ingersoll v. Sherry, 1 Phila. 68; Cooper v. Wilson, 96 Pa. 409.

<sup>11</sup> Thompson v. Martin, 11 W. N. C. 481.

<sup>12</sup> Atherholt v. Atherholt, 7 Supr. C. 82.

<sup>13</sup> Evans v. Sidwell, 9 Lanc. Bar, 113; Miller v. Lash, 4 Supr. C. 292.

<sup>14</sup> Evans v. Sidwell, *supra*.

<sup>15</sup> Faulkner v. Hunter, 10 Lanc. Bar, 29.

<sup>16</sup> Chadwick v. Patterson, 2 Phila. 275.

<sup>17</sup> Gantz v. Carpenter, 8 Lanc. L. R. 286.

<sup>18</sup> Van Billiard v. Van Billiard, 10 C. C. 620.

<sup>19</sup> Hollister v. Vanderlin, 165 Pa. 248; Louser v. Light, 202 Pa. 582.

<sup>20</sup> Dawson v. Morris, 4 Yeates, 341.

*ex.* after a rule to set it aside which is made absolute in the original county, it is error to acknowledge a sheriff's deed.<sup>21</sup>

#### 45. Imposition of terms upon the parties.

The court has power in setting aside a sale to impose such terms as will equitably protect all interests and parties; e. g., to require security that the property will bring a higher price;<sup>22</sup> or more than the mortgages.<sup>23</sup> But it has been decided that the defendant should not pay the costs where the advertisement was erroneous and there was no power in this proceeding to put them on the sheriff, the printer or the plaintiff.<sup>24</sup> The purchaser who takes no title may not be reimbursed his costs and expenses.<sup>25</sup> Where plaintiff's counsel was unable to attend the sale on account of illness, an order was made that the plaintiff pay the costs of sale and that the property bring as much at a re-sale.<sup>26</sup> Terms have been imposed on the defendant to meet plaintiff's offer<sup>27</sup> or that a re-sale will bring more money;<sup>28</sup> or that he pay the costs;<sup>29</sup> and that it bring more on re-sale;<sup>30</sup> or the amount of the first lien<sup>31</sup> or security for ten per cent more than the first bid, when applied for by the owner.<sup>32</sup> Each case depends upon its particular facts.<sup>33</sup> Where the application is by the purchaser he may be required to pay the costs;<sup>34</sup> or if by a prospective bidder who offers a higher price, on giving security and reimbursing the first purchaser<sup>35</sup> or upon application of the *terre-tenant* who gives security that the property will sell for more money.<sup>36</sup> The same conditions apply to a second mortgagee<sup>37</sup> and a mortgagee.<sup>38</sup>

#### 46. Appeal from order.

Before the era of elastic judicial discretion an order setting aside a sale was a final order from which the party aggrieved had a writ of error;<sup>39</sup> but now neither the setting aside nor the refusal

<sup>21</sup> *McKeown v. Craig*, 20 Pa. 170. (See section 100, act of 1836, P. L. 755.)

<sup>22</sup> *Building Assn. v. Mason*, 1 W. N. C. 82.

<sup>23</sup> *Ellis v. Bliem*, 2 W. N. C. 290.

<sup>24</sup> *Jane v. Storm*, 6 Kulp, 74.

<sup>25</sup> *Leeds v. Artzt*, 2 W. N. C. 507.

<sup>26</sup> *Garret v. Shaw*, 1 T. & H. Pr., section 1277.

<sup>27</sup> *Phila. v. Scott*, 9 Phila. 171.

<sup>28</sup> *Assn. v. Smith*, 1 W. N. C. 74.

<sup>29</sup> *Feury v. McLane*, 5 Luz. L. R. 257; *State Capital, Etc., Assn. v. Roche*, 5 Lack. Jur. 41.

<sup>30</sup> *Storz v. Weiss*, 7 Luz. L. R. 213.

<sup>31</sup> *Guarantee, Etc., Co. v. Klein*, 9 Kulp, 499.

<sup>32</sup> *Seranton, Etc., Co. v. Pier*, 1 Lack. L. N. 87.

<sup>33</sup> *Yeakel v. Hawkins*, 13 Montg. 53.

<sup>34</sup> *Finley v. McCulley*, 2 Phila. 212; P. & L. Dig., vol. 19, col. 33971; *Fry v. Patrick*, 13 C. C. 297.

<sup>35</sup> *Campbell v. Williams*, 3 Kulp, 92; *Houston v. Thomas*, 12 Montg. 159.

<sup>36</sup> *McNutt v. Levan*, 1 W. N. C. 130.

<sup>37</sup> *Percival v. Bryant*, 4 Clark, 161.

<sup>38</sup> *Merriman v. Richardson*, 12 Phila. 304.

<sup>39</sup> *Mackanness v. Long*, 85 Pa. 158.

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to set aside, although the price be grossly inadequate will be reviewed unless the appellate court think it an abuse of discretion.<sup>40</sup>

#### 47. Costs of advertising real estate, for sale.

The 8th section of the act of April 13, 1840, provides:

"In all cases where any sheriff, prothonotary or register of wills or clerk of court is or shall be required by law, or an order of court, to publish any notice in the newspapers, and is allowed by law, in said order, to charge the expense of said advertisements, it shall be the duty of said officer to make out a bill showing specifically the amount actually paid for printing said notice, and if said officer shall charge any greater or other amount than that actually paid for publishing such notice, he shall be subject to the penalties prescribed by law for taking illegal fees, to be sued for and recovered in the manner provided by the 26th section of the act entitled: "An act establishing a fee bill," passed March 28, 1814, but subject to the limitations contained in the fifteenth section of the supplement to said act passed Feb'y 22, 1821."

This act was extended to Philadelphia by section 7 of the act of Feb'y 8, 1848, P. L. 25; and the act of April 9, 1849, P. L. 524, extended it to cases of sales of real estate by the sheriffs, reserving to them their right to fees for posting hand-bills, serving notices and selling such real estate.

#### 48. Sale of land lying in two counties.

Prior to the act of 1840 (see *Inquisition, supra*), no title was given by the sale of land beyond the county;<sup>41</sup> and there is no law which restrains the creditor from proceeding by executions against the land in both counties at the same time if he has his record straight in both counties.<sup>42</sup>

Where mortgaged land lies in two counties and the mortgagee proceeds in but one county, the mortgagor residing in the other may set up a defense in that county.<sup>43</sup>

<sup>40</sup> *Germer v. Ensign*, 155 Pa. 464; *Miller v. Lash*, 4 Supr. C. 292; *Laird's Ap.*, 2 Supr. C. 300; *Southwest, Etc., Co. v. Fayette, Etc., Co.*, 145 Pa. 13; *P. & L. Dig.*, vol. 19, cols. 33974-5-6; *Phillips v. Wilson*, 164 Pa. 350; *McKee v. Kerr*, 192 Pa. 164; *Felton v. Felton*, 175 Pa. 44.

<sup>41</sup> *Menges v. Oyster*, 4 W. & S. 20.

<sup>42</sup> *Miller v. Lash*, 4 Supr. C. 292.

<sup>43</sup> *Frick v. Fiscus*, 164 Pa. 623. (See act Mar. 23, 1877, P. L. 26, as to *lev. fa.*)

## CHAPTER XXX.

### EXECUTIONS — SHERIFF'S DEED.

1. Duty of sheriff to execute deed to purchaser.
2. Form of sheriff's deed.
3. Effect of deed.
4. Sheriff's acknowledgment.
5. Postponement of acknowledgment — delivery of deed for record.
6. Deeds need not be recorded by prothonotary.
7. Index of deeds by recorder.
8. Return of process before acknowledgment, Phila.
9. Rule in Phila.
10. Rules in Allegheny county.
11. Correction of defective deeds.
12. Correction of error in description.
13. Special provisions in Allegheny county.
14. Petition to amend defective return.
15. Acknowledgment — effects.
16. Proof of title under sheriff's deed.
17. Setting aside and vacating sale.
18. Purchaser's liability as affected by the sale.
19. Liability on re-sale, for difference.
20. Tender of deed — suit by sheriff.

#### 1. Duty of sheriff to execute deed to purchaser.

The act of April 22, 1905, P. L. 265, has materially changed the law and practice in regard to the execution and acknowledgment of sheriff's deeds, which was formerly done in open court on notice and proclamation by the crier. Sections 95, 96, and 97 of the act of 1836 are modified, as also section 94, which provided as follows:

"The officer making sale of any real estate under execution, as aforesaid, shall make return thereof, endorsed or annexed to such writ, and give the buyer a deed, duly executed and acknowledged in court, for what is sold, in the manner hitherto practiced in case of the sale of lands by sheriffs upon execution."

#### 2. Form of sheriff's deed.

Section 1 of the act of April 22, 1905, P. L. 265, provides:

"Sheriff's and coroner's deeds shall be made in the following words:

Know all men by these presents, that I — —, sheriff (or coroner) of the county of — —, in the state of Pennsylvania, for and in consideration of the sum of — — dollars to me in hand paid, do hereby grant and convey to [here describe the grantee or grantees and the property conveyed, with the recital of title if desired], the same having been sold by me to the said grantee — —, on the — — day of — — Anno Domini one thousand nine hundred — —, after due advertisement according to law, under and by virtue of a writ [here name the writ] issued on the — — day of — — Anno Domini, — — out of the [here name the court] as of — — term, one thousand nine hundred — —, number — —, at the suit of [here name the

plaintiff or plaintiffs] against [here name the defendant or defendants and *terre-tenant* or *terre-tenants*, if any].

In witness whereof, I have hereunto affixed my signature, this — day of —, Anno Domini —.

Commonwealth of Pennsylvania, ss:

Before the undersigned [prothonotary or clerk, or deputy, as the case may be], of the [here name the court], personally appeared — —, sheriff [or coroner] of — county, aforesaid, and in due form of law declared that the facts set forth in the foregoing deed are true, and that he acknowledged the same in order that said deed might be recorded."

### 3. Effect of deed.

Section 2 of the act of 1905, *supra*, provides:

"Unless expressly limited to a lesser estate, such deeds shall be effective to pass to the grantee or grantees named therein a fee simple title to the premises conveyed, if the defendant or defendants possessed such title, though technical words of inheritance be not used."

### 4. Sheriff's acknowledgment.

Section 3 of the act of 1905, *supra*, provides:

"On being settled with for the purchase price of the property sold, and on being paid his charge for acknowledgment, and the cost of registering and recording, the sheriff or coroner shall acknowledge any such deed before the prothonotary or clerk of the court out of which the said writ issued, or his deputy, except in cases of *testatum* writs, when the acknowledgment shall be made before the prothonotary or deputy prothonotary of the Court of Common Pleas of the county in which the property is situate, on any day, Sundays and holidays excepted, and the fact of such acknowledgment shall be forthwith entered on the record of the particular cause. After the acknowledgment, and pending the delivery as hereinafter set forth, such deed shall remain in the custody of the prothonotary or clerk, subject to inspection as are other records of said court."

Acknowledgment of a sheriff's deed was formerly held to be a judicial act, provable only by the record,<sup>1</sup> and mere irregularities in process were cured by it;<sup>2</sup> so also as to misdescription of the estate.<sup>3</sup> So an omission to return the writ was held to be cured by acknowledgment.<sup>4</sup> Many of the cases arising under the old practice have only historical interest. For these, see vol. 19, P. & L. Dig. col. 33,977 *et seq.*

### 5. Postponement of acknowledgment—delivery of deed for record.

Section 4 of the act of 1905, *supra*, provides:

"No deed shall be acknowledged before the return day of the

<sup>1</sup> *Bellas v. McCarty*, 10 Watts, 13.

<sup>2</sup> *Steel v. Hull*, 95 Pa. 497.

<sup>3</sup> *Middleton's Exs. v. Middleton*, 106 Pa. 253.

<sup>4</sup> *Gibson v. Winslow*, 38 Pa. 49.

writ under which the sale was had, or pending a motion to set aside the sale, or exceptions made to its confirmation; nor shall a deed be delivered while such a motion or exceptions are pending, whether made before or after acknowledgment, and until the expiration of such further time, if any, as the court may direct by rule, or special or standing order. At the expiration of the times stated, and after the final disposition of all such motions or exceptions, if any such be made, the prothonotary or clerk shall deliver the deed to the sheriff or coroner, who shall forthwith cause it to be registered in the proper office, if registry be required, and recorded in the office for the recording of deeds and so forth, for said county. The acknowledgment of the deed and its delivery to the sheriff or coroner, for the purpose of recording, shall operate as a delivery to the grantee or grantees named therein, with the same effect as if acknowledged in open court, under existing laws, and as if delivered to such grantee or grantees personally."

**6. Deeds need not be recorded by prothonotary.**

Section 5 of the act of 1905, *supra*, provides:

"Such deeds need not be recorded, in whole or in part, in the office of said court; nor recorded, in whole or in part, in the office of said prothonotary or clerk; but the recorder of deeds shall immediately give to the said prothonotary or clerk a certificate stating the place of record thereof, and the latter shall note the same on the docket of the particular case."

The act of May 24, 1893, P. L. 127, required prothonotaries to record sheriff's deeds, which seems to be in conflict with the act, *supra*.

**7. Index of deeds by recorder — manner of.**

Section 6 of the act of 1905, *supra*, provides:

"The recorder of deeds shall index such deeds in the grantee index, in the name of the grantee or grantees therein, and in the grantor index, in the name of the defendant or defendants, and in the name of the *terre-tenant* or *terre-tenants*; and the record thereof, or a duly certified copy of such record, shall be evidence in all cases where the original deeds would be evidence: *Provided*, The minimum charge or fee for recording said instruments or deeds, under this act, shall be two dollars and fifty cents (\$2.50)."

**8. Return of process before acknowledgment of sheriff's deed — rule in Philadelphia.**

Section 1 of rule 36, Philadelphia, is as follows:

"Before the acknowledgment of any deed executed by the sheriff for any lands or tenements sold by him, under or by virtue of any process from any of these courts, shall be received or taken, the process under which such sale shall have been made shall be duly returned and filed with the prothonotary."

**9. Deeds to remain in Prothonotary's office one week after acknowledgment.**

Section 2, rule 36, of Philadelphia, as amended July 22, 1905, provides:



"Sheriffs' and coroners' deeds shall remain in the office of the prothonotary undelivered for one week after acknowledgment, and until after all proceedings to set aside the sale and all exceptions to its confirmation, if any, shall have been finally disposed of, and shall then be delivered to the sheriff or coroner for recording as in the act of April 22, 1905, provided."

The act of May 24, 1893, P. L. 127, required sheriffs' deeds to be recorded by the prothonotary.

#### 10. Rules in Allegheny county.

Rule 131, Allegheny County, provides:

1. Motions to set aside sheriffs' sales of real estate or exceptions to their confirmation may be filed by leave of court, but not otherwise, prior to the acknowledgment of the deed by the sheriff.

2. Upon the acknowledgment of a sheriff's deed, notice thereof with sufficient description to identify the particular sale, shall at once be posted by the prothonotary upon a bulletin board in his office specially provided for that purpose, which notice shall remain until Saturday of the week succeeding the date of the acknowledgment and notice.

3. Upon such acknowledgment exceptions or motions to set aside may be filed as of course at any time prior to said Saturday. If upon said Saturday neither motion to set aside nor exception is pending the prothonotary shall mark the sale confirmed absolutely and re-deliver the deed to the sheriff.

Rule 132, Allegheny County, provides:

"If exceptions or motions to set aside are filed the case shall be immediately placed on the argument list. Exceptions or motions founded upon matters not of record shall be verified by affidavit, otherwise they shall be treated as null."

#### 11. Correction of defective deeds.

Section 104 of the act of 1836, *supra*, which seems to have abridged the act of May 3, 1832, P. L. 404, provides:

"The several courts aforesaid shall have the like power to compel the sheriff or coroner making sale as aforesaid, to perfect the title of purchasers, in cases of defective or informal execution of sheriffs' or coroners' deeds, and they may grant relief in the manner and upon the terms and conditions aforesaid, and with like effect."

#### 12. Correction of error in description.

The act of June 24, 1895, P. L. 246, provides:

"When real estate has been correctly described in the sheriff's return to the writ of *feri facias*, and error has occurred in the description in the writ of *venditioni exponas*, or deed issued thereon, or both, the purchaser, or his successors in title, may apply within one year from the date of the aforesaid deed, to the court of Common Pleas, by petition to correct the error, and the said court having jurisdiction of the aforesaid writ, after due notice to the defendant in the aforesaid writ and all parties in interest, may correct the aforesaid deed, or issue a new deed, in conformity with the writ of *feri facias*, to be acknowledged by the acting sheriff,

and fix the costs as for similar services which shall be paid by the applicant: *Provided*, The purchaser or purchasers, or his or their successor, have possession, under the deed originally executed and no titles have passed: *And provided further*, That errors of description in the *feri facias* shall not be cured by this act."

**13. Special provision in Allegheny county as to defective deeds.**

Section 10 of the act of April 10, 1848, P. L. 448, provides:

"No grant, bargain, sale, or deed of conveyance, of any lands, tenements or hereditaments whatsoever, heretofore made and executed by the sheriff of Allegheny County, upon any judicial proceeding, out of any of the courts of said county, to any *bona fide* purchaser, and acknowledged in open court, shall be deemed, held or adjudged invalid or defective, or insufficient in law, by reason of any informality in setting forth the particulars of such acknowledgment, or by reason of any omission of the proper prothonotary duly to certify the same according to law; but all and every such grant, bargain, sale or deed of conveyance, as heretofore defectively acknowledged and certified, shall be good and valid, and effectual in law to transfer the interest of the defendant in such process, of, in and to such lands, tenements or hereditaments so sold."

(Extended to Erie County by section 14, act of March 11, 1853, P. L. 165).

**14. Petition to amend defective return of sheriff.**

Section 1 of the act of April 21, 1846, P. L. 430, provides:

"In all cases where any real estate hath been heretofore sold or shall hereafter be sold, under any execution issued out of any of the courts of record in this commonwealth, and the sheriff or other officer making such sale, shall have made or hereafter may make a defective or informal return of his proceedings upon each execution, it shall be lawful for the purchaser at such sale, or other person or persons interested therein, to apply by bill or petition to the court out of which such execution issued, setting forth the facts of the case; and after due notice to be given in such manner as the court may direct, to such purchaser or defendant in the execution, as whose property the same may have been sold, or to the executors, or administrators and heirs of such purchaser or defendant, or devisee of such estate, and to all other persons interested therein, to appear in such court, on a day certain to be fixed by said court, and answer such bill or petition; and thereupon the said court shall have power to examine into the facts of the case, and make such order and decree therein as justice and equity may require, either by dismissing such bill or petition, or by correcting and amending such return to the execution, according to the truth of the case; and directing the sheriff, for the time being, to execute a deed of such real estate to the purchaser thereof, or to such other person, or persons, for the use of such as may be entitled thereto, under such sale, upon such terms and conditions as the said court may determine, and justice and equity require; which deed, so executed and acknowledged, as sheriff's deeds are usually

acknowledged, shall be as effectual in law as if the proper return had been made, and the title had been completed, according to law."

By act of March 1, 1861, P. L. 83, the above act was extended to returns of sales of personalty in Carbon County.

The act of March 15, 1862, P. L. 125, requiring prothonotaries to deliver to their successors all uncalled-for sheriff's deeds is obviated by the act of 1905, *supra*, which requires the sheriff to lift them and deliver them to the recorder to be recorded.

#### 15. Acknowledgment — effects.

Where the court directed the sheriff to make an acknowledgment of a deed, it was held not to be reviewable.<sup>5</sup> The record is the best evidence of the acknowledgment.<sup>6</sup> But if the deed itself be produced with due acknowledgment thereon, it is admissible;<sup>7</sup> and the prothonotary's certificate as per act of April 5, 1842, P. L. 240, was held sufficient;<sup>8</sup> also under act of April 2, 1844, P. L. 188, of similar import.<sup>9</sup> The act of 1905, *supra*, however, provides a new practice.

It is no objection that the execution was irregular, after acknowledgment.<sup>10</sup> Where the record shows return of *vend. ex.* and acknowledgment of deed, the presumption of regularity arises.<sup>11</sup> Under the act of 1905, the delivery to the sheriff by the prothonotary is a delivery to the purchaser. But where the purchaser has failed to pay the purchase money and the confirmation is stricken off, he cannot object in an action for the deficit on a re-sale.<sup>12</sup>

#### 16. Proof of title under sheriff's deed.

A sheriff's deed is not by itself proof of title. It must be supported by evidence of judgment and execution process,<sup>13</sup> unless the party claims title by long possession.<sup>14</sup>

Under act of July 8, 1885, P. L. 270,<sup>15</sup> amending section 7 of the act of 1785, the limitation of action is six years as to a vendee in possession.

#### 17. Setting aside and vacating sale.

The general rule is that after acknowledgment of a sheriff's deed, it is too late, to move to set aside the sale, not even for fraud.<sup>16</sup> But after fraud is proved in an action of ejectment or under a bill in equity, it may be vacated.<sup>17</sup> In a recent case, where,

<sup>5</sup> Jackson v. Morter, 82 Pa. 291; Smith v. Hutchinson, 3 Walker, 254; Braddee v. Brownfield, 2 W. & S. 271.

<sup>6</sup> Bellas v. McCarty, 10 Watts, 13; Patterson v. Stewart, 10 Watts, 472.

<sup>7</sup> Foust v. Ross, 1 W. & S. 501.

<sup>8</sup> Dikeman v. Parrish, 6 Pa. 210.

<sup>9</sup> Wilson v. Howser, 12 Pa. 109.

<sup>10</sup> Steele v. Hull, 95 Pa. 497.

<sup>11</sup> Robisson v. Miller, 158 Pa. 177; Buehler v. Buffington, 43 Pa. 278.

<sup>12</sup> Hughes v. Miller, 186 Pa. 375.

<sup>13</sup> Hampton v. Speckenagle, 9 S. & R. 212.

<sup>14</sup> Burke v. Ryan, 1 Dallas, 94.

<sup>15</sup> Vol. 1, p. 327, par. 14.

<sup>16</sup> Cooper v. Wilson, 96 Pa. 409; Evans v. Maury, 112 Pa. 300; Phila. v. McMurray, 18 D. R. 91.

<sup>17</sup> Media, Etc., Co. v. Kelly, 185 Pa. 131.

the purchaser went into possession in consequence of the defendant's having made his appeal a supersedeas, the Supreme Court declined to vacate the sale, but ordered that a writ of restitution issue for the price of the lands sold.<sup>18</sup> Where the deed has not been delivered the court may, upon proper showing strike off or rescind the acknowledgment and set aside the sale,<sup>19</sup> even after the term,<sup>20</sup> and the purchaser cannot by bill compel the sheriff to deliver a deed to him.<sup>21</sup> If the evidence is insufficient to sustain the rule, the court may reinstate the sale.<sup>22</sup> The presumption of regularity which clothes a sheriff's sale protects it from collateral attack.<sup>22a</sup>

It may order a deed to be delivered up and canceled where the sheriff acknowledges it pending a rule to set aside the sale,<sup>23</sup> but notice of the rule must be served on the sheriff.<sup>24</sup> The court may set aside the sale on the application of the purchaser, after acknowledgment, if justice and equity require it;<sup>25</sup> also where the purchaser deterred other bidders by false statements,<sup>26</sup> or, being plaintiff, took an unfair advantage by adjournment.<sup>27</sup> Where the sale and deed have been procured by fraud the party aggrieved may have his remedy in ejectment or by bill.<sup>28</sup>

The latter method is not the proper one to determine the question of title,<sup>29</sup> but of fraud in procuring it, and unless the fraud is proved sufficiently the bill will be dismissed with costs,<sup>30</sup> which the defendant should not be required to pay as purchaser.<sup>31</sup> A deed will not be canceled for light reasons.<sup>32</sup> But where a sale was made on a *fi. fa.* without inquisition, etc., it is void on its face and will be set aside even after delivery of the deed.<sup>33</sup> The court will vacate an acknowledgment on petition of the sheriff where the purchaser fails to comply with the terms.<sup>34</sup>

#### 18. Purchaser's liability as affected by the sale.

It was held that a sale might be set aside where the defendant

<sup>18</sup> *Lengert v. Chaniel*, 208 Pa. 229.

<sup>19</sup> *Vanernan v. Cooper*, 4 Clark, 371.

<sup>20</sup> *Stephens v. Stephens*, 1 Phila. 108; *Jackson v. Morter*, 82 Pa. 291.

<sup>21</sup> *Stephens v. Forsyth*, 14 Pa. 67.

<sup>22</sup> *Weaver v. Lyon*, 5 Atl. 782.

<sup>22a</sup> *Randal v. Gould*, 225 Pa. 45.

<sup>23</sup> *Connelly v. Phila.*, 86 Pa. 110.

<sup>24</sup> *Chadwick v. Patterson*, 2 Phila. 275; *Wrode v. Bancroft*, 1 W. N. C. 374.

<sup>25</sup> *Shakespeare v. Delaney*, 86 Pa. 108; *P. & L. Dig.*, vol. 19, col. 34023.

<sup>26</sup> *Jackson v. Morter*, 82 Pa. 291.

<sup>27</sup> *Vanernan v. Cooper*, 4 Clark, 371.

<sup>28</sup> *Evans v. Maury*, 112 Pa. 300.

<sup>29</sup> *Wright v. MacConnell*, 50 Pitts. L. J. 190.

<sup>30</sup> *Reed v. McNary*, 47 Pitts. L. J. 317.

<sup>31</sup> *Biddle's Ap.*, 19 W. N. C. 219.

<sup>32</sup> *Sipp v. Ins. Co., Etc.*, 8 D. R. 283; *Prudential Trust Co. v. Kay*, 51 Pitts. L. J. 288.

<sup>33</sup> *Black v. Conwell*, 6 D. R. 66.

<sup>34</sup> *Hughes v. Miller*, 186 Pa. 375; *Mutual, Etc., Ass'n v. Ambrose*, 7 D. R. 526.

hired puffers to run up the price on *bona fide* bidders,<sup>35</sup> but the defendant himself has a right to bid up, without being classed as a puffer.<sup>36</sup> The proof of puffing is not an attempt to impeach the record by parol evidence.<sup>37</sup> A bidder may withdraw his bid at any time before the property is struck down to him, and the sheriff cannot abridge this right by onerous conditions to the contrary, because the rule of *caveat emptor* applies to the purchaser.<sup>38</sup> He has the right to withdraw his bid at the common law at any time, before the auctioneer has called "once, twice, thrice, sold to ———."

A bid is withdrawn by implication where the sale is adjourned.<sup>39</sup>

The sheriff cannot make terms different than those prescribed by law, and the purchaser must look out for mortgages, notwithstanding the sheriff's statements.<sup>40</sup> But a condition that a portion of the purchase money be paid down is not illegal.<sup>41</sup> The bidder cannot take a larger title than the defendant's. He must take notice of everything that affects it,<sup>42</sup> including prior conveyance by the defendant.<sup>43</sup>

The plaintiff in the execution, being the purchaser, may not challenge the regularity of his own process.<sup>44</sup> The purchaser cannot take advantage of irregularities and misdescriptions; the defendant alone can do this.<sup>45</sup> But if there was no judgment it is different.<sup>46</sup>

#### 19. Liability on re-sale, for difference.

The purchaser who fails to comply with his bid is liable for the difference on a re-sale, as a general rule. But when the terms are varied and a burden added on the re-sale he is discharged from liability.<sup>47</sup> The same rule applies where the terms are changed by the court.<sup>48</sup> But where he pays down money, on a re-sale, being purchaser for less, he is not entitled to credit for his payment, which goes as a forfeit.<sup>49</sup>

Where a minor child is concerned the purchaser is not relieved, because the widow takes title by agreement, on a re-sale.<sup>50</sup> The

<sup>35</sup> *Donaldson v. M'Roy*, 1 Browne, 346.

<sup>36</sup> *Menges v. Oyster*, 4 W. & S. 20.

<sup>37</sup> *Keener v. Hall*, 19 Pitts. L. J. 126.

<sup>38</sup> *Fisher v. Seltzer*, 23 Pa. 308.

<sup>39</sup> *Donaldson v. Kerr*, 6 Pa. 486.

<sup>40</sup> *Wood v. Levis*, 14 Pa. 9.

<sup>41</sup> *Forster v. Hayman*, 26 Pa. 266.

<sup>42</sup> *Smith v. Painter*, 5 S. & R. 223; *Davis v. Baxter*, 5 Watts, 515; *Hartman v. Pemberton*, 24 Supr. C. 222.

<sup>43</sup> *Friedley v. Scheetz*, 9 S. & R. 156.

<sup>44</sup> *Spang v. Schneider*, 10 Pa. 193.

<sup>45</sup> *Crawford v. Boyer*, 14 Pa. 380; *Emley v. Drum*, 36 Pa. 123.

<sup>46</sup> *Cooper v. Borrall*, 10 Pa. 491.

<sup>47</sup> *Piper v. Martin*, 8 Pa. 206; *Freeman v. Husband*, 77 Pa. 389; *Union, Etc., Bank v. Fife*, 42 Leg. Int. 363; *Zimmerman v. Eckert*, 2 Penny. 221; *Hare v. Bedell*, 98 Pa. 485. (See P. & L. Dig., vol. 19, col. 34041, for discussion of the cases.)

<sup>48</sup> *Weast v. Derrick*, 100 Pa. 509.

<sup>49</sup> *Tindle's Ap.*, 77 Pa. 201.

<sup>50</sup> *Hughes v. Miller*, 205 Pa. 627; 192 Pa. 365; 186 Pa. 375.

action for the deficiency is in assumpsit and an affidavit of defense is sufficient which avers failure of notice and demand by the sheriff before returning his writ, and a re-sale for the benefit of lien creditors who also failed to pay their bid.<sup>51</sup>

The sheriff may return the property as remaining unsold, for lack of payment of the purchase money and hold the bidder for the deficiency, or he may return it sold, tender a deed and sue for the amount of the bid.<sup>52</sup> If he returns it unsold and it is afterwards sold on a *lev. fa.* issued on a prior mortgage he cannot sue for the deficit.<sup>53</sup>

The plaintiff is not obliged, however, to proceed immediately with an alias writ; it is sufficient if he uses ordinary diligence.<sup>54</sup> If there is considerable delay the purchaser is entitled to demand as well as notice of re-sale.<sup>55</sup> Where the terms of sale provide for payment within ten days without demand, the purchaser cannot defend because no demand was made;<sup>56</sup> nor where he was present at the re-sale and evidently had notice and could protect himself.<sup>57</sup> If all the parties treat the first sale as abandoned, the purchaser will not be held for the difference.<sup>58</sup>

#### 20. Tender of deed — suit by sheriff.

The sheriff is not obliged to tender a deed duly acknowledged to the purchaser, before making demand for his bid,<sup>59</sup> or suing for the same.<sup>60</sup> The purchaser cannot object to the striking off by the court, of the acknowledgment without notice to him.<sup>61</sup> The action may be brought in the name of the sheriff, as such, for the use of the parties or it may be brought in his own name.<sup>62</sup>

The limitation begins to run against the right of action from the time the default occurs and not the date of the re-sale.<sup>63</sup> The fact of sale may be proved otherwise than by the sheriff's return.<sup>64</sup> The proper order of proof is first the judgment, then the writ or writs and return—but if this order is reversed, it is not an error which the appellate court will consider.<sup>65</sup> The return of the sheriff is *prima facie* evidence of who was the purchaser, when it shows it.<sup>66</sup>

<sup>51</sup> Connell v. Webb, 175 Pa. 52.

<sup>52</sup> Friedley v. Scheetz, 9 S. & R. 156.

<sup>53</sup> Connell v. Shryock, 167 Pa. 483.

<sup>54</sup> Hartman v. Pemberton, 24 Supr. C. 222.

<sup>55</sup> Holdship v. Doran, 2 P. & W. 9.

<sup>56</sup> Taylor v. Shoener, 12 W. N. C. 504.

<sup>57</sup> Lowry v. Haberlin, 8 D. R. 382.

<sup>58</sup> Girard Life Ins. Co. v. Young, 8 Phila. 16.

<sup>59</sup> Scott v. Greenough, 7 S. & R. 197; Hartman v. Pemberton, 24 Supr. C. 222; Allen v. Gault, 27 Pa. 473.

<sup>60</sup> Leeds v. Seery, 2 W. N. C. 223; Negley v. Stewart, 10 S. & R. 207.

<sup>61</sup> Hughes v. Miller, 186 Pa. 375.

<sup>62</sup> Gaskell v. Morris, 7 W. & S. 32; Freeman v. Husband, 77 Pa. 389; Hartman v. Pemberton, 24 Supr. C. 222; P. & L. Dig., vol. 19, cols. 34054-5.

<sup>63</sup> Funk v. Smith, 66 Pa. 27; Peck v. Whitaker, 103 Pa. 297.

<sup>64</sup> Emley v. Drum, 36 Pa. 123.

<sup>65</sup> Gaskell v. Morris, 7 W. & S. 32.

<sup>66</sup> Hyaskill v. Givin, 7 S. & R. 369; Cash v. Tozer, 1 W. & S. 519.

A return of "sold to A. for B." only binds A.<sup>67</sup> The "down" money may be applied to liens<sup>68</sup> and the court may apply it to the claim of a creditor not covered by the re-sale.<sup>69</sup>

But if legal reasons be given why the purchaser should not forfeit his payment, it will be ordered returned to him.<sup>70</sup> In the action to recover the loss occasioned by the bidder's default the fund cannot be distributed.<sup>71</sup> It is payable to the sheriff who will pay it out under direction of the court,<sup>72</sup> and not otherwise.<sup>73</sup> If the sheriff takes the purchaser's bond, no interest thereon is chargeable.<sup>74</sup> As there is no warranty of title in a sheriff's sale the purchaser must look out for himself and not come back on the sheriff or the plaintiff in the writ.<sup>75</sup>

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<sup>67</sup> *Lelar v. Holmes*, 18 Pa. 281.

<sup>68</sup> *Wright's Ap.*, 25 Pa. 373.

<sup>69</sup> *Tindle's Ap.*, 77 Pa. 201; *Dagg v. Thomas*, 48 Pitts. L. J. 210.

<sup>70</sup> *Safe, Etc., Co. v. Miller*, 8 Supr. C. 160.

<sup>71</sup> *Peck v. Whitaker*, 103 Pa. 297.

<sup>72</sup> *Whitaker v. Peck*, 3 Kulp, 159; *Smith v. Wilson*, 152 Pa. 552.

<sup>73</sup> *Ferris' Ap.*, 18 W. N. C. 89; *P. & L. Dig.*, vol. 19, col. 34065.

<sup>74</sup> *Oliphant v. Frost*, 9 Pa. 308; *Gardner v. Klinefelter*, 9 W. & S. 59.

<sup>75</sup> *Weidler v. Farmers' Bank, Etc.*, 11 S. & R. 134; *P. & L. Dig.*, vol. 19, col. 34068.

## CHAPTER XXXI.

### TITLE OF PURCHASER AT SHERIFF'S SALE.

1. Extent of estate.
2. Quantity, appurtenances, etc.
3. Character of purchaser in relation to the title.
4. When the title vests.
5. Title affected by outstanding titles or equities.
6. Title as affected by irregularities, etc.
7. Title as affected by fraud by purchaser.
8. Agreement to reconvey.
9. Agreement to hold for another.
10. Subsequent sale.
11. Purchasers of different parcels under one incumbrance.
12. Estoppel and waiver.
13. Discharge of liens.
14. Sales subject to liens.

#### 1. Extent of estate.

As already noted the purchaser generally takes no greater nor less estate than that which the defendant held.<sup>1</sup> All the sheriff can sell is embraced in "the right, title and interest of the defendant."<sup>2</sup> The test is what could the defendant himself convey;<sup>3</sup> did the judgment bind or affect the interest. If not, as in case of a trust estate, no title would pass.<sup>4</sup> The sale of land of defendant as "reputed owner," gives the purchaser a standing to redeem it from a tax sale.<sup>5</sup>

Whatever is the real interest of the defendant, unaffected by fraudulent conveyances or otherwise, passes to the purchaser by the sale.<sup>6</sup> The sheriff must sell the entire interest and cannot couple it with conditions or reservations.<sup>7</sup> But if the levy be of only the undivided moiety the sale confers no more.<sup>8</sup> Where the levy covers a greater interest than the *vend. ex.* it is held that the latter is amendable by the *fi. fa.* and therefore carries all that was levied.<sup>9</sup> The levy being of the entire interest of defendant, but wrongly described as one undivided half, covers the whole interest though

<sup>1</sup> Middleton v. Middleton, 106 Pa. 252; Fluck v. Replogle, 13 Pa. 405.

<sup>2</sup> Coulter v. Phillips, 20 Pa. 154; Reichenbach v. McKean, 95 Pa. 432; Aderhold v. Oil Well Supply Co., 158 Pa. 401; P. & L. Dig., vol. 19, cols. 34131-2-3.

<sup>3</sup> Scheetz v. Fitzwater, 5 Pa. 126.

<sup>4</sup> Shryock v. Waggoner, 28 Pa. 430.

<sup>5</sup> Shearer v. Woodburn, 10 Pa. 511.

<sup>6</sup> Snyder v. Christ, 39 Pa. 499; Zuver v. Clark, 104 Pa. 222; Kreamer v. Schroeder, 29 C. C. 59.

<sup>7</sup> Aulenbaugh v. Umbehauer, 4 Watts, 48; 3 W. & S. 259; Reigle v. Seeger, 2 P. & W. 340; Fretz v. Heller, 2 W. & S. 397; McLaughlin v. Shields, 12 Pa. 283.

<sup>8</sup> Carpenter v. Cameron, 7 Watts, 51; McCormick v. Harvey, 9 Watts, 482.

<sup>9</sup> De Haas v. Bunn, 2 Pa. 335.



greater.<sup>10</sup> A reasonable degree of latitude is allowed in the description of the particular estate.<sup>11</sup>

Where land is sold subject to mortgages the purchaser takes the equity of redemption,<sup>12</sup> which may be extinguished by a sale on the mortgages,<sup>13</sup> and, therefore, he is not entitled to pay the amount to the mortgagee, take an assignment, and recover from the mortgagor,<sup>14</sup> nor is he entitled to subrogation.<sup>15</sup> The interest of the defendant which passes includes a sum charged on the land but payable *in futuro*.<sup>16</sup> Where the purchaser agrees to pay it he is held to it and it must go to the creditors as part of the purchase money.<sup>17</sup> But where the land is sold subject to a charge the purchaser is bound to the burden and so is a subsequent purchaser of his interest.<sup>18</sup> Where the title of defendant is only that of bailee with an option to purchase, the title which passes is subject to the conditions of the bailment.<sup>19</sup>

## 2. Quantity, appurtenances, etc.

The quantity of land which passes to the purchaser must generally be determined by the levy,<sup>6</sup> since the sheriff cannot sell more land than he has levied upon.<sup>7</sup> But if the levy is upon all the land in possession of the defendant it will not be restricted to the number of acres mentioned—it will take the entire tract.<sup>8</sup> And where the defendant purchases a small tract adjoining the main tract and uses it with it a sale of the tract passes title to it.<sup>9</sup> The title which passes as to quantity is not determinable always by the description.<sup>10</sup> Where the description is defective, the purchaser may take a release from the defendant and thus cure it.<sup>11</sup>

Parol evidence is admissible to identify the property, and on this, the question is for the jury.<sup>12</sup> But a bidder cannot testify to what was his understanding;<sup>13</sup> nor as to his expectation and belief.<sup>14</sup> Where the points of the compass do not agree with the

<sup>10</sup> Trout v. Kennedy, 47 Pa. 387.

<sup>11</sup> Heartley v. Beam, 2 Pa. 165.

<sup>12</sup> Garo v. Thompson, 7 Watts, 416.

<sup>13</sup> Street v. Sprout, 5 Watts, 272.

<sup>14</sup> Cooley's Ap., 1 Grant, 401; Bank v. Burns, 87 Pa. 491.

<sup>15</sup> Steele v. Walter, 204 Pa. 257.

<sup>16</sup> McCoy v. Frey, 10 York, 9; Smith v. Hartman, 5 York, 55.

<sup>17</sup> Fretz v. Heller, 2 W. & S. 397.

<sup>18</sup> Hart v. Homiller, 20 Pa. 248.

<sup>19</sup> Cobb v. Deiches, 7 Supr. C. 252; Edward's Ap., 105 Pa. 103.

<sup>6</sup> Hoffman v. Danner, 14 Pa. 25; Grubb v. Guilford, 4 Watts, 223.

<sup>7</sup> Rodgers v. Gibson, 4 Yeates, 111; Sergeant v. Ford, 2 W. & S. 122; Kohler v. Kleppinger, 5 Atl. 750.

<sup>8</sup> Swartz v. Moore, 5 S. & R. 257; Zeigler v. Houtz, 1 W. & S. 533.

<sup>9</sup> Buckholder v. Sigler, 7 W. & S. 154.

<sup>10</sup> McCloskey, v. McCloskey, 2 Mona. 703; McArthur v. Sherwood, 177 Pa. 513.

<sup>11</sup> Iddings v. Cairns, 2 Grant, 88.

<sup>12</sup> Hoffman v. Danner, 14 Pa. 25; Carroll v. Miner, 1 Supr. C. 439; Woodburn v. Farmers', Etc., Bank, 5 W. & S. 447; Schall v. Miller, 3 Wharton, 250.

<sup>13</sup> Carroll v. Miner, 1 Supr. C. 439.

<sup>14</sup> Cannon v. Boyd, 73 Pa. 179.

adjoiners the latter will control as a matter of law.<sup>15</sup> It is for the jury to find whether a certain lot was included in the levy.<sup>16</sup> The sheriff cannot divide a tract in levying and the sheriff's descriptions must yield to the monuments on the ground which govern always.<sup>17</sup> Where lots are sold calling for streets as boundaries the purchaser takes title to the middle of the streets when they are easements.<sup>18</sup>

At the common law the purchaser takes everything growing upon the land or issuing out of it which belongs to the defendant;<sup>19</sup> and this includes timber, fence rails and posts and manure, but not firewood cut before the writ issued, nor new fencing not cut on the land and not set in place.<sup>20</sup> It does not include *fructus industriales* which belong to the tenant and are personalty, as already seen, *supra*, in sales of personal property; nor crops raised by the defendant himself when suffered to remain as tenant.<sup>21</sup> The sale carries an appurtenant easement without being mentioned.<sup>22</sup>

### 3. Character of purchaser in relation to the title.

If the officer who makes the sale also becomes the purchaser, he will be affected with a trust for defendant unless the latter consents.<sup>23</sup> In the absence of fraud the owner may disaffirm the sale and repay the purchase money.<sup>24</sup> The crier of a deputy marshal, it seems, does not stand in the same relation as a deputy sheriff, unless he repels or precludes bidders.<sup>25</sup>

When the attorney for the plaintiff in the execution bids in the property at less than the claim, there is a trust created for his client.<sup>26</sup> The same is true of an agent or trustee.<sup>27</sup> The entry of an attorney's name on the margin of the record is not of itself notice of such trust to one who purchases from the attorney.<sup>28</sup> He becomes trustee when his client elects.<sup>29</sup> If he buys from the purchaser at the sale, the trust has no application.<sup>30</sup>

If the employment of the attorney is specific, as to prevent condemnation, he may buy without being affected with a trust.<sup>31</sup> An agent cannot covinously buy the property of his principal at the sale and retain title.<sup>32</sup> One who is nominally only the defendant

<sup>15</sup> Stroup v. McCloskey, 10 Atl. 421, 481.

<sup>16</sup> Carroll v. Miner, 7 Supr. C. 467.

<sup>17</sup> Lodge v. Barnett, 46 Pa. 477.

<sup>18</sup> Baker v. Chester Gas Co., 73 Pa. 116.

<sup>19</sup> Barrell v. Dewart, 37 Pa. 134.

<sup>20</sup> Gourley v. Lukens, 4 Montg. Co. 15.

<sup>21</sup> Potter v. Lambie, 142 Pa. 535.

<sup>22</sup> Cope v. Grant, 7 Pa. 488; Richmond v. Bennett, 205 Pa. 470; Wright v. Chestnut Hill, Etc., Co., 45 Pa. 475.

<sup>23</sup> Lazarus v. Bryson, 3 Binney, 54; Powel v. Barrington, 1 Clark, 239.

<sup>24</sup> Jackson v. McGinness, 14 Pa. 331.

<sup>25</sup> Swires v. Brotherline, 41 Pa. 135.

<sup>26</sup> Barrett v. Bamber, 81 Pa. 247.

<sup>27</sup> Eshelman v. Lewis, 49 Pa. 410.

<sup>28</sup> Barlow v. Beall, 20 Pa. 178.

<sup>29</sup> Downey v. Gerrard, 3 Grant, 64.

<sup>30</sup> Maynard's Case, 1 Walker, 472; Brady v. Maynard, 23 Leg. Int. 276.

<sup>31</sup> Devinney v. Norris, 8 Watts, 314.

<sup>32</sup> Everly v. Harrison, 167 Pa. 355.

has a right to buy the land.<sup>33</sup> A joint debtor may, with his own means purchase his co-defendant's land, without becoming trustee.<sup>34</sup> If a sale is made at the instance of the defendant to bring about a fraud on his creditors, no title is vested by it.<sup>35</sup> A similar rule applies where a husband procures fraudulently the sale of his wife's property.<sup>36</sup> But the purchase by a wife of her husband's lands vests a good title in her as against him and his heirs, although she had no separate estate to draw from.<sup>37</sup>

A tenant who has an incumbrance against the estate cannot buy it at sheriff's sale without notice to the landlord;<sup>38</sup> but after the relation has terminated the rule is different.<sup>39</sup> One who holds a mortgage that is fraudulent is not estopped from buying the land when sold on a stranger's judgment.<sup>40</sup> County commissioners are authorized to buy lands for the county to protect it.<sup>41</sup>

#### 4. When the title vests.

The title which the purchaser takes under a lien judgment, has been held to be as large as the defendant's was when the judgment was entered.<sup>42</sup> This is peculiarly so of purchase money judgments.<sup>43</sup> "The general rule is that the sale on the judgment overreaches the *mesne* acts of the debtor and passes the title discharged from them."<sup>44</sup> The deed itself relates back to the day of sale;<sup>45</sup> but not the right of possession and consequently accruing rent.<sup>46</sup> Nor is the purchaser liable for accruing ground rent,<sup>47</sup> or taxes levied meanwhile.<sup>48</sup> The defendant in the execution is entitled to the fire insurance for loss between the date of sale and the acknowledgment of the deed.<sup>49</sup> But the purchaser's inchoate interest will be bound by the lien of a judgment entered meantime.<sup>50</sup>

The interest of the purchaser when the land is knocked down to him is fixed and cannot be defeated by defendant's offer to pay on the return day of the *vend. ex.*<sup>51</sup> The title thus acquired is subject to execution and sale.<sup>52</sup> His tenant cannot be treated as if he

<sup>33</sup> Kern v. Murphy, 2 Miles, 157.

<sup>34</sup> Gibson v. Winslow, 38 Pa. 49.

<sup>35</sup> Balliet v. Brown, 103 Pa. 546.

<sup>36</sup> Swisshelm's Ap., 56 Pa. 475.

<sup>37</sup> Bowser v. Bowser, 82 Pa. 57.

<sup>38</sup> Matthew's Ap., 104 Pa. 444.

<sup>39</sup> McHenry's Ap., 61 Pa. 432.

<sup>40</sup> Kellum v. Smith, 33 Pa. 158.

<sup>41</sup> Vankirk v. Clark, 16 S. & R. 286.

<sup>42</sup> Coulter v. Phillips, 20 Pa. 154.

<sup>43</sup> Barb v. Sayers, 107 Pa. 246.

<sup>44</sup> Sergeant, J., in McCormick v. McMurtrie, 4 Watts, 192; Bury v. Sieber, 5 Pa. 431.

<sup>45</sup> Elliott v. Pearsoll, 4 Clark, 157; Hawk v. Stouch, 5 S. & R. 157; Scheerer v. Stanley, 2 Rawle, 276; Hoyt v. Koons, 19 Pa. 277.

<sup>46</sup> Garrett v. Dewart, 43 Pa. 342; Hardenburg v. Beecher, 104 Pa. 20.

<sup>47</sup> Thomas v. Connell, 5 Pa. 13.

<sup>48</sup> Speakman v. Natl. Bank, Etc., 1 Kulp, 241.

<sup>49</sup> Collins v. London Ass. Corp'n, 165 Pa. 298.

<sup>50</sup> Morrison v. Wurtz, 7 Watts, 437; Slater's Ap., 28 Pa. 169.

<sup>51</sup> Young's Ap., 2 P. & W. 380.

<sup>52</sup> Hartman v. Stahl, 2 P. & W. 223.

were a mere intruder;<sup>53</sup> and the purchaser may have damages for entry under eminent domain.<sup>54</sup>

##### 5. Title affected by outstanding titles or equities.

The purchaser at sheriff's sale, being a purchaser for value,<sup>55</sup> is unaffected by a deed or mortgage which is defectively recorded or a lien void on its face;<sup>56</sup> nor by any secret or unrecorded transfer of which he has had no notice, actual or constructive.<sup>57</sup> He has a right to rely upon the verity of the record of the judgment under which he purchases.<sup>58</sup> He must take notice of the state of the record on the date of the sale.<sup>59</sup> An equitable estate cannot be converted into a legal one by a sale.<sup>60</sup> He is bound to inquire into the origin and status of defendant's title on the day of sale;<sup>61</sup> as well as the status of the judgment.<sup>62</sup> And where the land was devised subject to a charge, he must inquire of the legal representatives as to the status of the estate.<sup>63</sup> When notice of a resulting trust by one in possession, is given at the sale, the purchaser is put on his inquiry.<sup>64</sup>

He must not ignore visible evidences of possession and enjoyment.<sup>65</sup> He is bound to inquire after distinct notice of facts or circumstances which would affect the title.<sup>66</sup> Notice of a trust is sufficient at the sale and before the property is bid off.<sup>67</sup> The practice is to file written notice with the sheriff to be read by him, when he calls the tract; but if he fails to read the notice the party, his agent or attorney may read or give notice. Such notice is binding to the extent of defendant's very interest.<sup>68</sup>

A mortgagee stands on a different ground and notice must be brought home to him at the time of taking the mortgage.<sup>69</sup> A purchaser must take notice, when brought home to him, of an assignment for creditors in another county where the assignor resides, though not recorded where the land lies.<sup>70</sup>

<sup>53</sup> *Smith v. Grim*, 26 Pa. 95.

<sup>54</sup> *Penna., Etc., R. Co. v. Cleary*, 125 Pa. 442.

<sup>55</sup> *Irvine v. Campbell*, 6 Binney, 118.

<sup>56</sup> *Goepp v. Gartiser*, 35 Pa. 130; *Banks v. Ammon*, 27 Pa. 172; *Stewart v. Freeman*, 22 Pa. 120.

<sup>57</sup> *Clark v. Campbell*, 2 Rawle, 215; *Meehan v. Williams*, 48 Pa. 238; *Dewaters v. Kuhnle*, 199 Pa. 439.

<sup>58</sup> *Levan v. Millholland*, 114 Pa. 49.

<sup>59</sup> *Stewart v. Freeman*, 22 Pa. 120; *Fillman v. Divers*, 31 Pa. 429.

<sup>60</sup> *Morrison v. Funk*, 23 Pa. 421.

<sup>61</sup> *Gingrich v. Foltz*, 19 Pa. 38; *Beal v. Stehley*, 21 Pa. 376; *Aderhold v. Oil Well Supply Co.*, 158 Pa. 401; *Rhines v. Baird*, 41 Pa. 256.

<sup>62</sup> *Biddle v. Tomlinson*, 115 Pa. 299.

<sup>63</sup> *Tarr v. Robinson*, 158 Pa. 60.

<sup>64</sup> *McLaughlin v. Fulton*, 104 Pa. 161; *Sill v. Swackhammer*, 103 Pa. 7.

<sup>65</sup> *Beaver Falls, Etc., Co. v. Wilson*, 83 Pa. 83.

<sup>66</sup> *Miller v. Baker*, 166 Pa. 414; 160 Pa. 172.

<sup>67</sup> *Moyer v. Shick*, 3 Pa. 242; *Reed's Ap.*, 13 Pa. 475.

<sup>68</sup> *Barnes v. McClinton*, 3 P. & W. 67; *Ross v. Baker*, 72 Pa. 186; *Mott v. Clark*, 9 Pa. 399.

<sup>69</sup> *Dunning v. Reese*, 4 Kulp, 168; *Boyer v. Webber*, 22 Supr. C. 35; *Spackman v. Ott*, 65 Pa. 131.

<sup>70</sup> *Follweiler v. Lutz*, 102 Pa. 585.

#### 6. Title as affected by irregularities, etc.

The acknowledgment of the sheriff's deed to the purchaser while it cures mere irregularities does not make valid an illegal or void judgment or execution,<sup>71</sup> or where there was no *fi. fa.* preceding a *vend. ex.*<sup>72</sup>

Section 9 of the act of 1705, 1 Sm. L. 57, does not protect a purchaser in such cases.<sup>1</sup> If the judgment is only voidable, however, title will pass,<sup>2</sup> and it is not affected by a subsequent reversal.<sup>3</sup> All that can be awarded is the price paid, by way of restitution,<sup>4</sup> even where the execution plaintiff is the purchaser.<sup>5</sup> A judgment is not void but voidable where premature<sup>6</sup> or when entered on a *sci. fa.* although the original may be void,<sup>7</sup> or the *sci. fa.* may be irregular;<sup>8</sup> or where the defendant is declared a lunatic after judgment although the time when lunacy began was anterior, but of which the purchaser had no notice.<sup>9</sup> The sale of growing timber on a tract without limit of time, on a *fi. fa.*, without inquisition, passes no title,<sup>10</sup> it being *fructus naturales*; but where there is a contract to cut and remove such timber within thirty days, it becomes personalty.<sup>11</sup>

Where a judgment has been paid but is not satisfied of record, a stranger without notice, who buys at a sale under it is protected;<sup>12</sup> but not the execution plaintiff nor any one who had notice.<sup>13</sup> But a purchaser from the sheriff's vendee, *bona fide* and without notice, is protected.<sup>14</sup>

A subsequent entry of satisfaction does not affect the purchaser.<sup>15</sup>

#### 7. Title as affected by fraud by purchaser.

Where a purchaser by false representations or unfair devices deterred bidders, or procured the property at a reduced value, he becomes a trustee *ex maleficio* for the defendant and the latter may

<sup>71</sup> Book v. Edgar, 3 Watts, 29; Bowen v. Bowen, 6 W. & S. 504; Caldwell v. Walters, 18 Pa. 79; Hecker v. Haak, 88 Pa. 238; Brundred v. Egbert, 164 Pa. 615.

<sup>72</sup> Temple v. Miller, 1 Luz. L. R. 717; Glancey v. Jones, 4 Yeates, 212.

<sup>1</sup> Caldwell v. Walters, 18 Pa. 79.

<sup>2</sup> Sterrett v. Howarth, 76 Pa. 438; Jermon v. Lyon, 81 Pa. 107.

<sup>3</sup> Feger v. Keefer, 6 Watts, 297; Kirk v. Eaton, 10 S. & R. 103; Feger v. Kroh, 6 Watts, 294; Hecker v. Haak, 88 Pa. 238; Warder v. Tainter, 4 Watts, 270.

<sup>4</sup> St. Bart's Church v. Wood, 61 Pa. 96; Levan v. Millholland, 114 Pa. 49.

<sup>5</sup> Lengert v. Chaniel, 208 Pa. 229.

<sup>6</sup> Allison v. Rankin, 7 S. & R. 269; Union Transfer Co. v. Lea, 4 Walker, 487.

<sup>7</sup> Connolly v. Jenkins, 1 Lack. L. N. 279; Duff v. Wyncoop, 74 Pa. 300.

<sup>8</sup> Hays v. Shannon, 5 Watts, 548.

<sup>9</sup> Shannon v. Newton, 132 Pa. 375.

<sup>10</sup> Pattison's Ap., 61 Pa. 294.

<sup>11</sup> McClintock's Ap., 71 Pa. 365.

<sup>12</sup> Samms v. Alexander, 3 Yeates, 268.

<sup>13</sup> Gibbs v. Neely, 7 Watts, 305; Hoffman v. Strohecker, 7 Watts, 86.

<sup>14</sup> Saunders v. Gould, 124 Pa. 237.

<sup>15</sup> Gibson v. Winslow, 38 Pa. 49. (For cases illustrating what irregularities are cured by the acknowledgment of the sheriff's deed, see P. & L. Dig., vol. 19, cols. 34207-8-9, *et seq.*)

hold the title without tendering a return of the money paid. The sale is void.<sup>16</sup> Such is the case where the purchaser falsely holds out that he is bidding for the benefit of the defendant and his family and thus keeps down the price.<sup>17</sup>

The statements must be false and result in depressing the price.<sup>18</sup> If not false and fraudulent, he will not be affected.<sup>19</sup> The question of fraud is for the jury.<sup>20</sup> If the price be a fair one the fraudulent element is eliminated.<sup>21</sup> An attorney's requesting a bidder to withdraw his bid, when he has no connection with the defendant and acts solely in the interest of his client, does not affect the purchaser, who is the attorney himself.<sup>22</sup> It is no fraud for creditors who have liens against a property to join in the purchase, especially where the title is dubious.<sup>23</sup> But, if the purpose is to depress the price and squeeze out junior creditors, it will be a fraud on them and the defendant.<sup>24</sup>

A secret agreement of this kind is contrary to public policy,<sup>25</sup> unless the defendant and other creditors are aware of it and consent to it,<sup>26</sup> or where the purchaser agrees to hold it for the satisfaction of his own claim and other creditors,<sup>27</sup> if the price is not depressed thereby.<sup>28</sup> If the sale is fraudulent no tender of the amount paid is necessary to recover the land.<sup>29</sup>

#### 8. Agreements to reconvey.

Where the purchaser on consideration agrees with a defendant to reconvey on re-payment of his bid, he will be held to it.<sup>30</sup> But it must be in writing, otherwise the statute of frauds would prevent its enforcement.<sup>31</sup>

But if by a parol agreement the purchaser procures at a sacrifice, he will take no title.<sup>32</sup> But the covin or fraud must be at the

<sup>16</sup> *Faust v. Haas*, 73 Pa. 295; *Harbison v. Reed*, 29 Pitts. L. J. 262; *Johnson v. Oberholtzer*, 1 Walker, 103; P. & L. Dig., vol. 19, cols. 34220-1; *Power v. Thorp*, 92 Pa. 346; *Abbey v. Dewey*, 25 Pa. 413; *Barton v. Hunter*, 101 Pa. 406; *Seyler v. Carson*, 69 Pa. 81.

<sup>17</sup> *Walter v. Gernant*, 13 Pa. 515; *Hogg v. Wilkins*, 1 Grant, 67; *Christy v. Sill*, 95 Pa. 380.

<sup>18</sup> *Dick v. Cooper*, 24 Pa. 217.

<sup>19</sup> *Haines v. O'Conner*, 10 Watts, 313; *Sharp v. Long*, 28 Pa. 433.

<sup>20</sup> *Oram v. Rothermal*, 98 Pa. 300; *Brotherline v. Swires*, 48 Pa. 68; *Pentz v. Clark*, 100 Pa. 446.

<sup>21</sup> *Kistler's Ap.*, 73 Pa. 393.

<sup>22</sup> *Feely v. Hoover*, 130 Pa. 107.

<sup>23</sup> *Huber v. Crosland*, 140 Pa. 575.

<sup>24</sup> *Smull v. Jones*, 6 W. & S. 122; 1 W. & S. 128.

<sup>25</sup> *Hays' Est.*, 159 Pa. 381.

<sup>26</sup> *Phillips v. Hull*, 101 Pa. 567; *Maffet v. Ijams*, 103 Pa. 266; *Hotchkiss v. Lamphier*, 9 D. R. 23.

<sup>27</sup> *Blaich v. Bixenstein*, 2 W. N. C. 301.

<sup>28</sup> *Braden v. O'Neil*, 183 Pa. 462.

<sup>29</sup> *McGeary v. Jenkins*, 187 Pa. 440.

<sup>30</sup> *Kramer v. Dinsmore*, 152 Pa. 264; *Pratt v. Darlington*, 17 Supr. C. 231.

<sup>31</sup> *Fox v. Heffner*, 1 W. & S. 372; *Bennett v. Dollar Savings Bank*, 87 Pa. 382; 76 Pa. 402; P. & L. Dig., vol. 19, cols. 34244-5-6-7-8.

<sup>32</sup> *Sheriff v. Neal*, 6 Watts, 534; P. & L. Dig., vol. 19, cols. 34251-2-3-4.

time of the sale and not later<sup>33</sup> and must be clearly proved.<sup>34</sup> If the purchaser deters others from bidding, but with the consent of the defendant, no trust arises.<sup>35</sup> The proof of the agreement must satisfy.<sup>36</sup> A trust will not be established on light evidence and mere circumstances which are indefinite.<sup>37</sup> And where the facts show that defendant knew of the entire transaction the trust is not established.<sup>38</sup>

#### 9. Agreement to hold for another.

Where a purchaser agrees to buy for one who has an interest in the land and is not the defendant, he will hold as trustee.<sup>39</sup> Upon due proof a trust will be decreed.<sup>40</sup> The defendant having the right to redeem must do so within a reasonable time<sup>41</sup> where no time is fixed.

#### 10. Subsequent sale.

The title obtained cannot be nullified by a subsequent sale under an execution against the same defendant, although the second deed is first acknowledged, unless by long delay.<sup>42</sup> The second purchaser must take notice of the state of the record.<sup>43</sup> But if the first sale is fraudulent and void, the valid sale carries title to the land.<sup>44</sup>

#### 11. Purchasers of different parcels under one incumbrance.

Where a mortgage covers several parcels which are sold separately to different purchasers, they must each contribute in proportion to their respective values to be found by the jury.<sup>45</sup> This rule also applies to successive mortgages.<sup>46</sup> But where considerable time intervenes and the acts of the parties must be considered the rule may be modified to reach the equities of the case.<sup>47</sup>

#### 12. Estoppel and waiver.

The defendant is estopped from setting up informalities in the sale, when ejectment is brought by the purchaser;<sup>1</sup> and he cannot

<sup>33</sup> Shaffner v. Shaffner, 145 Pa. 163.

<sup>34</sup> Kraft v. Smith, 117 Pa. 183.

<sup>35</sup> Phillips v. Hull, 101 Pa. 567. (See Fellows v. Loomis, 156 Pa. 74.)

<sup>36</sup> Beckett v. Allison, 188 Pa. 279; Harris v. Brown, 202 Pa. 16; Dowdall v. Wisher, 167 Pa. 475.

<sup>37</sup> Huffnagle v. Blackburn, 137 Pa. 633.

<sup>38</sup> Evans v. McKee, 152 Pa. 89.

<sup>39</sup> Boynton v. Housler, 73 Pa. 453; Wolford v. Herrington, 74 Pa. 311; 86 Pa. 39; Cowperthwaite v. First Natl. Bank, Etc., 102 Pa. 397; Blaylock's Ap., 73 Pa. 146.

<sup>40</sup> Garner's Ap., 1 Walker, 438; Jenkinson Co. v. Porzel, 188 Pa. 559.

<sup>41</sup> Salsbury v. Black, 119 Pa. 200; P. & L. Dig., vol. 19, col. 34273.

<sup>42</sup> Hoyt v. Koons, 19 Pa. 277; Stoeve v. Rice, 3 Wharton, 21.

<sup>43</sup> McFee v. Harris, 25 Pa. 102.

<sup>44</sup> Hecker v. Haak, 88 Pa. 238; Page v. Simpson, 172 Pa. 288.

<sup>45</sup> Carpenter v. Koons, 20 Pa. 222.

<sup>46</sup> Milligan's Ap., 104 Pa. 503.

<sup>47</sup> Gible's Est., 134 Pa. 366; Jones' Est., 169 Pa. 392.

<sup>1</sup> Bowen v. Bowen, 6 W. & S. 504; Crowell v. McConkey, 5 Pa. 168.

aver the invalidity of the judgment;<sup>2</sup> or that it was not revived within five years;<sup>3</sup> or that his waiver of inquisition was obtained by fraud,<sup>4</sup> or that machinery in a factory belonged to him and not his wife, who owned the land and with him gave the mortgage.<sup>5</sup> An heir may by his acts and participation in the sale of his ancestor's land, estop himself from objecting;<sup>6</sup> but where the mortgage was void, and the rights of minors concerned, they were not estopped from asserting their rights.<sup>7</sup> However, after the disability is removed a vendor may ratify his acts and be estopped from challenging them.<sup>8</sup> One in possession as purchaser at a judicial sale, subject to a mortgage, may defend against the purchaser under the mortgage sale.<sup>9</sup> Where a judgment becomes merged in the title of the plaintiff, a subsequent owner does not need to object to the *fi. fa.* under the extinct judgment.<sup>10</sup> Although a sale might have been avoided by the defendant he may by long acquiescence ratify it, so that neither he nor his creditors can object.<sup>11</sup> A defendant who receives a part of the proceeds of the sale is estopped from denying its validity.<sup>12</sup>

Where one of the heirs receives her share of the purchase money she is estopped.<sup>13</sup> But a committee for a lunatic can waive no right, so as to bind his successor.<sup>14</sup> Although defendants may ratify a sale liable to objection they cannot make a void sale valid, and the fact that the proceeds are applied to their debts does not estop them.<sup>15</sup> But a defendant may lose his right to object on account of a misapplication of the fund, by delay;<sup>16</sup> or the distribution of it on an inconsistent ground.<sup>17</sup> Where the defendant makes representations to the purchaser on which he relies, he cannot afterwards be heard to allege the contrary.<sup>18</sup> But only those immediately concerned are estopped.<sup>19</sup>

The creditor under whose writ the sale is made is also estopped from denying its validity.<sup>20</sup>

<sup>2</sup> Weaver v. Lutz, 102 Pa. 593.

<sup>3</sup> Hinds v. Scott, 11 Pa. 19.

<sup>4</sup> Jackson v. Morter, 82 Pa. 291.

<sup>5</sup> Buck's Ap., 2 Penny. 327.

<sup>6</sup> Berg v. McLafferty, 17 W. N. C. 75. (See 21 W. N. C. 547.)

<sup>7</sup> Spencer v. Jennings, 139 Pa. 198.

<sup>8</sup> Bixler v. Gilleland, 4 Pa. 156.

<sup>9</sup> Natl. Transit Co. v. Weston, 121 Pa. 485.

<sup>10</sup> Koons v. Hartman, 7 Watts, 20.

<sup>11</sup> Spragg v. Shriver, 25 Pa. 282; Klopp v. Witmoyer, 43 Pa. 226; Critchlow v. Critchlow, 35 Pitts. L. J. 306; Albright v. Lehigh, Etc., Co., 203 Pa. 65; Wray v. Miller, 20 Pa. 111; Lusk's Ap., 108 Pa. 152.

<sup>12</sup> Duff v. Wynkoop, 74 Pa. 300; Wilkins v. Anderson, 11 Pa. 399; Hamilton v. Hamilton, 4 Pa. 193; Johnston v. Harvey, 2 P. & W. 82.

<sup>13</sup> Smith v. Warden, 19 Pa. 424.

<sup>14</sup> Warden v. Eichbaum, 14 Pa. 121. (But see S. C., 3 Grant, 42.)

<sup>15</sup> Gardner v. Sisk, 54 Pa. 506; Henry v. McClellan, 146 Pa. 34; Gibbs v. Tiffany, 4 Supr. C. 29.

<sup>16</sup> Jermon v. Lyon, 81 Pa. 107.

<sup>17</sup> Omwake v. Harbaugh, 148 Pa. 278.

<sup>18</sup> Buchanan v. Moore, 13 S. & R. 304; McLaughlin v. Shields, 12 Pa. 283.

<sup>19</sup> Shearer v. Woodburn, 10 Pa. 511; Gibbs v. Tiffany, 4 Supr. C. 29.

<sup>20</sup> Smith v. Exchange Bank, Etc., 110 Pa. 508; Rapp v. Crawford, 146



### 13. Discharge of liens.

By a sheriff's sale of land all liens capable of being ascertained are divested, except those saved by statute.<sup>21</sup> And this is so whether the money realized is sufficient to pay them or not.<sup>22</sup>

When unpatented lands are sold, the commonwealth's claim being paramount, is not discharged.<sup>23</sup>

Where the deed to the land sold contains a reservation of premises and charges, the purchaser takes the land subject thereto;<sup>24</sup> but not arrears of interest, unless the charge is followed by a mortgage.<sup>25</sup> A charge for testator's widow is not divested, under a later incumbrance;<sup>26</sup> nor the wife's interest, where she refused to join in the conveyance of her husband's land.<sup>27</sup> But if the incumbrance reserved in the deed has no existence, the title goes free. The cases where liens are not discharged are where liens are created by wills or deeds as permanent provisions for wives and children; where the incumbrance from its nature does not admit of valuation; and where by the agreement the incumbrance is to run with the land.<sup>28</sup> Where the sale is made subject to a fixed lien, as a ground rent or a mortgage, all prior liens are thereby saved.<sup>29</sup> Liens will be discharged, notwithstanding the defendant's attorney purchased for his client.<sup>30</sup> A sale on a mortgage will divest an interest descended from a widow's election against the will, when no record is made.<sup>30a</sup>

What liens remain and what are discharged are regulated by law and the sheriff cannot by his conditions alter it; unless by consent of all the parties interested.<sup>31</sup>

### 14. Sales subject to liens.

Although a lien would be discharged by the sale it is competent for the parties interested to agree that the sale shall be made subject to it and when the purchaser so takes it with notice, the court will enforce the agreement.<sup>32</sup> This should appear in the conditions of sale and the deed<sup>33</sup> and when it does, it is binding;<sup>34</sup> as where there is a mortgage.<sup>35</sup> The understanding need not be in writing.<sup>36</sup>

Pa. 21; *Van Stavaren's Ap.*, 12 Atl. 499; *Natalie, Etc., Co. v. Ryon*, 188 Pa. 138.

<sup>21</sup> *Loomis' Ap.*, 22 Pa. 312; *Zeigler's Ap.*, 35 Pa. 173. (For a long line of cases, see *P. & L. Dig.*, vol. 19, col. 34326.)

<sup>22</sup> *Beekman's Ap.*, 38 Pa. 385.

<sup>23</sup> *Connelly v. Withers*, 9 *Lanc. Bar.* 117.

<sup>24</sup> *Dewalt's Ap.*, 20 Pa. 236.

<sup>25</sup> *Wertz's Ap.*, 65 Pa. 306.

<sup>26</sup> *Helfrich v. Weaver*, 61 Pa. 385.

<sup>27</sup> *Lancaster Trust Co. v. Gochenauer*, 14 *Lanc. L. R.* 265.

<sup>28</sup> *Pierce v. Gardner*, 83 Pa. 211.

<sup>29</sup> *Devine's Ap.*, 30 Pa. 348; *Hacker v. Cozzens*, 92 Pa. 461; *P. & L. Dig.*, vol. 19, col. 34329.

<sup>30</sup> *Saunders v. Gould*, 124 Pa. 237; 134 Pa. 445.

<sup>30a</sup> *Levengood's Est.*, 38 *Supr. C.* 491.

<sup>31</sup> *Hellman v. Hellman*, 4 *Rawle*, 440; *Devine's Ap.*, 30 Pa. 348; *Fickes v. Ersick*, 2 *Rawle*, 166.

<sup>32</sup> *Zeigler's Ap.*, 35 Pa. 173; *Tospon v. Sipe*, 116 Pa. 588.

<sup>33</sup> *Shultze v. Diehl*, 2 *P. & W.* 273.

<sup>34</sup> *Schall's Ap.*, 40 Pa. 170; *P. & L. Dig.*, vol. 19, col. 34333.

<sup>35</sup> *Muse v. Letterman*, 13 *S. & R.* 167.

After an announcement by the sheriff, the purchaser bids subject thereto<sup>37</sup> and is bound by it;<sup>38</sup> and so is his vendee who buys with notice and subject to it.<sup>39</sup> It must, however, be done by the parties in interest, and not by the loose declarations of bystanders or bidders.<sup>40</sup> Otherwise the purchaser is bound only by the record as it appears at the time of the sale;<sup>41</sup> and the rule that all liens except first mortgages and other fixed liens at the time of the sale are divested by it.<sup>42</sup> Being protected by the record the purchaser cannot bring in evidence *dehors* the record to alter it;<sup>43</sup> and he is bound to take notice of it.<sup>44</sup>

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<sup>36</sup> Franklin v. Mackey, 9 Lanc. Bar, 197.

<sup>37</sup> Nowry's Est., 20 C. C. 76.

<sup>38</sup> Hart v. Homiller, 20 Pa. 248.

<sup>39</sup> Crooks v. Douglass, 56 Pa. 51; Kreamer v. Fleming, 200 Pa. 414.

<sup>40</sup> Fickes v. Ersick, 2 Rawle, 166; Mode's Ap., 6 W. & S. 280; Loomis' Ap., 22 Pa. 312.

<sup>41</sup> Magaw v. Garrett, 25 Pa. 319; Coyne v. Souther, 61 Pa. 455; Saunders v. Gould, 134 Pa. 445; Meigs v. Bunting, 141 Pa. 233; Budd v. Olver, 148 Pa. 194.

<sup>42</sup> Indiana County Bank's Ap., 95 Pa. 500.

<sup>43</sup> Reading v. Hopson, 90 Pa. 494.

<sup>44</sup> Parke v. Neeley, 90 Pa. 52.

## CHAPTER XXXII

### PROCEEDINGS TO OBTAIN POSSESSION

1. Purchaser's right to have possession.
2. Acts of assembly and decisions.
3. Procedure by petition in all judicial sales.
4. Form of petition.
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6. Form of order of court, awarding citation.
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8. Answer and pleas.
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11. Return of service.
12. Answer — brief of title — copy of lease — tender.
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16. Determination of facts by the court or a jury.
17. Determination when respondent is a tenant for years — costs.
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20. Recovery of rent from tenant.
21. Right of tenant's possession, when paramount.
22. Form of writ of possession.
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24. Writ against a farmer respondent or tenant for years — security for stay.
25. Amendments of pleadings — powers of court — appeals.
26. Acts repealed.
27. Writ of inquiry.

#### 1. Purchaser's right to have possession.

The purchaser does not acquire the immediate possession, but only the right to have possession delivered to him by due process of law;<sup>1</sup> unless he can get possession peaceably, though the defendant objects.<sup>2</sup> And he may gain possession from the tenant of the defendant, if he does so without fraud or force;<sup>3</sup> even though in his absence he sets out his goods.<sup>4</sup> But the sheriff cannot forcibly eject the defendant. If he does, he is liable for forcible entry and detainer and must make restitution.<sup>5</sup> The relation of landlord and tenant does not obtain between the defendant and the purchaser, strictly speaking, and while the purchaser has the right to enter peaceably, he cannot evict the defendant except by legal process.<sup>6</sup> The proceedings authorized by section 105 *et seq.* of the act of June 16, 1836, P. L. 755, now repealed, were intended to cover cases where peaceable possession could not be obtained.<sup>7</sup>

<sup>1</sup> Grier v. Sampson, 27 Pa. 183.

<sup>2</sup> Leidy v. Proctor, 97 Pa. 486.

<sup>3</sup> St. Clair v. Shale, 20 Pa. 105.

<sup>4</sup> Kellam v. Janson, 17 Pa. 467; Overdeer v. Lewis, 1 W. & S. 90.

<sup>5</sup> Pennsylvania v. Kirkpatrick, Addison, 193.

<sup>6</sup> Frick v. Fiscus, 164 Pa. 623.

<sup>7</sup> Leidy v. Proctor, 97 Pa. 486.

## 2. Acts of assembly and decisions.

Sections 105 to 118 of the act of 1836, *supra*, provided a method of procedure to obtain possession after three months' notice, which was satisfactory although cumbersome. By act of May 24, 1878, P. L. 134, it was attempted to change sections 105 and 107, and while the Superior Court declared section one of the act of 1878 constitutional,<sup>8</sup> it later held that section two was unconstitutional.<sup>9</sup> This left the procedure in the air and the legislature of 1905 by act of April 8, P. L. 121, in proper form amended the act of 1836 so as to give one justice or alderman jurisdiction and authorize a jury of six instead of twelve. But the same legislature by act of April 20, P. L. 239, repealed all the sections of the act of 1836 from 105 to 118 inclusive, and enacted a new law with which we are now alone concerned.

## 3. Procedure by petition in all judicial sales.

Section 1 of the act of April 20, 1905, P. L. 239, provides as follows:

"That purchasers at judicial sales of real estate in this commonwealth, and grantees, heirs and devisees thereof, after confirmation of such sales where required, and after the execution, acknowledgment and delivery of the deeds therefor, may present a petition, under oath or affirmation, to the court out of which was issued the writ of execution or order by virtue of which said sale was had, except in case of *testatum* writs, and then to the Court of Common Pleas of the county in which the land is situate, setting forth:

(a.) A description of the real estate sold, an averment of petitioner's title thereto, with a specific reference to the proceedings under which such sale was had; and, if the petitioner be a grantee, heir, or devisee of such purchaser, a statement of the method by which he derived title to such real estate.

(b.) That the persons in possession are the defendants, as whose property such real estate was sold; or that such named persons came into possession mediately or immediately through the right or title derived from such defendants, or some of them, in the manner set forth, or an averment that the manner of their obtaining possession is unknown to petitioner.

(c.) If the persons in possession be other than the defendants in the execution or order of sale, the petitioner's brief of title of said real estate, commencing at a point covering the title, if any, by right of which the persons in possession claim to retain such possession.

(d.) That the persons in possession had notice of the title of petitioner, and declined to deliver up possession of said real estate to petitioner; or, if tenants for a term of years, with a right of possession paramount to petitioner, that they declined to execute a lease with petitioner for the balance of said term, or to attorn in writing to petitioner on the terms and conditions of his letting with the previous owner; or that petitioner believes that the lease or

<sup>8</sup> *Wilson v. Downing*, 4 Supr. C. 487.

<sup>9</sup> *Moore v. Moore*, 23 Supr. C. 73; *Reams v. Yeager*, 29 Supr. C. 520.

attornment, respondent was willing to execute, was not upon the same terms and conditions as his letting with the previous owner; and praying that a citation issue to the persons in possession, commanding them to appear and answer said petition, and show cause, if any they have, why possession of such real estate should not be delivered to petitioner:

Whereupon the court shall issue a citation as prayed for, returnable at the expiration of fifteen days from the service thereof and of a copy of said petition, or at such subsequent time, not later than the next session of the court after the expiration of said fifteen days, as the court shall direct."

This act has been held constitutional.<sup>10</sup>

The petition must comply with all the requirements of the above section, or it may be demurred to, but if the respondent answers and demands a jury trial, and pleads he cannot object on the trial because the petition omitted to aver "that the persons in possession are the defendants as whose property said real estate was sold, etc."<sup>11</sup>

The defendant may set up that the purchaser agreed to purchase and hold as trustee for him.<sup>12</sup>

#### 4. Form of petition.

Petition for citation under act April 20, 1905, P. L. 239.	}	In the Court of Common Pleas of Schuylkill County. No. ——— Term, 19—.
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*To the Honorable the Judges of said court:*

The petition of S. O. Lutz of the borough of Tamaqua, in the County of Schuylkill, respectfully represents:

That, at a sheriff's sale held at Pottsville in the said county, by Thomas J. Whitaker, Esq., sheriff of the said county, on Saturday, September 9th, 1905, at ten o'clock in the forenoon, at the Court House in the said borough of Pottsville, your petitioner became the purchaser of:

[Here describe the lot, parcel or tract of land].

That a deed for the said premises was duly acknowledged by the said sheriff before Samuel H. Gore, Esq., prothonotary of said court on the 18th day of September, 1905, and was duly recorded in the office for the recording of deeds, etc., in and for said county, in deed book No. 302, page 280, on the 26th day of September, 1905.

That the premises hereinbefore described, and which were sold, granted and conveyed to your petitioner as aforesaid, were sold under and by authority of a writ of *fieri facias*, issued out of the Court of Common Pleas of Schuylkill County on the 7th day of August, 1905, to No. 26, September term, 1905, which said writ of *fieri facias* was founded on a certain judgment upon a judgment note dated July 24, 1905, given by Michael Matthews to Lutz and Scherer, payable one day after date, for the sum of \$114.91, which said note was duly filed and judgment entered thereon in the office

<sup>10</sup> Lutz v. Matthews, 37 Supr. C. 354.

<sup>11</sup> Lutz v. Matthews, *supra*.

<sup>12</sup> Lancaster Trust Co. v. Long, 220 Pa. 499.

of the prothonotary of said court to Number 116, September term, 1905, on the 25th day of July, 1905; in which said judgment note the said Michael Matthews, the maker thereof, waived the inquisition and condemnation of his real estate, to-wit: the premises as hereinbefore described and sold by the sheriff to your petitioner.

Your petitioner further represents that the said premises were levied upon by the said sheriff as and for the property of Michael Matthews, the defendant in the said judgment note, with notice to Benjamin Southam, William H. Mucklow and T. F. Mucklow; your petitioner further represents that the said Michael Matthews, as whose property the said real estate was sold, was the owner thereof at the time of the said sale; that the said Benjamin Southam was in possession of the said real estate at the time of the said sale and is now in possession thereof [that he came into possession by, etc., stating in what manner, or averring that the manner thereof is to your petitioner unknown],<sup>13</sup> and that the said William H. Mucklow and T. F. Mucklow now claim to be the owners of the said real estate. That notices of the claim of title to the said real estate were served by the said claimants on the sheriff at the sale (copies of which said notices are hereto attached). That the notices so as aforesaid given by claimants, are as this petitioner is informed and believes, founded on a deed made and executed on the 1st day of August, 1905, by Benjamin F. Southam, hereinbefore named, and Laura his wife, to the said William H. Mucklow and T. F. Mucklow, purporting to convey title to the said premises, which deed is recorded in Deed Book, No. 328, page 75, on the 2nd day of August, 1905.

Your petitioner further says that he claims title to and possession of the said premises hereinbefore described, by virtue of the following conveyances:

[Here insert abstract of title, going back far enough in the record to make it indefeasible.]

Your petitioner further represents that the said Benjamin F. Southam, who is in possession of the said real estate; Michael Matthews, as whose property said real estate was sold; and the said William H. Mucklow and T. F. Mucklow, who are claiming title and ownership to the said real estate as aforesaid, had notice of the title of your petitioner, with notice to surrender the possession of the said real estate to your petitioner, a copy of which notice is hereto attached, and that they have declined to deliver the possession thereof to your petitioner.

Your petitioner therefore prays the court that a citation issue to the said Michael Matthews, Benjamin F. Southam, William H. Mucklow, and T. F. Mucklow who are in possession and claim to be the owners of the said real estate, commanding them to appear and answer the matters set forth in this petition and show cause if any they have, why possession of the said real estate should not be delivered to your petitioner,

And he will ever pray, etc.

S. O. Lutz.

[Affidavit appended.]

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<sup>13</sup> Lutz v. Matthews, 37 Supr. C. 354.

**5. Copy of notice.**

Tamaqua, Pa., November 21, '05.

To Michael Matthews, Benjamin Southam, William H. Mucklow and T. F. Mucklow:

You and each of you are hereby notified that at a sheriff's sale at Pottsville, Pa., on the 9th day of September, A.D. 1905, by Thomas J. Whitaker, Esq., High Sheriff of Schuylkill County:

All that certain lot of ground [describing same] was exposed to public sale or vendue by the said sheriff, for and as the property of Michael Matthews, with notice to Benjamin Southam, William H. Mucklow and T. F. Mucklow, and was then and there purchased by the undersigned, S. O. Lutz, and a deed for the said lot of ground with the appurtenances was acknowledged by the said sheriff before Samuel H. Gore, Esq., prothonotary of the Court of Common Pleas of said county, on the 18th day of September, 1905, which deed was delivered to J. H. Nichter, Esq., Recorder of Deeds, etc., in and for said county, and by him was duly recorded on the 26th day of September, 1905, in Deed Book, 302, page 280, and thereupon said deed was delivered by the said Recorder to the said S. O. Lutz, the purchaser of the said premises. You and each of you are therefore, hereby notified that I hereby demand the surrender of the said lot of ground with the appurtenances, to me, the undersigned, the owner thereof, within ten days of the date of service thereof.

S. O. Lutz.

William H. Walters, being duly sworn, says that he served a copy of this notice on Benjamin Southam, William H. Mucklow and T. F. Mucklow therein named, personally on Nov. 21, 1905, and served a copy of this notice on Michael Matthews therein named personally on November 22d, 1905.

W. H. Walters.

Costs of service and proof \$1.25.

Sworn to, etc.

**6. Form of order of court, awarding citation.**

And now, to-wit, Dec. 20, 1905, the foregoing petition was presented and read by H. B. & R. J. Graeff, attorneys for petitioner, and the court having considered the same, directed that the citation issue as prayed for, returnable not less than fifteen days from service hereof.

By the Court.

**7. Form of affidavit of service.**

Schuylkill County, ss:

W. H. Walter being duly sworn, says that he served a copy of the foregoing petition and also the citation on [naming respondents] personally, on Thursday, the 11th day of January, 1906.

Wm. H. Walter.

Sworn to, etc.

**8. Answer and pleas.**

The answer in this case denied that the defendant named ever had any title and set up an ownership in fee by William H. Muck-

low and T. F. Mucklow, and gave a brief of title and prayed a jury trial.

The replication traverses the new matter set up in the answer.

After plea of "not guilty" and issue the court awarded a jury trial upon the pleadings as filed.

**9. Service of citation and copy of petition.**

"Section 2. Said citation and a copy of said petition may be served in whole or in part by the sheriff of the county, or by the sheriff of any other county if specially deputized for that purpose, or by any other adult person, upon the respondents named therein, and upon all other persons found in possession of said real estate, the latter being added as respondents by the prothonotary or clerk, upon the return of the citation:

(a.) By handing an exact copy thereof to them personally; or

(b.) By leaving an exact copy thereof at the residence of each of them, with an adult member of his family; or

(c.) If service cannot be had in either of the above methods, then in such manner as the court shall direct by rule, or special or standing order."

**10. Alias and pluries citations — intervenors.**

"Section 3. Alias and *pluries* citations may issue whenever it may be necessary to bring before the court any party interested and any such interested person may intervene and defend, *pro interesse suo*, upon leave granted for such purpose."

**11. Return of service.**

"Section 4. Return of the service of any citation shall set forth particularly the manner of service, and shall be filed at least five days before a judgment is entered by default, or at least five days before the time fixed for a hearing, and, if made by other than a sheriff, shall be under oath or affirmation. No judgment shall be entered or hearing had until the court shall be satisfied that service has been made upon all the respondents, in one or the other of the three methods herein provided."

**12. Answer — brief of title — copy of lease — tender.**

"Section 5. Respondents and intervenors shall, on or before the return day of the citation, make answer under oath or affirmation, to each and every of the facts averred in the petition, admitting those that are true and denying those that are alleged to be untrue; and if claiming by a right or title other than that set forth by petitioner, averring particularly, in the form of a brief, his right of title to such real estate, commencing at a point where the titles diverge, and praying a jury trial of the issues of fact thus raised, if one be desired. If such respondent or intervenor shall aver a right as tenant for years, paramount as to the possession to the right of petitioner, he shall set forth, particularly, when his term commenced, how long it was to last, what the rent is, and where and how it is to be paid; and he shall attach a copy of the lease, if there be one in his possession or obtainable by him;



and he shall also tender a willingness to execute with petitioner a lease for the balance of the term of letting, upon the terms and conditions of his then present tenancy, and such tender shall be made though the prior lease was verbal only, or a copy thereof, if in writing, is not obtainable."

A tenant farmer who does not hold by lease paramount need not answer, to get a stay.<sup>14</sup>

### 13. Tenants to notify landlords.

"Section 6. If the persons found in possession of such real estate, or actually served with the citation, be only the tenants of, or holding title for another, it shall be the duty of such persons, in addition to defending their own rights, if any, to forward the citation and petition to their landlord, or the person for whom they are holding title; and in case of an inability for any reason so to do, they may, upon cause shown in the answer, defend such absentees' right, in his name and at his expense."

### 14. Judgment pro confesso — writs of possession, inquiry and fi. fa.

"Section 7. If no answer be filed, the prothonotary or clerk of the court may, at any time after the return day, and the return of service of the citation, as aforesaid, enter a judgment that the petition be taken as confessed; and thereupon a writ of possession may be issued, in the form hereinafter set forth, with the same effect as if a judgment had been entered by the court after hearing; and a writ of inquiry of damages may also be issued, to award to petitioner damages for the detention of possession of said real estate. Upon return of the writ of inquiry of damages, a writ of *feri facias* may issue, to recover the damages so assessed and the costs of the proceedings; to be followed by alias and *pluries* writs, if necessary, to recover all or any part of said damages and costs."

### 15. Procedure after answer filed — jury trial.

"Section 8. If an answer be filed, the petitioner may order the cause for argument upon petition and answer; may join issue, and pray a hearing or jury trial upon the disputed issues raised; or may file a replication, under oath or affirmation, as to any new matter set forth in the answer, and require the respondent to rejoin thereto, under oath or affirmation; and thereafter enter a rule for judgment upon the whole record, or join issue and pray a hearing or jury trial upon the disputed issues raised. A respondent who has set forth new matter in his answer, may also require the petitioner to reply thereto under oath or affirmation, and may proceed thereafter as above set forth. If a jury trial be not prayed for in the pleadings, it shall be deemed to have been waived; but if there be controlling disputed questions of fact raised thereby, the court may direct a jury trial thereof, though not asked for by either party; and in such event, also may, at any stage of the proceedings, allow an issue to be framed, though the cause be ordered for a hearing upon petition and answer, or upon the whole record."

<sup>14</sup> Excelsior, Etc., Assn. v. Ruthman, 25 Montg. 131.

**16. Determination of facts by the court or a jury.**

"Section 9. If a jury trial be not asked or ordered, the facts may be brought before the court by agreements of the parties, by depositions, by commissions, by letters rogatory, or in any manner the parties may agree upon or the court may direct. If a jury trial be asked or ordered, the cause shall be heard upon the pleadings, as filed, unless the court shall direct specific issues to be framed and submitted to the jury for answer. Where a jury trial is to be had, if the proceedings are in the Orphans' Court, or in the Court of Quarter Sessions of the Peace, or in the Court of Oyer and Terminer and General Jail Delivery, the issues to be tried shall be certified to the Court of Common Pleas of the county in which the land is situate, and all subsequent proceedings shall be had in the latter court."

**17. Determination when respondent is a tenant for years — costs.**

"Section 10. If it shall be finally determined that the petitioner is the owner of said real estate, but that the respondent is a tenant for years, having a right of possession during his term, paramount to the right of petitioner, the proceedings shall be dismissed if such respondent shall execute with petitioner a lease for the balance of his term, or shall attorn in writing to petitioner on the terms of his letting with the previous owner, and shall also pay to petitioner the rent, as hereinafter provided for, and shall file a stipulation in writing agreeing to remove at the expiration of his said term. In such event the costs shall be at the discretion of the court. If the respondent fails or refuses to comply with the requirements of this section in any respect, or to remove at the end of his term according to his stipulation, a writ of possession, with a clause of *feri facias* conjoined to recover accrued rent and costs may be issued in the form hereinafter set forth."

**18. Determination when petitioner has no title — costs.**

"Section 11. If it shall be finally determined that petitioner is the owner of said real estate, with a present right of possession thereof, the proceedings, except in the case of a paramount tenancy, as aforesaid, shall be dismissed at petitioner's costs, and a writ or writs of *feri facias* may issue to recover said costs."

**19. Judgment when petitioner is owner — Fi. fa., etc.**

"Section 12. If it shall be finally determined that petitioner is the owner of said real estate, with a present right of possession thereof, the court shall enter judgment in his favor, at the costs of the respondents, and assess damages for the detention of possession of said real estate; and upon such judgment a writ of possession, with a clause of *feri facias* conjoined to recover said damages and costs, may be issued in the form hereinafter set forth."

**20. Recovery of rent from tenant.**

"Section 13. In the case of a tenant whose right of possession is not paramount to that of such purchasers, the latter shall be

entitled to recover rent from the date of delivery of their deed, except for such fractional part of a quarter as the tenant, if a farmer or engaged in raising crops or produce, or such fractional part of a month in other cases, as the tenant may, in accordance with the terms of his letting, have paid as an advance payment, prior to the date of delivery of said deed. In the case of a tenant whose right of possession is paramount to that of said purchasers, advance rent, paid prior to the date of delivery of petitioner's deed, shall be deemed properly paid, though paid prior to its due date, unless it is so paid with the actual notice of the pendency of the proceedings resulting in the sale, or with intent to defeat the rights of a purchaser thereat."

**21. Right of tenant's possession, when paramount.**

"Section 14. The right of possession of a tenant for years shall be deemed paramount to that of a purchaser at a judicial sale if, and only if the letting to him shall precede, in point of date, the entry of the judgment, order or decree on which such sale was had, and also shall precede the recording or registering of the mortgage, deed or will, if any, through which by legal proceedings the purchaser derives title, unless the letting is made with actual notice to such tenant of the contemplated entry of such judgment, order or decree, or of the fact of the execution of such mortgage, deed or other instrument of writing and with intent to avoid the effect thereof."

**22. Form of writ of possession.**

"Section 15. The writ of possession, with a clause of *fiery facias* conjoined, shall be in the following form:

The Commonwealth of Pennsylvania to the sheriff of — County, greeting:

Whereas, judgment has been entered in our Court of Common Pleas of — County, as of — term, nineteen hundred and — Number —, that A. B. recover possession from C. D. and E. F. of [here describe the real estate in the manner set forth in the pleadings]. Now, you are hereby commanded that, without any other writ from us, you forthwith cause possession of said real estate to be taken from the said C. D. and E. F. and all persons holding possession under or through them and deliver the same to the said A. B. and that of the goods and chattels, lands and tenements of the said C. D. and E. F. you forthwith cause to be levied as well the sum of — dollars and — cents, for damages, by reason of the detention of the said real estate, as — dollars and — cents for the costs of said proceedings, as also your own costs; and that this writ with the manner of your execution thereof, you return to our said court on the — day of —, Anno Domini, nineteen hundred and —.

Witness the Honorable — —, President of our said court, and the seal thereof, this — day of —, Anno Domini nineteen hundred and —.

Prothonotary [or clerk].

**23. Alias and pluries writs.**

Section 16. Alias and *pluries* writs of possession, as aforesaid, may issue whenever necessary to carry into full effect the judgment of the court, though possession may have been actually delivered under a prior writ; and a writ of *fiery facias*, and alias and *pluries* writs thereof, may likewise thereafter issue, if the damages and costs awarded have not been fully recovered."

**24. Writ against a farmer respondent or tenant for years — security for stay.**

"Section 17. In any case where a writ of possession is issued before the expiration of the respondent's tenancy, if he be a farmer, or engaged in raising crops or produce, he shall be entitled to a stay of proceedings for three months from the time the petition was filed, or until the expiration of his term if a tenant for years, and it sooner expires, upon entering security to pay the costs of the proceedings, the damages awarded, and any additional rent due, in accordance with the provisions of this act, to the date of delivery of actual possession. If the respondent be a tenant for years, but not a farmer, or engaged in raising crops or produce, he shall be entitled to a stay of proceedings for two months from the time the petition was filed, or until the expiration of his term if it sooner expires, and he enters security to pay the costs of the proceedings, the damages awarded, and any additional rent accruing from the date of delivery of petitioner's deed to the date of delivery of actual possession; and in all other cases the respondent shall be entitled to a stay of proceedings for one month from the time the petition was filed, upon entering security to pay the costs of the proceedings, the damages awarded, and any additional rent accruing from the date of delivery of petitioner's deed to the date of delivery of actual possession. The security shall be in such sum as the parties may agree upon, or the court shall direct, and shall be approved by the prothonotary or clerk, subject to an appeal to the court as in other cases. Application for the stay of proceedings shall state the time desired, not exceeding the times above provided for, and must be made within three days from the time the sheriff demands possession by virtue of the writ of possession, and said writ shall not be further executed during those three days. The sheriff shall retain possession of said writ during the stay allowed, and shall execute it, if necessary, after the stay has expired; but he shall not be responsible for anything occurring during the stay."<sup>15</sup>

**25. Amendments of pleadings — powers of court — appeals.**

"Section 18. The court may, upon such terms as it shall deem just, allow amendments to the pleadings or issues; may require amended petitions, answers or replications to be replied to under oath or affirmation, with the same effect as if the reply were to the original pleading; may open or set aside any judgment by

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<sup>15</sup> *Excelsior Assn. v. Ruthman*, 25 Montg. 131.  
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default; may vacate or set aside any writ of possession or *feri facias*, or the return to any writ of inquiry of damages, and may cause possession of the real estate to be redelivered to the respondent, if upon final judgment, he be found entitled thereto. From any final judgment, and from the refusal of the court to open a judgment by default, an appeal may be taken to the Supreme or Superior Court; but such an appeal shall not operate as a supersedeas unless specially so allowed by the court from or to which the appeal is taken, and upon the entry of security as in other appeals."

#### 26. Acts repealed.

Section 19 repeals sections 105 to 118 of the act of June 16, 1836, P. L. 761; the last clause of section 16 of the act of April 9, 1849, P. L. 524; the act of May 13, 1871, P. L. 820, relating to Schuylkill County, and section 3 of the act of February 17, 1876, P. L. 4, and all acts or parts of acts general, special or local inconsistent with it are repealed.

Thus being a general act and repealing all laws general, local and special, the Schuylkill County act is by it repealed without having given notice by publication.<sup>16</sup>

#### 27. Writ of inquiry.

The practice of having a writ of inquiry directed to the sheriff to assess the damages was not abrogated by section 27 of the act of May 22, 1722, 1 Sm. L. 131. If the deputy performs the act the sheriff may revoke it for sufficient cause and select a new jury, and unless the defendant objects, that there are clerks and employees of the court house on the jury, before the inquiry has been found, it will not be set aside.<sup>17</sup> The jury are the judges of the damages and their finding will not be disturbed unless grossly excessive.<sup>18</sup>

The mode of inquiry prescribed by statute, if demanded, is a matter of right, but when conducted in open court, it has the same effect as if the sheriff had summoned a jury.<sup>19</sup>

<sup>16</sup> Lutz v. Matthews, 37 Supr. C. 354, citing Comth. v. Moir, 199 Pa. 534.

<sup>17</sup> Miller v. Jackson, 38 Supr. C. 477. (See Bierly on Juries, Etc., 1908, for practice and forms.)

<sup>18</sup> Corson v. Cookus, 25 Montg. 170.

<sup>19</sup> Spring Run Coal Co. v. Tosier, 102 Pa. 342; Kohler v. Luckenbach, 84 Pa. 258.

## CHAPTER XXXIII.

### DISTRIBUTION OF PROCEEDS OF SHERIFF'S SALE.

1. Distribution of fund.
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#### 1. Distribution of fund.

Section 86 of the act of 1836, *supra*, provides:

"In all cases of sale upon execution, as aforesaid, where there shall be disputes concerning the distribution of the money arising

therefrom, the court from which the execution shall have issued shall have power, after reasonable notice given, either personally, or by advertisement, to hear and determine the same, according to law and equity."

The judges of our courts of Common Pleas have too many demands upon their time to admit of their performing the functions required by the above section, and it has, therefore, become the uniform practice to appoint competent persons, learned in the law, as auditors to perform these duties and make due report thereof to the court.

## **2. Appointment of auditors to make distribution.**

The appointment of auditors is usually regulated by rules of court, with the restrictions in several acts of assembly,<sup>1</sup> and on motion of an attorney or attorneys of the parties in interest. The prothonotary, on request, makes out a certificate of appointment under the seal of the court, showing the auditor's authority to act.

Section 1 of the act of June 28, 1871, P. L. 1376, provides:

"It shall be lawful for any court in this commonwealth to decree the distribution of any funds raised by sheriffs' sales of real and personal property, or, when expedient, to appoint auditors to make distribution, in all cases in which the parties in interest shall assent to such decree or appointment, notwithstanding that the proceeds of such sales shall not have been paid into court."

Distribution under this section cannot be made without assent of the parties.<sup>2</sup> But if they have notice and do not dissent, it will be assumed.<sup>3</sup>

Rule 39, Allegheny County (D. R. C. 45), provides:

"In cases where it appears to be necessary, the court, on application of any party interested, will appoint an auditor; but in cases where exceptions may be filed, no auditor shall be appointed until the time for doing so has elapsed, nor will any agreement of parties for the appointment of an auditor be regarded, unless an affidavit is filed therewith, stating that those who signed the agreement, by themselves or attorneys, represent all the parties interested."

## **3. Rules in Allegheny, vacating appointment.**

Rule 40, Allegheny County, provides:

"If no satisfactory cause for the delay is shown, the court will vacate the appointment of any auditor whose report is not filed within sixty days after his appointment, on motion for that purpose being made by any party in interest."

(Compare your rules of court).

The court has authority to appoint an auditor to distribute a fund made by its process, independently of any agreement;<sup>4</sup> but it required an act of assembly to authorize the court to distribute

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<sup>1</sup> See vol. 1, p. 174; also act of April 1, 1909, P. L. 95. (See act 1871, *supra*.)

<sup>2</sup> Kauffman's Ap., 70 Pa. 261.

<sup>3</sup> Rogers' Ap., 2 Kulp, 30.

<sup>4</sup> Furth v. Stahl, 205 Pa. 439.

the proceeds of a sale not paid into court.<sup>5</sup> The report of an auditor appointed, *ex parte*, to marshal liens in advance of a sale, is not conclusive and binding although confirmed by the court *pro forma*.<sup>6</sup> Where there is a dispute as to various lien claimants the court may appoint a commissioner to report upon the liens and the proportionate value of the building against which mechanic's liens were entered.<sup>7</sup>

#### 4. Rules in Allegheny, duties and fees.

Rule 41, Allegheny County, is as follows:

"When an auditor is appointed, he shall assign a time and place for hearing, and proceed without delay, except for sufficient cause; he shall keep and return regular minutes of his proceedings; showing his different sessions and their extent, and the cause of delay, if any, so that the court may adjust the amount to be allowed for fees and expenses, and direct how and by whom the same shall be paid."

#### 5. Rules in Allegheny, fees of auditors, masters, etc.

Rule 71 (D. R. C., p. 62), Allegheny County, provides:

"No amount will be fixed for the fees of any auditor, master or other person, whose compensation it shall be the duty of the court to determine, without the parties in interest or their attorneys shall have filed a statement in writing of the amount they considered proper therefor, or such auditor, master or other person, shall file an affidavit stating the amount which he considers a reasonable compensation for his services in the premises. A reasonable amount for the services of artists appointed by the court may be taxed and allowed as costs."

#### 6. Rules in Allegheny, auditor's notice of hearing.

Rule 42, Allegheny County (D. R. C. 45), provides:

"Ten days' notice of the time and place of hearing shall be given personally to all lien creditors, and others appearing to be interested, or their attorneys, if residing in the county; all others shall be notified by advertisement published once a week for three consecutive weeks in some newspaper in the city of Pittsburg, the last of which advertisements shall be published at least ten days before the day of hearing."

By the rules of court in some counties auditors shall post a notice of the time and place of meeting in the prothonotary's office, and note thereon every adjournment. (See your rules of court.)

#### 7. Scope of inquiry as to judgments.

The auditor cannot inquire into the validity of a judgment, being regular on its face,<sup>7a</sup> but he may disregard one which is void on its face.<sup>7b</sup> He may hear testimony to show that a judgment has

<sup>5</sup> Hoch's Ap., 72 Pa. 53. (See act 1871, *supra*.)

<sup>6</sup> McFarland's Est., 16 Supr. C. 142.

<sup>7</sup> Werth v. Werth, 2 Rawle, 151.

<sup>7a</sup> Second Natl. Bank's Ap., 85 Pa. 528; Leeds v. Bender, 6 W. & S. 315; Thompson's Ap., 126 Pa. 434; McCormick v. McGonigal, 4 Supr. C. 408; P. & L. Dig., vol. 2, cols. 1893-4.

<sup>7b</sup> Brunner's Ap., 47 Pa. 67.



been paid or otherwise satisfied since its entry;<sup>8</sup> and how much, if any, is still due,<sup>9</sup> but it has been questioned whether he can inquire into the entry of satisfaction.<sup>10</sup> He cannot throw out a judgment for error in amount<sup>11</sup> or merely irregular.<sup>12</sup> But it has been held that he may inquire whether a judgment has been given to hinder, delay or defraud creditors when attacked by them,<sup>13</sup> and determine it, if the parties do not apply to him in due form for an issue.<sup>14</sup> But he cannot inquire whether the judgment debtor was over-reached, as charged by other creditors;<sup>15</sup> nor whether usury was charged when the debtor does not complain,<sup>16</sup> unless in a proper inquiry where the judgment does not show a specific sum and other evidence is resorted to for that purpose.<sup>17</sup> He cannot go behind the *prima facie* validity of a judgment to make deductions.<sup>18</sup> He is bound by the verity of the lien docket as to the order, and cannot go back of that.<sup>19</sup>

An auditor may inquire into the validity of a deed or assignment;<sup>19a</sup> but he cannot entertain a question where the damages are unliquidated;<sup>19b</sup> nor can he hear parties who claim the fund adversely to the appointment.<sup>19c</sup>

#### 8. Parties who may be heard.

The auditor should hear all parties to the record and those showing an interest in the fund to be distributed whether they be lien creditors of record, or have statutory liens, such as the claimants of wages, etc. An assignee for the benefit of creditors represents all the creditors.<sup>20</sup> The holder of a mortgage who appears conditionally is not concluded by the auditor's finding that his mortgage is discharged.<sup>21</sup> As a general rule all claimants on the fund must present their claims to the auditor and if they do not, they will be barred.<sup>22</sup>

<sup>8</sup> Borland's Ap., 66 Pa. 470.

<sup>9</sup> Gray's Ap., 10 W. N. C. 458; Lefever's Est., 7 Lanc. L. R. 131.

<sup>10</sup> Apple v. Fetter, 18 Lanc. L. R. 337; Bare's Est., 5 Lanc. L. R. 36.

<sup>11</sup> Meckley's Ap., 102 Pa. 536.

<sup>12</sup> Edwards' Ap., 66 Pa. 89; Brady v. Conway, 3 W. N. C. 110.

<sup>13</sup> McNaughton's Ap., 101 Pa. 550; Woodward v. Schmitt, 5 Phila. 152; Schick v. Pharo, 49 Pa. 384; Duffy v. Duffy, 6 C. C. 161; Able v. Able, 6 Northam. 277; Cadwalader v. Montgomery, 9 Leg. Int. 133; Stark's Ap., 128 Pa. 545.

<sup>14</sup> Meckley's Ap., 102 Pa. 536.

<sup>15</sup> Lancaster Trust Co. v. Wiley, 13 Lanc. L. R. 145; Thompson's Ap., 57 Pa. 175.

<sup>16</sup> Second Natl. Bank's Ap., 85 Pa. 528; Sill v. Wright, 21 Pitts. L. J. 190.

<sup>17</sup> Price's Ap., 84 Pa. 141.

<sup>18</sup> Baird v. Ford, 152 Pa. 637; P. & L. Dig., vol. 20, col. 34483.

<sup>19</sup> Kendig's Ap., 82 Pa. 68.

<sup>19a</sup> Bridaham's Ap., 1 Penny. 262; McGettrick's Ap., 98 Pa. 9.

<sup>19b</sup> Wear's Assignment, 1 Kulp, 104.

<sup>19c</sup> Okie's Ap., 9 W. & S. 156; Wylie's Ap., 92 Pa. 196.

<sup>20</sup> Irwin v. Keen, 3 Wharton, 347; Gruver v. Benedict, 9 Kulp, 157.

<sup>21</sup> Woods v. White, 97 Pa. 222.

<sup>22</sup> Pentecost's Ap., 1 W. N. C. 35; Peck's Ap., 11 W. N. C. 31; Helison's Est., 6 Kulp, 466.

The defendant is a competent witness on a dispute between creditors.<sup>23</sup> Whatever interest passed by the sale, the creditors whose liens attached thereon are entitled to participate.<sup>24</sup> Where property is sold as realty, although the will worked a conversion, it must be distributed as realty.<sup>25</sup> And where machinery although attached to the realty is sold as personalty and detached the execution creditor is entitled to the proceeds.<sup>26</sup> The question on distribution is not how the fund was produced,<sup>27</sup> or whose property it was,<sup>28</sup> but who has a right to claim it and what interest passed by virtue of the sale.<sup>29</sup> One who claims title against the defendant is estopped from claiming any of the proceeds;<sup>30</sup> as the grantee prior to judgment;<sup>31</sup> or one denying the validity of a mortgage which produced the fund;<sup>32</sup> or a landlord who claims to be owner of the tenant's goods levied upon;<sup>33</sup> or plaintiff in a prior attachment execution,<sup>34</sup> or an assignee for the benefit of creditors on a prior assignment;<sup>35</sup> or a prior assignee of collateral security.<sup>36</sup> But the rule is different where the assignment is subsequent.<sup>37</sup>

And the *cestui que trust* may follow a fund where goods were held by a surety or trustee;<sup>38</sup> or a mortgagee to a married woman on the legal title;<sup>39</sup> but not one who claims adversely to her as against her husband's interest or liability;<sup>40</sup> nor a claimant against the husband alone where the estate is by entirety.<sup>41</sup>

#### g. Claimants whose liens are not divested.

Only liens which are divested by the sale may participate<sup>42</sup> but not a mortgage which remains,<sup>43</sup> or installments of interest due upon

<sup>23</sup> Galway's Ap., 34 Pa. 242; Security, Etc., Co. v. Boll, 13 York, 125; act May 23, 1887, P. L. 158.

<sup>24</sup> Beekman's Ap., 38 Pa. 385; Eberly v. Shirk, 206 Pa. 414; Housekeeper's Ap., 49 Pa. 141.

<sup>25</sup> Wolf v. Porter, 7 York, 194.

<sup>26</sup> Hutchman's Ap., 27 Pa. 209.

<sup>27</sup> Brant's Ap., 20 Pa. 141; Hyde v. Kiehl, 183 Pa. 414.

<sup>28</sup> Reily's Ap., 36 Leg. Int. 413; 1 Walker, 454.

<sup>29</sup> Loudermilch v. Loudermilch, 2 Pearson, 134.

<sup>30</sup> Eberly v. Shirk, 206 Pa. 414.

<sup>31</sup> Helfrich's Ap., 15 Pa. 382.

<sup>32</sup> Housekeeper's Ap., 49 Pa. 141; Bush's Ap., 65 Pa. 363.

<sup>33</sup> Vetter's Ap., 99 Pa. 52; Edward's Ap., 105 Pa. 103.

<sup>34</sup> Penna. Natl. Bank v. Dengler, 1 Leg. Rec. 346.

<sup>35</sup> Walters v. Pratt, 2 Rawle, 265; Reiley's Ap., 36 Leg. Int. 413.

<sup>36</sup> Henderson v. Henderson, 133 Pa. 399.

<sup>37</sup> Rohrer's Ap., 62 Pa. 498.

<sup>38</sup> Dean v. Briggs, 3 C. P. R. 29; Landell's Ap., 105 Pa. 152.

<sup>39</sup> Wightman's Ap., 29 Pa. 280.

<sup>40</sup> Hamnett's Ap., 72 Pa. 337.

<sup>41</sup> Leet v. Miller, 6 D. R. 725.

<sup>42</sup> Penna. Co., Etc.'s, Ap., 18 W. N. C. 469; Remsen v. Hilgert, 17 Phila. 186.

<sup>43</sup> Greensburg Fuel Co. v. Irwin Natl. Gas Co., 162 Pa. 78; P. & L. Dig., vol. 20, col. 34400.

it;<sup>44</sup> or a lien for revenue created by act of Congress.<sup>45</sup> If a lien is discharged in part it must be discharged in whole.<sup>46</sup>

#### 10. Unsecured claims — surplus.

A creditor who has not put his claim into judgment cannot participate, and if there is any balance it goes to the defendant or his assignee;<sup>47</sup> and a judgment creditor who has neglected to revive his judgment as against the *terre-tenant* is cut out by a later judgment against the *terre-tenant* although the land was sold on a judgment against the former owner.<sup>48</sup> A judgment before a justice of the peace entered after a sale and before distribution, will not come in on the fund in the Common Pleas;<sup>49</sup> nor where a levy has been made by the sheriff and an execution comes into the hands of the constable before sale.<sup>50</sup>

A justice's judgment, cannot participate where the defendant has appealed;<sup>51</sup> or where a certiorari has been issued and the constable has relinquished his levy, although there was no supersedeas.<sup>52</sup> Although the plaintiff has filed his transcript in the Common Pleas a regular appeal shuts him out of the distribution.<sup>53</sup> Where there are joint defendants and interests, if there is any surplus it must go to them in proportion to their respective interests;<sup>54</sup> and this applies to a chattel interest, part owners of which may estop themselves by agreeing to the sale of their interest.<sup>55</sup> The surplus belonging to the defendant may be levied on while still in the hands of the sheriff,<sup>56</sup> unless assigned by him before the execution comes into the hands of the officer.<sup>57</sup>

#### 11. Claimant, when estopped.

One who claimed the proceeds of the sale is estopped from claiming the surplus as equitable owner of the land.<sup>1</sup> A creditor on whose statement as to the amount due him, a purchaser of subsequent liens relied is estopped from claiming more.<sup>2</sup> One who gives notice of a lien and purchases the land at a low price has been held

<sup>44</sup> Field v. Oberteuffer, 2 Phila. 271.

<sup>45</sup> Bosset v. Miller, 2 Woodward, 40.

<sup>46</sup> Tower's Apprn., 9 W. & S. 103.

<sup>47</sup> Hahn v. Smith, 1 P. & W. 484; Fitch's Ap., 10 Pa. 461; Bitting's Ap., 17 Pa. 211; Prouty v. Prouty, Etc., Co., 155 Pa. 112; Hopkins' Ap., 90 Pa. 69.

<sup>48</sup> Rudy's Ap., 94 Pa. 338.

<sup>49</sup> Balmer v. Balmer, 2 Lanc. L. R. 11; Van Valzal v. Croman, 1 D. R. 190; Weil v. Levy, 13 Lanc. L. R. 118.

<sup>50</sup> Robinson v. Hart, 23 Supr. C. 299.

<sup>51</sup> Comth. v. Smith, 3 Atl. 872.

<sup>52</sup> Weis v. Weis, 3 W. N. C. 76.

<sup>53</sup> McCauly v. Boeshore, 2 Lanc. L. R. 337; Belber v. Belber, 6 Supr. C. 361.

<sup>54</sup> Brown's Est., 2 Pa. 463; Butterfield's Ap., 77 Pa. 197.

<sup>55</sup> Hopkins v. Forsyth, 14 Pa. 34.

<sup>56</sup> Herron's Ap., 29 Pa. 240.

<sup>57</sup> Hahn v. Smith, 1 P. & W. 484.

<sup>1</sup> Omwake v. Harbaugh, 148 Pa. 278.

<sup>2</sup> Gray's Ap., 10 W. N. C. 458.

to be estopped from claiming his lien out of the fund;<sup>3</sup> but a different rule has been applied to a mortgagee subsequent to the judgment.<sup>4</sup>

## 12. Restitution.

Where an appeal has been taken without a supersedeas, and the plaintiff has proceeded with his execution to sale, the appellate court, on reversing the judgment will award a writ of restitution of the money made by the sheriff,<sup>5</sup> which may be issued by the lower court on the return of the record. But where the reversal is on a *sci. fa.* and the presumption is that the defendant is indebted to the plaintiff, the writ will be refused and the money paid the plaintiff ordered into court.<sup>6</sup> The awarding of a writ of restitution is not a matter of right.<sup>7</sup> The purchase price at the sale and not the land will be restored.<sup>7a</sup>

## 13. Form of petition for writ of restitution.

Elias Smith	} In the Court of Common Peas of Carbon County.		
v.			
Jans Jones.		Original No. ———	Term, 19—.
		<i>Fi. fa.</i> No. ———	Term, 19—.
		<i>Vend. ex.</i> No. ———	Term, 19—.

To the Honorable ———, judge of said court, your petitioner respectfully represents that upon the ——— day ———, A. D. 19—, the Superior Court at its session at Williamsport, Pa., awarded a writ of restitution in reversing original No. ——— Term, 19—, above stated, as per remittitur filed in this court duly appears; that notwithstanding the appeal in this cause Elias Smith the plaintiff above named sued out his *fi. fa.* [or *vend. ex.* as the case may be], levied upon the property of the defendant and the sheriff of said county on the ——— day of ——— A. D. 19—, sold the same to ——— for the sum of ——— dollars which sum less the costs to-wit: ——— dollars and ——— cents, he paid over to said Elias Smith, the plaintiff.

Your petitioner therefore prays that a writ of restitution be issued to said Elias Smith, plaintiff, to return and restore to him the said defendant the amount realized upon the sale of his said property, to-wit, \$——, and he will ever pray.

Jans Jones.

Affidavit to truth of petition.

## 14. Form of writ of restitution.

Commonwealth of Pennsylvania, } ss.  
Allegheny County,

To the Sheriff of Allegheny County, Greeting:

Whereas, Whitesell & Sons, lately, that is to say, at No. 14,

<sup>3</sup> Birney's Ap., 114 Pa. 519; Power v. Thorp, 92 Pa. 346.

<sup>4</sup> Lindle v. Neville, 13 S. & R. 227.

<sup>5</sup> Feger v. Kroh, 6 Watts, 294.

<sup>6</sup> Kirk v. Eaton, 10 S. & R. 103.

<sup>7</sup> Baker v. Smith, 4 Yeates, 185.

<sup>7a</sup> Lengert v. Chaninell, 26 Supr. C. 626; 205 Pa. 280.

February Term, 1893, D. S. B., entered judgment against H. R. Peck, *et al.*, are convicted as by the said record to us appears; which said judgment was duly assigned of record to Frederick Maul, and was on November 26, 1892, duly satisfied of record; and,

*Whereas*, Afterwards, to-wit, on May 29, 1893, the said Maul presented to said court his petition praying that the said entry of satisfaction be stricken off, which matter (after notice to defendants and to M. H. Stevenson, *terre-tenant*), was so proceeded in that on June 16, 1894, the said satisfaction was stricken off; and

*Whereas*, By reason of divers errors in the said proceeding, the said order was, on appeal taken to the Supreme Court, reversed and totally annulled, and afterwards, to-wit: On May 23, 1896, it was considered by our said Supreme Court that the said M. H. Stevenson be restored to all things which he has lost by reason of the order aforesaid, and for having execution of said judgment of restitution the special mandate of our said Supreme Court was sent down to our said Court of Common Pleas; and

*Whereas*, Pending the said appeal, the said Frederick Maul, on pretense of the said former judgment, hath had execution of the same with costs, to-wit, the sum of \$757.26, and is yet possessed thereof,

*Now, therefore, we command you*, That without delay you cause the said M. H. Stevenson, to have full restitution, of the said sum of \$757.26, with interest thereon from October 31, 1894, together with all legal costs on this behalf expended; and if you cannot cause him to have restitution thereof, then that you cause the same to be levied of the goods and chattels and for want thereof, then of the lands and tenements of the said Frederick Maul in your bailiwick, and that you cause the money to be delivered without delay to the said M. H. Stevenson.

And in what manner you shall execute this writ, make appear to our said Court of Common Pleas on the first day of our next term.

Witness the Hon. John M. Kennedy, President Judge of our said Court of Common Pleas, No. 3, at Pittsburg, Pa., this 27th day of May, A. D. 1896.

Attest:

[Seal.]

See Stevenson's Pet. Pitts., L. J. (N. S.) 26, P. 440.

A. J. McQuitty,  
Prothonotary.

### 15. Impounding of fund.

The court may, in order to reach the equities of all concerned, stay distribution and impound the fund, until the title to the land is settled in an ejectment suit pending;<sup>8</sup> but this will not be done on petition of a subsequent lien creditor, who alleges that the senior lien is also against other land of the defendant;<sup>9</sup> nor where land of husband and wife held by entireties is sold, on petition of the husband's creditors based on the contingency of his survival;<sup>10</sup> nor will a portion of the fund be impounded to await trial on a *sci. fa. sur* mechanic's lien.<sup>11</sup>

<sup>8</sup> Tomlinson v. Wurfflein, 16 Phila. 86.

<sup>9</sup> Order of Solon v. Gunther, 8 Supr. C. 319.

<sup>10</sup> Leet v. Miller, 6 D. R. 725.

<sup>11</sup> Andrews v. Fishing Creek Lumber Co., 161 Pa. 204.

### 16. Distribution according to law and equity.

Since the distribution shall be made "according to law and equity,"<sup>12</sup> the court, or auditor, will give due effect to equitable principles,<sup>13</sup> and it has been held an auditor may on his own motion rule out evidence which he believes to be incompetent and irrelevant.<sup>14</sup> E. G. A vendee under articles will, as against his vendor, be allowed what he paid on the land sold under a mortgage;<sup>15</sup> and he will be preferred to his vendor's creditor who obtained judgment after the articles of sale, such judgment being a lien only on the unpaid purchase money.<sup>16</sup> The distribution will be made according to the agreement.<sup>17</sup>

All the circumstances and incidents will be considered, where equity demands it;<sup>18</sup> and the assets will be applied accordingly.<sup>19</sup> The equity of the vendee to have lien holders proceed against remaining land of the vendor first, also applies to the vendee's judgment creditors, and where one of the judgments against the vendor after the sale is alleged to be fraudulent, proceedings will be stayed until this question is determined.<sup>20</sup> The paramount incumbrancer, however, is not to be delayed by the contest between equitable claimants;<sup>21</sup> and if he owns several judgments against a defendant, with different sureties, in the absence of an agreement, he may proceed on whichever he chooses.<sup>22</sup> Where a mutual mistake is made in the distribution the one by whose supineness it was suffered, cannot ask to be relieved in a collateral proceeding.<sup>23</sup> The only true guide of all the parties is the state of the record when the sale took place, and hence a claim of subrogation as surety cannot avail on distribution.<sup>24</sup>

Under the act of June 13, 1840, P. L. 689, where land lies in adjoining counties subject to liens in both the court is given ample discretion in the distribution.<sup>25</sup> The method of distribution is not open to challenge by anyone who has no claim on the proceeds,<sup>26</sup> as the purchaser, *e. g.*;<sup>27</sup> unless his interest is divested by sale on

<sup>12</sup> Section 86, act June 16, 1836, P. L. 755.

<sup>13</sup> Kelly's Ap., 16 Pa. 59; Tindle's Ap., 77 Pa. 201; Leonard's Ap., 94 Pa. 180; Selden's Ap., 74 Pa. 323; Britton's Ap., 45 Pa. 172; Vallee v. Elizabethtown, Etc., Co., 18 Lanc. L. R. 65.

<sup>14</sup> Bowman v. Bowman, 1 York, 215.

<sup>15</sup> Kohl v. Harting, 8 Watts, 329.

<sup>16</sup> Crouse's Ap., 28 Pa. 139.

<sup>17</sup> Potter v. Langstrath, 151 Pa. 216.

<sup>18</sup> Early's Ap., 89 Pa. 411; Souder's Ap., 57 Pa. 498; Rice's Ap., 79 Pa. 168.

<sup>19</sup> Krum v. Roth, 16 Lanc. L. R. 252.

<sup>20</sup> Tigue v. Banta, 176 Pa. 414; Norristown Trust Co. v. Smith, 19 Montg. 21.

<sup>21</sup> Evans v. Duncan, 4 Watts, 24; Order of Solon v. Gunther, 8 Supr. C. 319.

<sup>22</sup> Marshall v. Franklin Bank, 25 Pa. 384.

<sup>23</sup> Yerkes' Ap., 8 W. & S. 224.

<sup>24</sup> Indiana County Bank's Ap., 95 Pa. 500.

<sup>25</sup> Martin's Ap., 2 Supr. C. 67.

<sup>26</sup> Weiss' Ap., 5 W. N. C. 423.

<sup>27</sup> Lewin v. Acheson, 47 Pitts. L. J. 215.

a paramount lien.<sup>28</sup> A lien creditor, whose claim could not be reached, has no standing to dispute;<sup>29</sup> nor a devisee of land subject to legacies, as to a decree directing the payment of the legacies out of the proceeds of sale on execution against him.<sup>30</sup>

#### 17. Distribution by the sheriff.

The sheriff may assume the risk, generally, to distribute money made out of the sale of personalty and take the execution plaintiff's receipt and make proper return thereof; but where there are claims for wages or rent his safest course is to attach the notices and ask leave to pay the money into court.<sup>31</sup> But if there are no such claims he should pay it over promptly.<sup>32</sup> In case of conflicting claims, he may have leave to pay into court.<sup>33</sup> The court is the judge of the necessity or advisability of so ordering.<sup>34</sup> However, the sheriff who distributes money himself does so at his own risk;<sup>35</sup> and the elder and more conservative jurists who believed in doing things well and safely, without too much haste, held that the sheriff could on his own motion pay the money into court according to the command of his writ to have it there on the return thereof.<sup>36</sup> A subsequent execution creditor can rule the money into court, on the allegation that prior executions were issued and held only for purpose of lien and to hinder, delay and defraud other creditors.<sup>37</sup>

#### 18. Distribution on list of liens.

The act of April 10, 1862, P. L. 364, relating to Allegheny County, was extended to the entire state by act of June 4, 1901, P. L. 357, and under this the sheriff must report distribution according to the certified list of liens, or he will be held liable for any loss.<sup>38</sup>

#### 19. Liability of the sheriff.

When the sheriff distributes money himself he must take notice of what liens are discharged by the sale and apply the money in the proper order, or he will be liable personally.<sup>39</sup>

<sup>28</sup> Jacoby's Est., 9 Phila. 311.

<sup>29</sup> McFarland's Est., 16 Supr. C. 142; Bitting's Ap., 17 Pa. 211.

<sup>30</sup> Drake v. Brown, 68 Pa. 223.

<sup>31</sup> Kirk v. Buckholdt, 7 W. N. C. 81; Kochenderfer v. Feigel, 5 W. N. C. 404; Dunn v. Megargee, 12 Phila. 343; Mathews v. Webster, 7 W. N. C. 81.

<sup>32</sup> Marble Co. v. Burke, 12 Phila. 302; Baum v. Brown, 11 W. N. C. 202.

<sup>33</sup> Geisel v. Jones, 7 W. N. C. 82; Lynch v. English, 4 Del. Co. 481.

<sup>34</sup> Marble Co. v. Burke, 12 Phila. 302; P. & L. Dig., vol. 20, cols. 34426-7.

<sup>35</sup> Dickerman v. Edinger, 3 D. R. 11; Morris v. Doyle, 6 Kulp, 446.

<sup>36</sup> Williams' Ap., 9 Pa. 267; Comth. v. Alexander, 14 S. & R. 257; Mather v. McMichael, 13 Pa. 301. (See P. & L. Dig., vol. 20, cols. 34430-1, for a variety of cases on this subject.)

<sup>37</sup> Mulligan v. Barnes, 171 Pa. 53.

<sup>38</sup> Campbell v. McCleary, 166 Pa. 1; Semple v. Semple, 193 Pa. 630. (See sheriff's receipt under lien creditor act, *supra*. See also Hallowell v. McCormick, 19 Mont'g Co., 86, and Frazier's Ap., 9 Atl. 493.)

<sup>39</sup> Comth. v. Alexander, 14 S. & R. 257; McDonald v. Todd, 1 Grant,

He is not liable to the owner of a first lien which the prothonotary omitted to enter on the judgment docket; but the prothonotary is.<sup>40</sup> A rule of court requiring the sheriff to pay over the money to the party or his attorney entitled to it, does not relieve him from the duty of paying it to the one legally entitled.<sup>41</sup> But in doing so he is guided solely by the record<sup>42</sup> at the time he makes distribution, unless he does so before the return day when other claims come in on the fund,<sup>43</sup> for such distribution is premature.<sup>44</sup>

#### 20. Interest.

Interest on a lien ceases on the day of sale, but if by neglect the sheriff becomes liable for a sum he also is liable for interest thereon,<sup>45</sup> unless he can show good faith and that he did not use any of the fund.<sup>46</sup> Pending a dispute about the distribution there is no interest chargeable to the officer,<sup>47</sup> unless the sheriff uses the money.<sup>48</sup>

#### 21. Remedy against the sheriff.

The more direct and proper remedy against the sheriff for wrongful distribution is to rule him to pay the money into court,<sup>49</sup> but an action of trespass for official misfeasance will also lie.<sup>50</sup> He is also liable on his bond,<sup>51</sup> which is the proper remedy where he distributes the fund after the return day in good faith and without notice of any disputes.<sup>52</sup> If an order be made directing the sheriff to pay money into court, he is entitled to notice and a hearing.<sup>53</sup> Where the court has made an order confirming a wrongful distribution creditors who are injured may attack the order and move to have it rescinded.<sup>54</sup> If the sheriff takes notes and assigns them to his creditors for his own debts the assignees having notice, a bill will lie against them to refund.<sup>55</sup> The sheriff cannot have the sale set aside for an erroneous distribution.<sup>56</sup>

A legatee entitled to participate, because his legacy was charged

17; *Lewis v. Rogers*, 16 Pa. 18; *Pryer v. Mark*, 129 Pa. 529; *Mather v. McMichael*, 13 Pa. 301; *Enterline v. Comrey*, 15 C. C. 627; *P. & L. Dig.*, vol. 20, col. 34436.

<sup>40</sup> *Mann's Ap.*, 1 Pa. 24.

<sup>41</sup> *McCaully v. Boeshore*, 2 Lanc. L. R. 337.

<sup>42</sup> *Lewis v. Rogers*, 16 Pa. 18; *O'Donnell v. Rorer*, 4 D. R. 146.

<sup>43</sup> *Fisher v. Allen*, 2 Phila. 115.

<sup>44</sup> *Williams v. Gilmore*, 1 Am. L. J. 269; *Williams' Ap.*, 9 Pa. 267.

<sup>45</sup> *Ricketson v. Comth.*, 51 Pa. 155.

<sup>46</sup> *Reed v. Reed*, 1 W. & S. 235; *Hantz v. York Bank*, 21 Pa. 291. (See *North v. Cottrell*, 22 Lanc. L. R. 150, as to time to which interest runs.)

<sup>47</sup> *Stewart v. Stocker*, 13 S. & R. 199.

<sup>48</sup> *Comth. v. Crevor*, 3 Binney, 121.

<sup>49</sup> *Harwood v. Ramsey*, 15 S. & R. 31.

<sup>50</sup> *Levistean v. Deal*, 3 Phila. 413.

<sup>51</sup> *Gerhart v. Gerhart*, 18 Montg. 78.

<sup>52</sup> *Bastian's Case*, 90 Pa. 472; *Franklin Twp. v. Osler*, 91 Pa. 160; *Henderson's Ap.*, 4 Penny. 229; *Tisch v. Raisch*, 7 Kulp, 131.

<sup>53</sup> *Dewoody v. Dewoody*, 157 Pa. 603.

<sup>54</sup> *Williams' Ap.*, 9 Pa. 267.

<sup>55</sup> *Reed's Ap.*, 34 Pa. 207.

<sup>56</sup> *Mackaness v. Long*, 85 Pa. 158.



on the land but discharged by the sale may bring assumpsit against the sheriff,<sup>57</sup> and it is not necessary to join the sureties in the action.<sup>58</sup> They will be secondarily liable. A demand has been held to be necessary, but such demand prior to the return day is sufficient to hold the sureties, after the sheriff's death.<sup>59</sup> When the sheriff is sued in trespass the burden is upon the plaintiff to prove every fact essential to fix the liability,<sup>60</sup> including the right of the claimant to participate,<sup>61</sup> unless it be the execution plaintiff, whose right the sheriff cannot challenge.<sup>62</sup> Money erroneously paid out to a *bona fide* creditor of defendant, although a junior lien, cannot be recovered from him;<sup>63</sup> nor can an excess paid him when there is not enough to satisfy all creditors.<sup>64</sup>

But if a fraud has been practiced on the sheriff he may recover it.<sup>65</sup> The suit should be brought in the name of the sheriff,<sup>66</sup> unless there is an agreement between the creditors, when the one beneficially interested may maintain it.<sup>67</sup> Where the sheriff takes a refunding bond the decree of the court distributing the money is conclusive in a suit upon it.<sup>68</sup> But upon such bond it is a good defense that the sheriff was indebted to the defendant in this suit.<sup>69</sup> If there are several plaintiffs a payment to one is a payment to all,<sup>70</sup> but he must pay to the real and not a nominal plaintiff.<sup>71</sup>

If he pays to the mortgagee after an assignment without notice of such assignment he need not pay again to the assignee;<sup>72</sup> or if he pays to the administrator without notice of a claim by an heir, he is discharged;<sup>73</sup> or the counsel of record, as against the plaintiff,<sup>74</sup> unless he has notice that the attorney's authority has been revoked.<sup>75</sup> He is protected if he pays to a trustee for a class of creditors.<sup>76</sup>

<sup>57</sup> Pryer v. Mark, 129 Pa. 529.

<sup>58</sup> Enterline v. Comrey, 15 C. C. 627.

<sup>59</sup> Ricketson v. Comth., 51 Pa. 155.

<sup>60</sup> Dowd v. Crow, 205 Pa. 214.

<sup>61</sup> Crow v. Comth., 16 Pitts. L. J. 250.

<sup>62</sup> Dean v. Patton, 1 P. & W. 437. (For other cases similar see P. & L. Dig., vol. 20, col. 34451.)

<sup>63</sup> Krumbhaar v. Yewdall, 153 Pa. 476; Urie v. Johnston, 3 P. & W. 212; Diechman v. Northampton Bank, 1 Rawle, 54; P. & L. Dig., vol. 20, col. 34455.

<sup>64</sup> Finnel v. Brew, 81 Pa. 362; First Natl. Bank, Etc., v. Fair, 127 Pa. 324.

<sup>65</sup> McDonald v. Todd, 1 Grant, 17; Priestly v. Bird, 1 Northumberland, 113.

<sup>66</sup> Longenecker v. Zeigler, 1 Watts, 252.

<sup>67</sup> Lewis v. Rogers, 16 Pa. 18.

<sup>68</sup> Noble v. Cope, 50 Pa. 17.

<sup>69</sup> Morrison v. Mullin, 34 Pa. 12.

<sup>70</sup> Lazarus v. Follmer, 4 W. & S. 9.

<sup>71</sup> Zantzinger v. Old, 2 Dallas, 265.

<sup>72</sup> Comth. v. Watmough, 12 Pa. 316.

<sup>73</sup> Comth. v. Rahm, 2 S. & R. 375.

<sup>74</sup> Henderson's Ap., 4 Penny. 229.

<sup>75</sup> Irwin v. Workman, 3 Watts, 357.

<sup>76</sup> Yarnal's Ap., 3 Pa. 363.

## 22. Practice on payment into court.

As already stated, in case of dispute or doubt the sheriff should ask leave to pay the money into court, unless he takes a refunding bond. The mere payment to the prothonotary has been held not to be payment into court. The exigency of the writ is that he have the money before the court,<sup>1</sup> which should order it invested *pendente lite*, all going upon the record at the time, otherwise the sheriff is not relieved.<sup>2</sup> The mere return that he has the money ready to pay into court is not payment into court.<sup>3</sup> A sheriff who collects money on a *testatum vend. ex.* may pay it into the court of his county, with leave, or the county where the writ issued;<sup>4</sup> but on a *testatum fi. fa.* he must pay it into the court from which it issued.<sup>5</sup> He will not be ruled to pay the money into court where there is no substantial dispute.<sup>5a</sup>

If the sheriff dies leaving an official account at a bank the practice is to rule his successor, and not the bank, to pay it into court.<sup>6</sup> A rule to show cause why an order of court directing a sheriff to pay money into court should not be vacated is not of course; it must be issued by allowance of court.<sup>7</sup> Where the rule is made absolute a certiorari is premature, before an attachment has issued to enforce the rule.<sup>8</sup> The sheriff is not a party to the disputes of creditors and should not swear to a petition in behalf of one of them.<sup>9</sup> His course is merely to show the court that there are disputes or difficulties and he is perplexed with doubts and ask leave to pay into court.<sup>10</sup> When it is once in court it is there for distribution<sup>11</sup> and the real creditor may be restrained from taking it out, by the nominal plaintiff,<sup>12</sup> and when an auditor has been appointed claimants must go before him.<sup>13</sup>

## 23. Distribution by the court.

The court of Common Pleas will not distribute money paid into court before the return day of the writ.<sup>14</sup> It, and not the Orphans' Court, has jurisdiction to distribute money made on an execution against the estate of a decedent.<sup>15</sup> There is no authority to dis-

<sup>1</sup> *Marble Co. v. Burke*, 12 Phila. 302.

<sup>2</sup> *Comth. v. Walter*, 99 Pa. 181.

<sup>3</sup> *Williams' Ap.*, 9 Pa. 267; *Allegheny Bank's Ap.*, 48 Pa. 328; *McDonald v. Todd*, 1 Grant, 17.

<sup>4</sup> *Borlin's Ap.*, 9 W. N. C. 545.

<sup>5</sup> *Meixell v. Meixell*, 1 Lehigh V. L. R. 127.

<sup>5a</sup> *Logue v. Atherholt*, 7 D. R. 365.

<sup>6</sup> *Allegheny Bank's Ap.*, 48 Pa. 328.

<sup>7</sup> *Garver v. Ward*, 9 W. N. C. 192.

<sup>8</sup> *Franklin Twp. v. Osler*, 91 Pa. 160.

<sup>9</sup> *O'Donnell v. Poike*, 2 D. R. 790.

<sup>10</sup> *Shantz v. Lyle*, 1 W. N. C. 224; *Faunce v. Sedgwick*, 8 Pa. 407; *Snively v. Comth.*, 40 Pa. 75.

<sup>11</sup> *Fitch's Ap.*, 10 Pa. 461.

<sup>12</sup> *Manly's Ap.*, 3 Walker, 222.

<sup>13</sup> *Christman v. Hyde*, 1 W. N. C. 7; *Souder's Ap.*, 57 Pa. 498; *P. & L. Dig.*, vol. 20, col. 34465.

<sup>14</sup> *Gregg's Ap.*, 30 Pitts. L. J. 59; *Freed v. Wells*, 6 Kulp, 206.

<sup>15</sup> *Penna., Etc., Bank v. Stambaugh*, 13 S. & R. 299.

tribute a fund not brought into court, except as provided by the acts of April 20, 1846, P. L. 411, and June 28, 1871, P. L. 1376, *supra*.<sup>16</sup> But after distribution by an auditor has been confirmed, it is too late to object and the appellate court will presume that the money was in court,<sup>17</sup> unless the auditor's report shows it was not.<sup>18</sup> Under the act of 1871, *supra*, the parties in interest shall assent, and without their assent a fund out of court cannot be distributed by the court.<sup>19</sup> The assent of all the parties in interest is requisite.<sup>20</sup> Where they all appear before the auditor they will be presumed to have assented.<sup>21</sup>

#### 24. Issue to try disputes of fact.

Section 87 of the act of 1836, *supra*, provides:

"If any fact connected with such distribution shall be in dispute, the court shall, at the request in writing, of any person interested, direct an issue to try the same, and the judgment upon such issue shall be subject to a writ of error, in like manner, as other cases wherein writs of error now lie."

#### 25. Affidavit of facts in dispute.

Section 2 of the act of April 20, 1846, P. L. 411, provides:

"Before an issue shall be directed upon the distribution of money arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to writ of error or appeal by such applicant, if the issue be refused, in like manner as in other cases in which such writ now lies."

#### 26. Request for issue — rule in Allegheny.

Rule 46, Allegheny County (D. R. C. 47), provides:

"It shall be the duty of any person desiring an issue under the acts of assembly relating to executions, to present his request in writing to the auditor within forty-eight hours after the hearing of the evidence has been concluded; which request shall particularly set forth the specific facts in dispute on which he founds his claim to an issue, verified by affidavit; and it shall be the duty of the auditor forthwith to report the same to the court."

This rule has been held to be reasonable and proper.<sup>22</sup>

<sup>16</sup> Williams' Ap., 9 Pa. 267; Atkins' Ap., 58 Pa. 86; Kauffman's Ap., 70 Pa. 261; Semple v. Semple, 193 Pa. 630; P. & L. Dig., vol. 20, cols. 34470-1.

<sup>17</sup> Constine's Ap., 1 Grant, 242.

<sup>18</sup> Masser v. Dewart, 46 Pa. 534.

<sup>19</sup> See *supra*, par. 2, this chapter.

<sup>20</sup> Grayson v. Hangstorfer, 9 W. N. C. 333; Poulson's Pet. 11 Phila. 297; Natl. Gas Co.'s Ap., 1 Penny. 100.

<sup>21</sup> Rogers' Ap., 2 Kulp, 30; Hopkins' Ap., 90 Pa. 69; McFarland's Est., 16 Supr. C. 142.

<sup>22</sup> McQuade v. Stewart, 11 Pitts. L. J. 188.

**27. Form of application for issue.**

Sue Wayland } In the Court of Common Pleas of Huntingdon  
 v. } County.  
 Blank Bitner. } *Vend. Ex.* No. — Term, 1910.

To the Honorable Joseph M. Woods, President Judge of the Court of Common Pleas of said county, the petition of Merl Mercer respectfully represents that he is a lien creditor of the above named Blank Bitner, defendant, and as such, interested in the distribution of the money in court, that there are material facts in dispute in relation to said distribution the nature and character of which are as follows, viz.: [set forth fully].

He therefore prays your honorable court to direct an issue to try said disputed facts, and he will ever pray as in duty bound.

Merl Mercer.

Huntingdon County, ss.

Merl Mercer being duly sworn says that the facts set forth above are just and true as he verily believes.

Merl Mercer.

Sworn to, etc.

[For form of order for feigned issue, see title "Judgments," Opening of, *supra*.]

**28. Who may apply for an issue.**

One who has no lien on the fund or right to participate in the distribution cannot demand an issue.<sup>23</sup> If the record shows that no one can be benefited by it an issue will not be granted;<sup>24</sup> nor where the grounds are very slight.<sup>25</sup> The right to apply is not confined to lien creditors; any one whose claim may be injuriously affected may apply.<sup>26</sup> An attaching creditor whose attachment issued prior to the sale has a standing to move for an issue.<sup>27</sup> So also, one whose attachment issued before a magistrate, subsequent to the judgment and when reduced to judgment, it was filed in the Common Pleas.<sup>28</sup> It depends on whether the applicant has a lien or is entitled to participate in the distribution.<sup>29</sup> One who recovers judgment after the sale cannot ask for an issue;<sup>30</sup> nor one who claims adversely to the sale, as the heir.<sup>31</sup> An assignee in bankruptcy after a sheriff's sale has a standing;<sup>32</sup> also a lien holder who seeks to protect his lien.<sup>33</sup>

<sup>23</sup> Strouse, Etc., Co. v. Miller, 3 Dauphin, 90.

<sup>24</sup> Lackawanna Valley Bank v. Williams, 2 Law Times (N. S.), 198; Dawson v. Melvin, 2 Law Times (N. S.), 204.

<sup>25</sup> Mott v. Mott, 21 Mont'g Co. 110.

<sup>26</sup> Robinson v. Vandiver, 2 Pearson, 95; Greene v. Tyler, 39 Pa. 361; Towers v. Tuscarora Academy, 8 Pa. 297.

<sup>27</sup> Atherholt v. Atherholt, 7 Supr. C. 82; Scull's Ap., 115 Pa. 141.

<sup>28</sup> Ziegler v. Pierce, 5 C. C. 518.

<sup>29</sup> Smith v. Reiff, 20 Pa. 364; Jones' Case, 2 Kulp, 126; Filbert v. Filbert, 9 C. C. 149; Belber v. Belber, 6 Supr. C. 361; Meade v. Israel, 6 D. R. 389.

<sup>30</sup> Cunningham v. Ihmsen, 63 Pa. 351.

<sup>31</sup> Housekeeper's Ap., 49 Pa. 141.

<sup>32</sup> Rohrer's Ap., 62 Pa. 498.

<sup>33</sup> Wolfe v. Oxnard, 152 Pa. 623.

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The application for an issue should be made to the court having a grasp on the fund.<sup>34</sup> But if the parties have acquiesced in another jurisdiction they are estopped and the appellate court in reversing will not award a *ven. fa. de novo*.<sup>35</sup> The application should be made to the court and not the auditor;<sup>36</sup> though notice should be given to the auditor.

### 29. Waiver and laches.

If the application is not promptly made, it will be held waived.<sup>37</sup> But not for light or trivial reasons.<sup>38</sup> It is not too late to apply after the argument,<sup>39</sup> or after the auditor's report has been filed,<sup>40</sup> any time before final confirmation.<sup>41</sup> But having taken his chances with the auditor he cannot demand an issue as a matter of right.<sup>42</sup> If he petitions for an issue or the appointment of an auditor and the court appoints an auditor the applicant is bound by it.<sup>43</sup> Where a rule of court requires a request to be made to the auditor the applicant must follow the rule of court.<sup>44</sup>

Where the claimant has had the audit re-opened, after long drawn out litigation, he will not be awarded an issue.<sup>45</sup>

### 30. Subject matter of issue.

In a dispute about the ownership of a lien either party is entitled to demand an issue,<sup>46</sup> which cannot be had on a question of law<sup>47</sup> or law and immaterial matters.<sup>48</sup> Whether a judgment is a lien is purely a question of law;<sup>49</sup> also whether a party is entitled to come in on the fund.<sup>50</sup>

The court must confine the issue to fact and not mix it with law<sup>51</sup> nor submit *res judicata*.<sup>52</sup> Where a judgment is disputed an issue may be framed on the ground of fraud.<sup>53</sup> Without showing fraud or payment an issue will be refused.<sup>54</sup> A second lien creditor cannot set up as an issue want of consideration between the defendant

<sup>34</sup> Brown's Est., 2 Pa. 463; Mahler's Ap., 38 Pa. 220.

<sup>35</sup> Walker v. Marine Bank, 98 Pa. 574.

<sup>36</sup> Penna., Etc., Case, 4 Lanc. L. R. 265.

<sup>37</sup> Yardley v. Holby, 1 T. & H. Pr., section 1350; Morgan's Est., 2 Foster, 208; Port Carbon, Etc., v. Stevens, 1 Leg. Rec. R. 301.

<sup>38</sup> Salsburg v. Frank, 4 Kulp, 502.

<sup>39</sup> Trimble's Ap., 6 Watts, 133.

<sup>40</sup> Souder's Ap., 57 Pa. 498.

<sup>41</sup> Reigart's Ap., 7 W. & S. 267; Rohrer's Ap., 62 Pa. 498; Brown's Est., 2 Pa. 463.

<sup>42</sup> Bradford's Ap., 29 Pa. 513.

<sup>43</sup> Dickerson's Ap., 7 Pa. 255.

<sup>44</sup> Myers v. Fichtner, 10 Kulp, 45.

<sup>45</sup> Seip's Ap., 26 Pa. 176; McLawrence's Est., 2 Luz. L. R. 262.

<sup>46</sup> Souder's Ap., 57 Pa. 498; Mahon v. Rosenkrantz, 8 Kulp, 334.

<sup>47</sup> Montgomery's Ap., 6 Atl. 125.

<sup>48</sup> Wolfe v. Oxnard, 152 Pa. 623.

<sup>49</sup> Christophers v. Selden, 28 Pa. 165.

<sup>50</sup> Shertzer v. Herr, 19 Pa. 34; Russel v. Reed, 27 Pa. 166.

<sup>51</sup> Christophers v. Shelden, 28 Pa. 165.

<sup>52</sup> Robinson v. Vandiver, 2 Pearson, 95.

<sup>53</sup> Clark v. Douglass, 62 Pa. 408; Moore v. Dunn, 147 Pa. 359.

<sup>54</sup> Air Brake B. & L. Assn. v. Bishop, 50 Pitts. L. J. 382.

and the first lien creditor.<sup>55</sup> The court must determine the question first whether the facts alleged to be in dispute are material<sup>56</sup> and sufficient to call for a jury.<sup>57</sup>

In the earlier state of practice the question was determined from the petition and affidavits filed;<sup>58</sup> but where an answer is filed denying the petition, depositions will be ordered and the whole question comes up whether there is sufficient evidence to sustain the verdict of a jury in case an issue is awarded.<sup>59</sup> If no depositions are taken in such case the issue will be refused.<sup>60</sup> The finding of the lower court will have great weight in the appellate court.<sup>61</sup> In order to sustain an issue the facts averred must be material.<sup>62</sup> And the claimant must show that a portion of the fund would reach his claim: if it will not, he is not entitled to an issue.<sup>63</sup> Sufficient facts must be set up to warrant a jury in finding a verdict thereon<sup>64</sup> and there must be a dispute.<sup>65</sup> It must be alleged by one and denied by the other;<sup>66</sup> and it must be such a dispute as only a jury can settle<sup>67</sup> and if found in his favor, affect the distribution.<sup>68</sup> If the answer denies the averments and is supported by depositions the court will refuse an issue.<sup>69</sup>

Where an issue is refused the court should state the grounds, so that the appellate court may know on what reasons the judge based his refusal.<sup>70</sup> Whether a prior judgment is fraudulent or not, is a material question, and upon a proper showing an issue will be awarded<sup>71</sup> but not on slight circumstances.<sup>72</sup> If the petition and depositions make out a strong case an issue will be granted.<sup>73</sup>

### 31. Effect of audit and rules.

One who does not ask for an issue under section 87 of the act of 1836, *supra*, and appears before the auditor loses his right to an

<sup>55</sup> Dawson v. Melvin, 2 Law Times (N. S.), 201.

<sup>56</sup> Montgomery's Ap., 6 Atl. 125; Loeffler v. Schmertz, 152 Pa. 615; Providence, Etc., Co. v. Chase, 108 Pa. 319.

<sup>57</sup> Able v. Able, 6 Northam. 277; Hazy v. Poike, 160 Pa. 522.

<sup>58</sup> Gordon's Est., 9 Phila. 350; Kilheffer v. Carpenter, 10 Lancaster Bar, 21.

<sup>59</sup> Moore v. Dunn, 147 Pa. 359; Able v. Able, *supra*.

<sup>60</sup> Friedlander v. Blau, 8 Kulp, 478.

<sup>61</sup> Jones v. English, 168 Pa. 438.

<sup>62</sup> Martin's Ap., 97 Pa. 85; Ryman's Ap., 124 Pa. 635; Overholt's Ap., 12 Pa. 222; Benson's Ap., 48 Pa. 159.

<sup>63</sup> Jones v. English, 168 Pa. 438.

<sup>64</sup> Jones v. Rash, 8 D. R. 714.

<sup>65</sup> Dickerson's Ap., 7 Pa. 255; Knight's Ap., 19 Pa. 493.

<sup>66</sup> Ryman's Ap., 124 Pa. 635.

<sup>67</sup> Hagy v. Poike, 160 Pa. 522.

<sup>68</sup> Battin v. Meyer, 5 Phila. 73; Loeffler v. Schmertz, 152 Pa. 615.

<sup>69</sup> Wile v. Locks, 9 Supr. C. 193; Boll v. Boll, 11 York, 20; Irvin's Ap., 28 W. N. C. 60.

<sup>70</sup> Meade v. Israel, 6 D. R. 389.

<sup>71</sup> Haller v. Meads, 15 York, 81; Bach v. Morey, 1 Northam. 387.

<sup>72</sup> Corfield v. Klein, 173 Pa. 363.

<sup>73</sup> Marks' Assignment, 8 Kulp, 501; Whitmore v. Bunt, 6 Lack. L. N. 100.

issue under act of April 20, 1846, P. L. 411, *supra*.<sup>1</sup> Where rules of court fix the time and manner of making the demand, unless these are observed the claimant will be held to have waived the issue;<sup>2</sup> but an assignee in bankruptcy after the sale will not be thus concluded.<sup>3</sup>

### 32. The affidavit.

The second section of the act of April 20, 1846, P. L. 411, requires that an affidavit setting forth that there are material facts in dispute, shall be filed, and without it an issue will not be allowed when the proceedings are under that act.<sup>4</sup> It was held that an attorney's affidavit on information and belief was insufficient.<sup>5</sup> The affidavit must set forth clearly what the facts in dispute are, specifically<sup>6</sup> and with precision.<sup>7</sup> An averment by a party in interest, on information and belief and expectation to prove is sufficient.<sup>8</sup> It must not be inferential<sup>9</sup> nor vague;<sup>10</sup> but if it is certain to a common intent it will be sufficient.<sup>11</sup>

### 33. When issue is of right.

Both under the act of 1836 and 1846, when the applicant brings himself within the terms he is entitled to an issue;<sup>12</sup> and when awarded, it will not be stricken off on the assertion that there is lack of evidence.<sup>13</sup> Where the right is refused the remedy is by appeal from the decree of final distribution.<sup>14</sup> Where there are several feigned issues with different plaintiffs an appeal should be taken in each case separately.<sup>15</sup>

### 34. Framing the issue.

"When an issue is directed, the court should indicate who are to be the parties, plaintiff and defendant and the counsel of the party asking for it should then draw up a declaration in assumpsit as upon a wager."<sup>16</sup> But since the act of 1887 the practice is modi-

<sup>1</sup> Dawson v. Melvin, 2 Law Times (N. S.), 201; Second Natl. Bank, Etc., v. Penna., Etc., Co., 140 Pa. 628; People's Sav. Bk. v. Mosier, 199 Pa. 375.

<sup>2</sup> McLawrence's Est., 2 Luz. L. R. 262.

<sup>3</sup> Rohrer's Ap., 62 Pa. 498.

<sup>4</sup> Biddle v. King, 1 Phila. 394; Schick's Ap., 49 Pa. 380.

<sup>5</sup> Friedlander v. Blau, 8 Kulp, 478.

<sup>6</sup> Brinton v. Perry, 1 Phila. 436; Robinson's Ap., 36 Pa. 81; Thompson's Ap., 126 Pa. 434; P. & L. Dig., vol. 20, col. 34520.

<sup>7</sup> Kennedy's Ap., 3 Walker, 68.

<sup>8</sup> Goodwin v. Sheppard, 3 Phila. 441.

<sup>9</sup> Marcy v. Heermans, 2 Law Times (N. S.), 108.

<sup>10</sup> Thompson's Ap., 126 Pa. 434.

<sup>11</sup> Building Ass'n. v. McDonald, 5 Phila. 442; Atherholt v. Atherholt, 7 Supr. C. 82; Schwartz's Ap., 21 W. N. C. 246.

<sup>12</sup> Overholt's Ap., 12 Pa. 222; Benson's Ap., 48 Pa. 159; P. & L. Dig., vol. 20, cols. 34541-2.

<sup>13</sup> Dormer v. Brown, 72 Pa. 404.

<sup>14</sup> Providence, Etc., Co. v. Chase, 108 Pa. 319, citing a line of authorities; Rohrer's Ap., 62 Pa. 498.

<sup>15</sup> Kimmel v. Johnson, 18 Supr. C. 429.

<sup>16</sup> Woodward, J., in Muhlenberg v. Brock, 25 Pa. 517.

fied. A good form of feigned issue upon a judgment alleging fraud and undue influence will be found under Opening Judgments, *supra*.<sup>17</sup> The petitioner may be made plaintiff and the plaintiff in the lien attacked, defendant.<sup>18</sup> The issue should be so moulded as to embrace the disputed facts, and if the attorneys cannot agree upon it, the court will frame it.<sup>19</sup> Although the issue be defectively framed if properly tried, the appellate court will not disturb it.<sup>20</sup>

### 35. Trial of feigned issue.

The right to have a jury trial is statutory although chancery principles are commingled in determining the justice of the case,<sup>21</sup> and all the issues may be tried by the same jury, in the discretion of the court.<sup>22</sup>

The practice in trying the feigned issue will be the same as in any other action,<sup>23</sup> and the court should not presume to sit as a chancellor and influence the verdict<sup>24</sup> or refuse to submit the questions in dispute.<sup>25</sup> It may not change the issue but may construe it.<sup>26</sup> The one who has the affirmative, whether he be made plaintiff or defendant, has the burden of proof.<sup>27</sup> The verdict and judgment thereon are conclusive upon the auditor<sup>28</sup> and generally, unless appealed from or when there was nothing pending at the trial to which it could be material.<sup>29</sup> When an appeal is taken after final distribution, the party must assign error as to the trial, if he wishes to have it reviewed, otherwise he will be concluded by the verdict.<sup>30</sup> But it only affects those who are made parties to the issue;<sup>31</sup> and when a party is improperly joined and objects, he is not bound<sup>32</sup> or where the applicant desires to withdraw his application and the court refuses to allow it.<sup>33</sup>

### 36. Investment of funds pendente lite.

Section 3 of the act of 1846, *supra*, provides:

"Upon granting any such issue, it shall be discretionary with the court, so soon as the money arising from such sale shall have been

<sup>17</sup> See chapter on Judgments, *supra*.

<sup>18</sup> Haller v. Meads, 15 York, 81; Boyd v. Roberts, 2 C. C. 535; Huston v. Ticknor, 99 Pa. 231.

<sup>19</sup> M'Daniel v. Haly, 1 Miles, 353; Stewart v. Stocker, 1 Watts, 135; Duffy v. Duffy, 6 C. C. 161.

<sup>20</sup> Clark v. Douglass, 62 Pa. 408.

<sup>21</sup> Dormer v. Brown, 72 Pa. 404.

<sup>22</sup> M'Daniel v. Haly, 1 Miles, 353.

<sup>23</sup> Sansenbacher v. Schickendantz, 141 Pa. 418.

<sup>24</sup> Brown v. Parkinson, 56 Pa. 336.

<sup>25</sup> Muhlenberg v. Brock, 25 Pa. 517.

<sup>26</sup> Sheetz v. Hanbest, 81 Pa. 100.

<sup>27</sup> Brandt v. Stevenson, 3 Phila. 205.

<sup>28</sup> Thompson v. Kelly, 6 Phila. 218.

<sup>29</sup> Martin v. Gernandt, 19 Pa. 124.

<sup>30</sup> Garrison's Ap., 38 Pa. 531.

<sup>31</sup> Shulze's Ap., 1 Pa. 251; Cash's Ap., 1 Pa. 166; Brown v. Parkinson, 56 Pa. 336; Moore v. Dunn, 147 Pa. 359; Schick v. Pharo, 49 Pa. 384.

<sup>32</sup> Wolf v. Payne, 35 Pa. 97.

<sup>33</sup> Shick's Ap., 49 Pa. 380.



paid into court, upon the application of the party or parties appearing by the record, *prima facie* entitled to the said fund, to order the same to be invested *pendente lite*, in the debt of the United States, or some other sufficient security, subject to the decree of the court."

### 37. Costs of feigned issue.

The costs of the trial of a feigned issue generally, are in the discretion of the court and no execution can issue for them without leave of court.<sup>34</sup> They should be paid, not out of the fund, but by the parties<sup>35</sup> and may be apportioned among the creditors.<sup>36</sup> But under the act of 1846, an exceptant puts himself in such a position that the costs may follow the verdict;<sup>37</sup> and this is the more so since the act of May 26, 1897, P. L. 95, on interpleader provides that the costs of a feigned issue shall follow suit.

### 38. Remedy by appeal.

The proper practice to reach errors on the trial of a feigned issue is to appeal after decree of final distribution and take up the entire record;<sup>38</sup> and errors on the trial and judgment must be specified, if the party wishes to have them reviewed.<sup>39</sup> It was formerly held that a writ of error would lie to the judgment, though interlocutory<sup>40</sup> but this practice has been discountenanced and since a writ of error is no longer issued technically, an appeal which reaches the trial and judgment is sufficient.<sup>41</sup> To preserve his rights and standing to appeal the party must take and have his exceptions allowed and made part of the record in the same manner as if he would appeal directly from the judgment.

### 39. Duties of auditor.

The appointment of auditors and the limitations upon their inquiry into the validity of judgments have been considered *supra*. It is in order, here, to see what is the general scope of an auditor's duties. Generally, he is limited by the purposes of his appointment which should be expressed in the motion or agreement for his appointment<sup>1</sup> and his duties cannot be enlarged by the assent of an attorney without his client's express consent,<sup>2</sup> though if the report be approved by the court a mere irregularity may be cured.<sup>3</sup>

Having been appointed to distribute a specific fund, he cannot embrace other funds arising in different proceedings.<sup>4</sup> Where he

<sup>34</sup> Reigel's Ap., 1 Walker, 72.

<sup>35</sup> Hooper v. Diffenderfer, 5 Lanc. L. R. 245.

<sup>36</sup> Cowden's Est., 1 Pa. 267.

<sup>37</sup> Sansenbacher v. Schickendantz, 141 Pa. 418; Black's Ap., 106 Pa. 344.

<sup>38</sup> Christophers v. Selden, 28 Pa. 165; Reed's Ap., 71 Pa. 378.

<sup>39</sup> Garrison's Ap., 38 Pa. 531.

<sup>40</sup> Brown's Ap., 26 Pa. 490.

<sup>41</sup> Providence, Etc., Co. v. Chase, 108 Pa. 319; Brown v. Parkinson, 56 Pa. 336.

<sup>1</sup> Girard, Etc., Co. v. Young, 8 Phila. 16; Mengas' Ap., 19 Pa. 221.

<sup>2</sup> Willis v. Willis' Admrs., 12 Pa. 159.

<sup>3</sup> Bloom's Ap., 106 Pa. 498.

<sup>4</sup> Wither's Ap., 16 Pa. 151; Benson's Ap., 48 Pa. 159.

exceeds his powers the court may distribute on the facts found by him, if no others are alleged.<sup>5</sup> He cannot by his report compel a creditor to compromise<sup>6</sup> but if the parties all agree to a compromise he may report it to the court for approval. His authority is that contained in the certificate of appointment made under the seal of the court, and if the docket entry of it is evidently incomplete it may be amended by the certificate.<sup>7</sup> An auditor may refuse to impound a fund for a creditor who fails to appear before him;<sup>8</sup> or to await the outcome of an issue upon a *sci fa. sur mechanic's lien*.<sup>9</sup>

#### 40. Oath — form.

When the record in the appellate court does not show that the auditor was sworn, it will presume that he was.<sup>10</sup> But the record should not be deficient.

Following is a proper form of appointment and oath:

"Rene Jones v. Jonas Rees.	}	In the court of Common Pleas of Lackawanna County. Original No. ——— Term. 19— <i>Fi. fa.</i> (or <i>vend ex.</i> ) No. ——— Term, 19—
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Now, to-wit, June 25, 1910, on motion of John F. Murphy, Esq., the court appoints Joseph F. Gilroy, Esq., auditor to distribute the money in court [or the balance in the hands of ———] arising from the sale of the real estate of Jonas Rees the defendant, to and among the persons legally entitled thereto and to make report to this court. Certified from the records.

[Seal.]

W. M. Bunnell, Prothy.

Joseph F. Gilroy being duly sworn says that he will perform the duties of the above appointment with fidelity.

Joseph F. Gilroy.

Sworn to. ———, Prothy.

#### 41. Notice of meetings.

Where a rule of court requires advertisement of the time and place of meeting, it must be observed;<sup>11</sup> and if an error is made in the notice, whereby a creditor is misled, the final confirmation will be revoked and a re-advertisement ordered.<sup>12</sup>

#### 42. Witnesses — testimony, etc.

The auditor has power to subpoena witnesses to appear before him though the subpoena should issue under the seal of the court and be attested by the prothonotary or clerk. If a witness fails to obey the subpoena or refuses to testify the auditor has power to attach

<sup>5</sup> Drysdale's Ap., 14 Pa. 531.

<sup>6</sup> Bacon's account, 1 Phila. 430.

<sup>7</sup> Yoder's Ap., 45 Pa. 394.

<sup>8</sup> Stubb's Est., 11 Lanc. Bar, 115.

<sup>9</sup> Andrews v. Fishing Creek, Etc., Co., 161 Pa. 204.

<sup>10</sup> Bull's Ap., 24 Pa. 286.

<sup>11</sup> Reist's Est., 13 Lanc. L. R. 272, as to Lancaster county.

<sup>12</sup> Strohman's Est., 8 Lanc. L. R. 273.

him and application should be made to him in the first instance.<sup>13</sup> In hearing evidence the auditor is governed by the same rules of law as to competency and relevancy as the court. "When evidence is offered and objected to and he is desired by a party to note it for the opinion of the court, he should distinctly show in his report, the offer and its purpose, the objection thereto, and his ruling thereon; in some cases, he may also state how the report should be in case the evidence has been erroneously admitted or reported by him; and it may be very proper in some cases, to report the question of evidence to the court for decision, and suspend the proceedings until it is decided."<sup>14</sup> Incompetent testimony will not be received unless all the parties in interest assent to it.<sup>15</sup> But, having been admitted, a report will not be set aside which is amply sustained by competent testimony.<sup>16</sup> After arguments of counsel and before his report is written, he may upon cause shown and due notice, re-open the cause and take additional evidence.<sup>17</sup> The auditor should take notes of all the material evidence, the offers, objections and rulings thereon and have the same ready to file when required by the court.<sup>18</sup> His safest practice is to take the testimony in full, read it to the witness or have him read it and if he wishes, correct it and sign it. If he only takes an outline he is liable to have his report returned to him to have a rehearing and reduce the testimony to writing.<sup>19</sup> This should be considered of the first importance since the auditor's findings of fact have the effect of a special verdict.

#### 43. The auditor's report.

An auditor's report should be as definite and specific as the findings of a court separating the law from the facts and finding each distinctly.<sup>1</sup> He must find the facts not the evidence, although he reports the evidence on which he bases his findings.<sup>2</sup> It should clearly identify the claims in favor of which he finds.<sup>3</sup> If the report does not find the facts sufficiently it will be referred back to him.<sup>4</sup> If a particular lien creditor is clearly entitled to the fund, the finding of that fact is sufficient.<sup>5</sup> He is confined to the distribution of the money arising from the writ on which he was appointed.<sup>6</sup> Where he awards all the funds to one claimant it is wrong to put the costs

<sup>13</sup> *Hulburt's Est.*, 8 W. N. C. 254; *Enos v. Garrett*, 2 D. R. 86, section 4, of the act of April 11, 1848, P. L. 507, gives auditors powers herein "according to the practice of the courts."

<sup>14</sup> *Lowrie, J.*, in *Mengas' Ap.*, 19 Pa. 221.

<sup>15</sup> *Sweeten's Est.*, 4 Lanc. L. R. 54.

<sup>16</sup> *Sawtelle's Ap.*, 84 P. 306; *Roberts' Ap.*, 126 Pa. 102; *Neely's Est.*, 5 York, 199.

<sup>17</sup> *Myer's Est.*, 13 Supr. C. 476; *Rhinesmith's Case*, 25 Supr. C. 300.

<sup>18</sup> *Mengas' Ap.*, 19 Pa. 221.

<sup>19</sup> *Hermstead's Ap.*, 60 Pa. 423, *Sharswood, J.*

<sup>1</sup> *Lackey's Est.*, 181 Pa. 638; *Abbott v. Myers*, 5 Phila. 451.

<sup>2</sup> *Bitting's Ap.*, 17 Pa. 211; *Wesco's Ap.*, 52 Pa. 195; *P. & L. Dig.*, vol. 2, col. 1904.

<sup>3</sup> *Helison's Est.*, 6 Kulp, 466; *Souder's Ap.*, 57 Pa. 498.

<sup>4</sup> *Wilkinson v. Kugler*, 153 Pa. 238.

<sup>5</sup> *Girard Life Ins. Co. v. Young*, 8 Phila. 16.

<sup>6</sup> *Benson's Ap.*, 48 Pa. 159.

on the other claimants, when their claims are honest and meritorious. The costs should come out of the fund in such case.<sup>7</sup> Having made and filed his report he cannot recall it — but it may be recommitted to him by the court.<sup>8</sup> The right to record the report is embraced in the act of April 25, 1850, P. L. 569, section 19.<sup>9</sup>

#### 44. Form and contents of report.

Every auditor will have his own ideas about the fitness of form and conciseness of contents of his report to the court. It is not good form, however, for him to review evidence and offer opinions, but he may be requested to attach his notes of testimony for use upon the argument.<sup>10</sup> He should state the facts concisely as he finds them from the evidence adduced.<sup>11</sup> The usual course when objections are made to testimony, is to note them and then take the testimony.<sup>12</sup>

#### 45. Rules of court in Allegheny county.

The duties of auditors are regulated in some jurisdictions by rules of court. As not all the rules of court in the various counties can be given in a work of this kind, a few are here given as illustrative. Reference must be had to the rules in each county.

Rule 43, Allegheny County (D. R. C. 46), provides:

"Where facts are controverted the auditor shall report his finding thereon in concise form, after the manner of a special verdict, and shall also state concisely the points of law raised before him, with his opinion and reasons therefor; and where an account and schedule of distribution is necessary, it shall not be blended with other parts of the report, but stated separately in a form convenient to be recorded. The testimony, documentary or otherwise, shall be returned separately and filed with the report."

#### 46. Notice of filing report — rule in Allegheny.

When a rule of court requires notice of filing to be given to the parties or their attorneys when the report is ready it must be observed, but if no notice is required a report will not be set aside nor will exceptions be allowed *nunc pro tunc*.<sup>13</sup> It is a good rule to give ten days' notice, so that exceptions may be filed before the auditor and an opportunity given him to revise his report.<sup>14</sup>

Rule 44, Allegheny County, is as follows:

"After the report is made out the auditor shall give the parties ten days' notice of the day designated for filing the same, and, in

<sup>7</sup> *Shenk v. Burger*, 3 Lanc. Bar, No. 15; *Magaw's Ap.*, 2 Pitts. L. J. 174.

<sup>8</sup> *Benson's Ap.*, *supra*.

<sup>9</sup> *Krause v. Stiles*, 9 Phila. 127.

<sup>10</sup> *Haines v. Burr*, 1 Phila. 52, *Sharswood, J.*; *Mengas' Ap.*, 19 Pa. 221; *Field v. Oberteuffer*, 2 Phila. 271; *Church v. Church*, 5 Phila. 358.

<sup>11</sup> *Treasurer, Etc., v. Shannon*, 51 Pa. 221; *Stilwell's Est.*, 8 Phila. 178; *Ford's Est.*, 8 Phila. 196.

<sup>12</sup> *Fuller's Est.*, 4 Kulp, 479.

<sup>13</sup> *Gossner's Est.*, 6 Wharton, 401.

<sup>14</sup> *Mengas' Ap.*, 19 Pa. 221.

the meantime they shall be allowed access thereto; and no exception to such report shall be received unless filed with the auditor before the day so designated; and if exceptions are so filed, the auditor shall re-examine the subject and amend his report, if, in his opinion, the exceptions are in whole or in part well-founded."

While the lower courts may expound their own rules, they may not disregard a rule requiring auditors to give notice of the filing of their reports as, *e. g.*, in Schuylkill County.<sup>15</sup>

[Compare your rules of court.]

#### 47. Filing and confirmation — rule in Allegheny.

Having filed his report once his jurisdiction ends unless the court re-commits it for correction and revision. He cannot file a supplemental report.<sup>16</sup>

Rule 45, Allegheny County, is as follows:

"The report on being filed in the office, shall be marked confirmed *nisi* by the prothonotary, which confirmation shall become absolute without further order, if no objection thereto is made and noted on the record within ten days; and if objection is so made it shall be treated as a renewal of the exceptions filed by the party with the auditor, and the prothonotary shall immediately enter the case on the argument list, and on the hearing the party will be confined to these exceptions; reserving to the court, however, the power of re-committing the report should justice require it."

An auditor's report confirmed by the court has the effect of a verdict on the facts, but it will nathless be reversed when the appellate court is satisfied that the auditor drew erroneous inferences from the facts.<sup>17</sup>

Where the auditor has made no definite or detailed findings of fact his conclusions resting upon assumptions which are erroneous are not entitled to be shielded by the rule.<sup>18</sup>

#### 48. Exceptions.

Exceptions to an auditor's report should be specific and clearly point out the distinct matter complained of as erroneous. The party excepting must show an interest in the distribution either by the record or an affidavit.<sup>19</sup> If he shows no interest his exceptions will be dismissed;<sup>20</sup> also if the exceptions are to informalities by one who proved no claim before the auditor.<sup>21</sup> After appearing before him without objection a party cannot except to his jurisdiction after his report.<sup>22</sup>

One who has not appeared and presented his claim can file no exceptions.<sup>23</sup> He must apply for a re-hearing.<sup>24</sup> Unless objection

<sup>15</sup> Brennan's Est., 65 Pa. 16.

<sup>16</sup> Benson's Ap., 48 Pa. 159.

<sup>17</sup> Cake's Ap., 110 Pa. 65.

<sup>18</sup> Hawley v. Griffith, 187 Pa. 306.

<sup>19</sup> Peck's Ap., 11 W. N. C. 31; Stewart's Ap., 110 Pa. 410.

<sup>20</sup> Bitting's Ap., 17 Pa. 211; Balmer v. Balmer, 2 Lanc. L. R. 11.

<sup>21</sup> Helison's Est., 6 Kulp, 466.

<sup>22</sup> Flanagan v. McAfee, 1 Phila. 75.

<sup>23</sup> McLellan's Ap., 26 Pa. 463.

<sup>24</sup> Carey's Est., 1 Kulp, 331.

is made to the incompetency of a witness when offered it cannot be raised by exception;<sup>25</sup> and if objection is made at the time and the witness is cross-examined as to matters on which he is incompetent the exception is waived and the witness made competent.<sup>26</sup> A finding of fact is conclusive unless excepted to.<sup>27</sup> An exception should not be coupled with a dubious demand for an issue.<sup>28</sup>

#### 49. Time and manner of filing exceptions.

When a rule of court prescribes the time of filing exceptions it is binding and the enforcement thereof will not be reviewed.<sup>29</sup> The court may allow exceptions to be filed *nunc pro tunc* in proper cases.<sup>30</sup> Exceptions as to the auditor's fee should be filed to the report in which it is charged.<sup>31</sup> An agreement not to file exceptions is binding only upon those who sign the agreement.<sup>32</sup> After withdrawing exceptions confirmation can only be had by order of court.<sup>33</sup> Notice to a receiver that exceptions will be filed to an auditor's fee is not a compliance with the rule.<sup>34</sup>

When the auditor gives notice that his report is ready and exceptions may be filed "until" a certain day, exceptions filed on that day, though after the report was filed, are in time.<sup>35</sup> The exceptions filed with the auditor will be heard by the court and not the auditor.<sup>36</sup> No exceptions can be filed in the Common Pleas or in the appellate court.<sup>37</sup> One of two parties to whom a fund is awarded in specified proportions is not estopped from excepting to the award made to the other, by taking out of court as much as was awarded to him.<sup>38</sup>

#### 50. Review by the court.

The evidence before the auditor will only be brought up for review by order of the court<sup>39</sup> upon motion supported by an affidavit and only such portions as are material and to which the exceptions relate.<sup>40</sup> The findings of fact from the evidence by the auditor where there is sufficient to submit to a jury will not be disturbed except

<sup>25</sup> Harris' Est., 12 W. N. C. 66; Jones' Ap., 62 Pa. 324; Ackerman's Ap., 106 Pa. 1.

<sup>26</sup> Bierly's Est., 81 \* Pa. 419.

<sup>27</sup> Wolf v. Ferguson, 129 Pa. 272; Wissel's Ap., 4 Penny. 236.

<sup>28</sup> Brinton v. Perry, 1 Phila. 436.

<sup>29</sup> Lloyd's Ap., 6 Atl. 915; Kaub v. Ziegler, 11 W. N. C. 433.

<sup>30</sup> Bartolet's Ap., 1 Walker, 77; Diller's Est., 9 Lanc. Bar, 2.

<sup>31</sup> Marsh's Est., 5 C. C. 159.

<sup>32</sup> Miller's App., 30 Pa. 478.

<sup>33</sup> May's Est., 10 Lanc. Bar, 22.

<sup>34</sup> McHenry v. Finletter, 23 Supr. C. 636.

<sup>35</sup> Croft's Est., 17 Phila. 103.

<sup>36</sup> Moore v. Hunter, 4 Yeates, 358; Kaub v. Ziegler, 11 W. N. C. 433. (See rule 9, Phila. Common Pleas.)

<sup>37</sup> Dickey's Ap., 115 Pa. 73; Potter v. Langstrath, 151 Pa. 216.

<sup>38</sup> Souder's Ap., 57 Pa. 498.

<sup>39</sup> Killion's Ap., 3 Brewster, 235; Gegan's Est., 4 W. N. C. 127.

<sup>40</sup> Tatham v. Crawford, 2 W. N. C. 365; O'Kane's Est., 1 W. N. C. 416; McMullen's Est., 1 W. N. C. 415; Mayer's Est., 17 W. N. C. 312; Stilwell's Est., 8 Phila. 178; Russell's Est., 4 Kulp, 291.

for clear mistake or for fraud which exceptant has the burden of showing.<sup>41</sup>

### 51. Effect of auditor's findings of fact.

The findings of fact by an auditor have the same conclusiveness as a special verdict, and can only be challenged for clear errors apparent.<sup>42</sup> He will not be reversed because the story of the witnesses seems improbable.<sup>43</sup> When the court has approved and confirmed the auditor's report it will have the force of a general verdict on the facts, and will not be reversed except for fraud, clear mistake or for reasons which would induce a court to set aside a verdict and award a new trial.<sup>44</sup> It is not sufficient to raise a doubt as to the facts and that a different conclusion might have been reached.<sup>45</sup> If the court erroneously sets aside an auditor's report on the facts, it will be reversed.<sup>46</sup> This rule applies only where the auditor has made distinct and proper findings of fact.<sup>47</sup>

The court will not set aside a report merely because the evidence is liable to different constructions.<sup>48</sup> It will require reasons, which if applied to a verdict would induce the court to set it aside.<sup>49</sup> But if it is a mere inference and not based on testimony it will be set aside.<sup>50</sup>

Where the auditor finds matters upon an interlocutory question which injuriously affect a party his remedy is to demand an issue and not to except.<sup>51</sup>

### 52. Re-submission.

An application by a party interested for a re-submission and rehearing will be granted of grace and not of right and there must be showing that appeals to the sense of justice and fairness of the court.<sup>52</sup> But where the court cannot determine the issue from the findings, it will be re-committed;<sup>53</sup> or where the reasons would

<sup>41</sup> *Pittsburg's Ap.*, 70 Pa. 142; *Gilbert's Ap.*, 78 Pa. 266; *Schepper's Ap.*, 125 Pa. 598; *Hess' Est.*, 150 Pa. 346; *Huckestein v. Kaufman*, 173 Pa. 199; *Dutton's Est.*, 181 Pa. 426.

<sup>42</sup> *Jones v. Jones*, 11 Phila. 559; *Cameron v. Crossman*, 4 C. C. 316; *Myers v. Fichtner*, 10 Kulp, 45; P. & L. Dig., vol. 20, col. 34494; *Real, Etc., Est.*, 13 D. R. 749; *Coleman's Est.*, 200 Pa. 29.

<sup>43</sup> *Price v. Price*, 3 Northam. Co. 61.

<sup>44</sup> *Platt-Barber Co. v. Groves*, 193 Pa. 475; *Union Traction Co. v. Grubb*, 24 Supr. C. 345; *Muehling v. Muehling*, 181 Pa. 483; *Prouty v. Prouty, Etc., Co.*, 155 Pa. 112; P. & L. Dig., vol. 20, col. 34495.

<sup>45</sup> *Stevenson Co. v. Sample*, 174 Pa. 165; *Gibbons v. Moyamensing, Etc., Co.*, 184 Pa. 608.

<sup>46</sup> *Pittsburg's Ap.*, 70 Pa. 142.

<sup>47</sup> *Hawley v. Griffith*, 187 Pa. 306.

<sup>48</sup> *Platt-Barber Co. v. Groves*, 193 Pa. 475.

<sup>49</sup> *Fessenden's Est.*, 170 Pa. 631; *Nauman's Ap.*, 116 Pa. 505; P. & L. Dig., vol. 2, col. 1914.

<sup>50</sup> *Moore's Ap.*, 3 Penny. 110; *Hindman's Ap.*, 85 Pa. 466; *Sweatman's Ap.*, 150 Pa. 369; *Milligan's Ap.*, 97 Pa. 525.

<sup>51</sup> *Stehman's Ap.*, 5 Pa. 413; P. & L. Dig., vol. 2, col. 1915.

<sup>52</sup> *Coates' Est.*, 2 Parsons, 258; *Phillips' Est.*, 1 Kulp, 332; *Smith v. Claven*, 12 Phila. 179.

<sup>53</sup> *Wilkinson v. Kugler*, 153 Pa. 238.

move the court to grant a new trial.<sup>54</sup> Upon referring the case back to the auditor the whole case is re-opened and all parties are required to take notice of it.<sup>55</sup>

But where it is referred back only to re-state an account he need not take testimony.<sup>56</sup> If referred back for a particular purpose he is confined to it.<sup>57</sup>

An auditor's second report will not be set aside for irregularities in the original reference.<sup>57a</sup>

Only lien creditors who except can take advantage from the re-hearing.<sup>58</sup> Re-commitment does not extend the time for demanding an issue for non-excepting creditors.<sup>59</sup> A report may be re-committed to correct an over-sight by the auditor.<sup>60</sup> If the auditor's report is lost the court may inquire into the matter and pass upon the exceptions without re-commitment.<sup>61</sup> When the court over-rules an auditor's report it should file its reasons.<sup>62</sup>

### 53. Compensation of auditors.

Auditors are entitled to compensation for their labors, even where there is no law providing for it; in such case the court will fix it.<sup>1</sup> Under the act of June 4, 1879, P. L. 84, an auditor is entitled to not exceeding ten dollars per day necessarily engaged in the case, unless the court shall, for a special reason allow more, not exceeding fifteen dollars a day.<sup>2</sup> His report and statement of charges will be taken as *prima facie* evidence of the time.<sup>3</sup>

If the charge appears excessive to the court it will be reduced.<sup>4</sup> The compensation of auditors in Philadelphia is regulated by the act of April 14, 1870, P. L. 1158, which allows ten dollars per day when the fund amounts to \$1,000, but not exceeding five days, and the additional sum of \$25 for making a report; and if less than \$1,000, one-half the above rates.<sup>5</sup>

The court will use its discretion in allowing compensation and in considering the time necessarily expended by the auditor in hearing, considering and determining both law and facts,<sup>6</sup> but he is not entitled to charge for mere continuances.<sup>7</sup> If he relies upon

<sup>54</sup> Hottenstein's Ap., 2 Grant, 301; Mengas' Ap., 19 Pa. 221.

<sup>55</sup> Thomas' Est., 76 Pa. 30.

<sup>56</sup> Donnelly's Est., 3 Phila. 18; Landis' Est., 6 Lanc. Bar, 57.

<sup>57</sup> Emig's Est., 186 Pa. 409.

<sup>57a</sup> Davis v. Griffiths, 1 Lack. Jur. 112; Ludlam's Est., 13 Pa. 188.

<sup>58</sup> Stone v. Compton, 3 Luz. L. Obs. 416.

<sup>59</sup> McLawrence's Est., 2 Luz. L. R. 262.

<sup>60</sup> Camac v. Beatty, 5 Phila. 129.

<sup>61</sup> Andrews v. Fishing, Etc., Co., 161 Pa. 204; Chew's Ap., 45 Pa. 228.

<sup>62</sup> Furth v. Stahl, 205 Pa. 439.

<sup>1</sup> Baldwin's Est., 4 Pa. 248.

<sup>2</sup> Wiest v. Koons, 2 C. C. 317; Hamme's Est., 12 York, 129.

<sup>3</sup> Riddle v. Witcraft, 3 Kulp, 186.

<sup>4</sup> Wiest v. Koons, 2 C. C. 317.

<sup>5</sup> Krause v. Stiles, 9 Phila. 127; McHenry v. Finletter, 23 Supr. C. 636.

<sup>6</sup> Bordman's Est., 1 Phila. 384; Porter's Ap., 30 Pa. 496; Welscher's Est., 3 Walker, 241; Lukenhaus' Ap., 39 Leg. Int. 299; Geisinger's Ap., 1 Mona. 600; Bracken's Est., 138 Pa. 104; P. & L. Dig., vol. 2, col. 1920.

<sup>7</sup> Funk's Est., 1 C. C. 430.



an agreement for higher compensation it must be in writing.<sup>8</sup> The Supreme Court will not review the discretion of the lower courts in this matter.<sup>9</sup>

#### 54. Costs of audit.

The auditor, it has been held, may determine the costs and apportion them<sup>10</sup> subject to revision by the court.<sup>11</sup>

The expenses of an auditor will not be allowed as a separate item without a special reason for it.<sup>12</sup> The costs of a stenographer under the act of May 24, 1887, P. L. 199, were held to be proper, where the parties did not object.<sup>13</sup>

The general rule is that the costs should come out of the fund,<sup>14</sup> especially when there are reasonable grounds for a contest;<sup>15</sup> but if the contest is frivolous and vexatious, and without just ground, the costs may be put upon the party whose act gives rise to them.<sup>16</sup> They may be imposed proportionally in proper cases.<sup>17</sup> If the party's claim is unwarranted he should pay the costs.<sup>18</sup> If the question was one of fact alone the costs have been placed upon the contestant who lost.<sup>19</sup>

The proper practice is for the auditor to determine the matter of costs in his report, and the question can then be raised by exception.<sup>20</sup> No part of the costs should be put on the judgment creditor who wins.<sup>21</sup> If there is probable cause the costs should not be imposed on the applicant;<sup>22</sup> but if there is only suspicion they should.<sup>23</sup> If the question is a mixed one and the contest is begun in good faith, the costs may be charged on the fund<sup>24</sup> and a lienholder whose claim will not be reached cannot complain.<sup>25</sup>

Generally, in case of an honest dispute, the costs are chargeable

<sup>8</sup> Bradley's Est., 11 Phila. 87.

<sup>9</sup> Stockdale v. Maginn, 207 Pa. 226; McCann's Ap., 9 Atl. 48.

<sup>10</sup> Remsen v. Hilgert, 17 Phila. 186.

<sup>11</sup> Pryor v. Lloyd, 13 York, 5.

<sup>12</sup> Comth. v. Lancaster, Etc., Co., 16 Lancaster L. R. 60; Messersmith's Est., 1 Dauphin Co. 223.

<sup>13</sup> Comth. v. Lancaster, Etc., Co., *supra*. (See section 9, act of 1897, vol. 1, p. 179.)

<sup>14</sup> Becker v. Yeager, 1 Supr. C. 107; Shelly's Ap., 38 Pa. 210; P. & L. Dig., vol. 2, col. 1916.

<sup>15</sup> Sansenbacher v. Schickendantz, 141 Pa. 418; Second Natl. Bank's Ap., 85 Pa. 528; Reynolds v. Reynolds Lumber Co., 175 Pa. 437; Dinsmore v. Davis, 13 Phila. 57.

<sup>16</sup> Hamnett's Ap., 72 Pa. 337; Patterson's Ap., 11 Leg. Int. 150.

<sup>17</sup> Moore's Ap., 50 Pa. 25.

<sup>18</sup> Kauffman's Ap., 112 Pa. 645; Larimer's Ap., 22 Pa. 41; Am. Sewing Machine Co.'s Ap., 83 Pa. 198.

<sup>19</sup> Cameron v. Crossman, 4 C. C. 316.

<sup>20</sup> Dinsmore v. Davis, *supra*.

<sup>21</sup> Hummel v. Hummel, 155 Pa. 198.

<sup>22</sup> Tatem v. Crawford, 11 Phila. 195.

<sup>23</sup> Strupler v. Ainey, 4 C. C. 315; Duffy v. Duffy, 9 C. C. 256.

<sup>24</sup> Melroy v. Melroy, 6 C. C. 419; Carstairs v. Haggerty, 21 W. N. C. 558; Hartman v. Garner, 7 Montg. 199.

<sup>25</sup> McFarland's Est., 16 Supr. C. 142.

on the fund.<sup>26</sup> Sometimes it is proper to divide the costs between the fund and the exceptant<sup>27</sup> or equitably proportion.<sup>28</sup> If there is no just ground for contest and it is apparent that the contest must fail to produce anything but costs and delay the costs will be placed upon the contestant.<sup>29</sup>

#### 55. Effect of final decree of distribution.

The effect of a decree of distribution is conclusive as to everyone, which includes the sheriff;<sup>1</sup> and as to everything that did or could properly come within the scope of the adjudication, nor will it be subject to collateral examination or review, except on appeal.<sup>2</sup> It cannot be re-examined by another auditor.<sup>3</sup> This conclusiveness does not apply to a question not before the auditor nor within his jurisdiction.<sup>4</sup> A report excluding a prior mortgage when the decree is confirmed is conclusive that it was not discharged by the sale.<sup>5</sup>

One who does not object to the distribution cannot come in and benefit by the appeal of another.<sup>6</sup> The Common Pleas, however, has power to correct a plain error, on a timely application.<sup>7</sup>

#### 56. Appeal from final decree.

No appeal lies until final decree of distribution,<sup>8</sup> and to be final, it must dispose of the whole fund.<sup>9</sup> The appellate court will not review the findings of fact of an auditor when the evidence is not brought up with the record.<sup>10</sup>

Pending an appeal upon a judgment involved in the distribution, it is error to confirm finally an auditor's report which is alternative.<sup>11</sup> The general rule as to all auditor's reports confirmed by the lower court is that it stands on the same level as a verdict and will not be reversed except for error of law, plain mistake or fraud,<sup>12</sup> and this the appellant must clearly show.<sup>13</sup>

<sup>26</sup> German, Etc., Assn. v. Heebner, 12 Montg. 24; Bedell's Ap., 87 Pa. 510.

<sup>27</sup> Grayson v. Hangstorfer, 9 W. N. C. 333; Perkins v. Nichols, 2 Chester Co. 229; Gibbons v. Gaffney, 154 Pa. 48.

<sup>28</sup> Malseed v. Scott, 2 Luz. L. Obs. 107.

<sup>29</sup> Riddle v. Witcraft, 3 Kulp, 186; Mathew's Est., 144 Pa. 139; Hamnett's Ap., 72 Pa. 337; P. & L. Dig., vol. 20, col. 34570.

<sup>1</sup> Hamner v. Griffith, 1 Grant, 193; McLellan's Ap., 76 Pa. 235.

<sup>2</sup> Noble v. Cope, 50 Pa. 17; Finnel v. Brew, 81 Pa. 362; Comth. v. Steacy, 100 Pa. 613; McHenry v. Finletter, 23 Supr. C. 636.

<sup>3</sup> Newman v. Metzgar, 1 Pearson, 273.

<sup>4</sup> Woods v. White, 97 Pa. 222; Cowan v. Gonder, 5 Phila. 15.

<sup>5</sup> Towers v. Tuscarora Academy, 8 Pa. 297.

<sup>6</sup> Cash's Ap., 1 Pa. 166.

<sup>7</sup> Beek's Ap., 15 Pa. 406. (See P. & L. Dig., vol. 20, col. 34577.)

<sup>8</sup> Royer v. Tate, 1 P. & W. 227; Hoch's Ap., 72 Pa. 53.

<sup>9</sup> Stulzfoos' Ap., 3 P. & W. 265; Wesner's Ap., 4 Walker, 338; Keim's Ap., 27 Pa. 42.

<sup>10</sup> Singmaster's Ap., 86 Pa. 169; Pittsburg, Etc., Est., 198 Pa. 250.

<sup>11</sup> Smith's Ap., 11 W. N. C. 378.

<sup>12</sup> Wilkinson v. Kugler, 153 Pa. 238; P. & L. Dig., vol. 2, col. 1927.

<sup>13</sup> Cooper v. Potts, 185 Pa. 115; Gibbons v. Moyamensing, Etc., Co., 184 Pa. 608; Walker v. Gilliland, 197 Pa. 649; Ridgeway's Ac., 206 Pa. 587. (See vol. 1, C. R. A., col. 520.)

Section 89 of the act of 1836, *supra*, provides:

"Any person aggrieved by the decree of the court in any case of distribution, made without the intervention of a jury, may, at any time within twenty days thereafter, appeal from the same to the Supreme Court."<sup>14</sup>

#### 57. Investment of fund pending appeal.

Section 92 of the act of 1836, *supra*, provides:

"It shall be lawful for the court into which any money arising from a sheriff's sale shall be paid, in case of a writ of error or appeal from any decree, as aforesaid, to order the investment of the fund in the debt of this commonwealth, or of the United States, or upon real security, or it shall be lawful for such court to order the payment of the money according to the decree of distribution, if the distributees shall give sufficient real security to refund the same, with the interest thereon, or so much thereof as shall be required by the court, if such decree shall be reversed, or altered, and in such case, the order of restitution may be enforced by a writ of *fiat facias*, or otherwise."

#### 58. Distribution after 20 days — Allegheny county.

Rule 80, Allegheny County, provides:

"If no appeal be taken within twenty days after final confirmation of a report, or entry of a decree, distributing money, the money shall be paid over according to the report or decree, without further order."

#### 59. Record of receipts, Allegheny county.

Rule 79, Allegheny County, is as follows:

"It shall be the duty of the officer or party distributing or paying out money in any manner connected with proceedings in court, in all cases, to have a receipt for each item paid out entered on the appearance docket in the prothonotary's office, or on the face of the proper record of the lien or claim in whatever office it exists."

#### 60. Parties who may appeal — subject and manner.

Only parties whose claims were submitted to the auditor have a standing on appeal from the distribution of the proceeds of personality.<sup>15</sup> An appeal will be quashed when the claimant filed no exceptions or made no objections either before the auditor or in the lower court.<sup>16</sup> A debtor who takes no action cannot be indirectly benefited by his appeal.<sup>17</sup> The sheriff may appeal in his own interest when his rights are threatened injuriously.<sup>18</sup>

A bank which, on a rule pays moneys into court which belonged to

<sup>14</sup> See act May 19, 1897, P. L. 67, as to appeals, vol. 1, p. 107, *et seq.*; sections 90 and 91 of the act of 1836 are supplied.

<sup>15</sup> Reamer's Ap., 18 Pa. 510.

<sup>16</sup> Patrick's Ap., 105 Pa. 356; Walker's Ap., 2 Atl. 857; Dickey's Ap., 115 Pa. 73; Reynolds v. Reynolds Lumber Co., 175 Pa. 437; Adamson's Ap., 110 Pa. 459.

<sup>17</sup> Constine's Ap., 1 Grant, 242.

<sup>18</sup> Hamner v. Griffith, 1 Grant, 193.

the sheriff, has no interest and no standing on appeal.<sup>19</sup> Separate and independent claimants cannot appeal jointly. If they do so appeal they will be required to elect which one shall prosecute his appeal, and the others will suffer a *non pros.*<sup>20</sup> Questions arising on distribution are collateral to those arising on the judgment and cannot be considered on the latter.<sup>21</sup> Upon an appeal errors must be specifically assigned.<sup>22</sup>

Upon reversal in the Supreme Court, to save the rights of the parties, the court may set aside all the proceedings and order the distribution *de novo*;<sup>23</sup> and where the facts are in doubt as to a certain claim the decree will be suspended until further proof is had, as to that claim.<sup>24</sup> On reversal, without an order as to costs, they will come out of the fund.<sup>25</sup>

#### 61. Payment pending appeal.

If money is paid out pending appeal, a refunding bond should be taken in all cases. Following is a suitable form:

#### 62. Form of refunding bond after distribution and appeal.

Allen Bechtel }  
v. } In the Court of Common Pleas of Monroe County.  
Vocht Barnes. } Vend. ex. No. —, Term, 1910.

Know all men by these presents that we, Willis Reed, Pear Clemmer and Samuel Tod, all of the county of Monroe, are held and firmly bound to the commonwealth of Pennsylvania in the sum of one thousand dollars, lawful money of the United States, to be paid to the said commonwealth, her certain attorney and assigns, to which payment well and truly to be made, we do bind ourselves, jointly and severally, our heirs, executors and administrators, firmly by these presents: Sealed with our seals and dated the 3d day of May, A. D. 1910.

Whereas, By an order of the said court of Common Pleas, distributing the money in court under the above stated execution, the said money, to-wit: Five hundred dollars was ordered to be paid to the said Willis Reed and

Whereas, William Shull has appealed from said order to the Superior Court of Pennsylvania and the said court has ordered the said sum to be paid to the said Willis Reed, upon his giving sufficient real security to refund the same as provided by the act of assembly,

Now, the condition of this obligation is, That if the said Willis Reed shall refund the said sum of five hundred dollars with interest thereon, or so much thereof as shall be required by the court, in the

<sup>19</sup> Allegheny Bank's Ap., 48 Pa. 328.

<sup>20</sup> White's Ap., 15 W. N. C. 313; Adamson's Ap., 110 Pa. 459; Reynolds v. Reynolds Lumber Co., 175 Pa. 437.

<sup>21</sup> Irwin v. Gallagher, 8 S. & R. 528.

<sup>22</sup> Wolf v. Ferguson, 129 Pa. 272; Second Natl. Bank, Etc., v. Penna., Etc., Co., 140 Pa. 628.

<sup>23</sup> Schick's Ap., 49 Pa. 380.

<sup>24</sup> Stulzfoos' Ap., 3 P. & V. 265.

<sup>25</sup> O'Neal v. McClure, 1 Phila. 102.

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event that said order shall hereafter be reversed or altered, then this obligation to be void, but otherwise to remain in full force and virtue.

Sealed and delivered	}		
in presence of		Willis Reed,	[Seal.]
W. S. Goudy,		Pear Clemmer,	[Seal.]
Clarence Racine.		Samuel Tod.	[Seal.]

To comply with the act this bond should be accompanied with a mortgage on real estate.

#### 63. Removal of auditor.

If an auditor is guilty of misconduct the remedy is by exception ordinarily, though there may be rare instances when he should be removed and his appointment revoked. But the appellate court will not interfere by a mandamus to the lower court.<sup>26</sup>

#### 64. Recording of reports.

Auditors' reports should be so arranged that they may be recorded as required by the acts of assembly.

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<sup>26</sup> Powel's Est., 209 Pa. 76.

## CHAPTER XXXIV

### ACCOUNT RENDER

- |                           |                              |
|---------------------------|------------------------------|
| 1. Where the action lies. | 6. Reference to arbitrators. |
| 2. How commenced.         | 7. Reference to auditors.    |
| 3. Form of præcipe.       | 8. Powers of court and jury. |
| 4. Form of declaration.   | 9. Execution.                |
| 5. Amendments.            | 10. Action by legatees.      |

#### 1. Where the action lies.

Account render is a form of action which at the common law lay between partners and also tenants in common where one tenant acted as bailiff for another. Its maintenance depended upon a joint interest.<sup>1</sup> The statute of 3d Anna. O. 16, which is in force in Pennsylvania provides that account render may be brought "against the executors and administrators of every guardian, bailiff and receiver and by one joint tenant or tenant in common, his executors and administrators, against the other for receiving more than his share, and against their executors and administrators." (Roberts Dig. P. 13.)

"A bailiff is one who hath administration and charge of lands, goods and chattels, to make the best benefit for the owner; against whom an action of account lies for the profits, which he hath raised, or by his care and industry might have raised, his reasonable charges and expenses being deducted." (Coke on Litt. 172a.)

Although this action is now seldom resorted to in practice, it will be of interest to outline its scope. It was held to lie where one party has been entrusted with the property for the use of the plaintiff, with express or implied privity between them.<sup>2</sup> Where the action is between partners the receipt of the money or property

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<sup>1</sup> Griffith v. Willing, 3 Binney, 317; M'Adam v. Orr, 4 W. & S. 550.

<sup>2</sup> Bredin v. Dwen, 2 Watts, 95; Bredin v. Kingland, 4 Watts, 420; Denison v. Goehring, 7 Pa. 175; Bish's Admrs. v. Bish, 1 Am. L. J. (N. S.) 167; Conklin v. Bush, 8 Pa. 514; McLean's Exs. v. Wade, 53 Pa. 146; Kelley v. Kelley, 13 Phila. 179.

by defendant for the joint use must be averred and proved.<sup>3</sup> It will lie after a settlement has been repudiated by one of the partners.<sup>4</sup> It is not to be invoked where assumpsit will lie, nor where the sum has been ascertained.<sup>5</sup> An objection to the right of plaintiff to sue in his own name is made too late after judgment of *quod computet*.<sup>6</sup> If more than one be made defendant a joint liability of all the defendants to account to plaintiff must be averred and shown.<sup>7</sup> All the partners must be made parties;<sup>8</sup> and all the tenants in common.<sup>9</sup>

## 2. How commenced.

The action may be commenced by summons or by writ of foreign attachment.<sup>10</sup> If commenced by summons which is regular on its face, it will not be quashed on motion,—the party moving must take a rule to show cause. The writ being quashed, and no further step taken, the action is no longer pending.<sup>11</sup>

## 3. Form of Præcipe.

Following is a form of præcipe in this action.

Nome Beck	{	In the court of common pleas of Clinton County. No. ———	Term, 19—.
v.			
Lide Schrack			

Issue summons to answer the plaintiff of a plea that the defendant render unto him a reasonable account for the time in which the said Lide Schrack was receiver of the moneys of the said Nome Beck; from whatsoever cause or contract arising to the common and joint benefit and advantage of them the said Lide Schrack and Nome Beck, etc.

Returnable on ———

R. B. McCormick,  
Attorney for Plaintiff.

To ———, Esq.

Prothonotary.

The summons follows the præcipe.

## 4. Form of declaration.

Nome Beck	{	In the court of common pleas of Clinton County. No. ———	Term, 19—.
v.			
Lide Schrack.			

<sup>3</sup> Thouron v. Paul, 6 Wharton, 615; McFadden v. Sallada, 6 Pa. 283; Demmy v. Dougherty, 1 Pearson, 236.

<sup>4</sup> Leonard v. Leonard, 1 W. & S. 342.

<sup>5</sup> Gillis v. McKinney, 6 W. & S. 78, P. & L. Dig. vol. 1, col. 6.

<sup>6</sup> Bredin v. Dwen, 2 Watts, 95.

<sup>7</sup> Whelen v. Watmough, 15 S. & R. 153; Peters v. Horbach, 4 Pa. 134; Portsmouth v. Donaldson, 32 Pa. 202.

<sup>8</sup> McFadden v. Sallada, 6 Pa. 283.

<sup>9</sup> M'Creary v. Ross, 7 Watts, 483.

<sup>10</sup> Strock v. Little, 45 Pa. 416; Crowe v. Davis, 33 W. N. C. 103.

<sup>11</sup> Clarke v. Ballou, 12 C. C. 369.

Clinton County ss.

Lide Schrack of the county aforesaid, merchant, was summoned to answer Nome Beck of a plea that he render to him a reasonable account of the time in which he was bailiff of the said Nome Beck and receiver of moneys from whatever cause or contract to the common and joint advantage of the plaintiff and defendant, coming as by the law merchant he may reasonably show to him he ought to render, etc. And thereupon the said Nome Beck by his attorney, R. B. McCormick, complains, for that whereas the said Lide Schrack was bailiff of the said Nome Beck at the county aforesaid, from \_\_\_\_\_ to \_\_\_\_\_, and during that time had the care and management [here state the particular matter] of the value of one thousand dollars, for the common benefit and joint profit of him the said Nome Beck and the said Lide Schrack and to render a reasonable account of the said profits to the said Nome Beck when he should be thereunto afterwards requested: Nevertheless, the said Lide Schrack (although often requested so to do), their reasonable account of the said premises, to the said Nome Beck, has not yet rendered, but the same to him render hitherto has refused and still does refuse; to the damage of the said Nome Beck in the sum of five hundred dollars, and therefore he brings this suit, etc.

R. B. McCormick,  
Attorney for plaintiff.

\_\_\_\_\_, 1910.

##### 5. Amendments.

The declaration may be amended before judgment *quod computet*,<sup>12</sup> by adding another count,<sup>13</sup> even if there is a variance from the writ.<sup>14</sup> By amendment the action has been converted into *assumpsit*, with the right to proceed under the act of May 25, 1887, P. L. 271. The plaintiff, while confined to his allegations in his proofs and cannot prove what he has not alleged,<sup>15</sup> need not prove all his allegations, if he make out a case on some.<sup>17</sup> Whilst a justice of the peace has no jurisdiction,<sup>18</sup> arbitrators have, by act of March 30, 1821, 7 Sm. L. 429, and it has been ruled that after judgment of *quod computet*, although no declaration had been filed, an award and judgment thereon would be sustained.<sup>19</sup> An award will cure defects of formality in the declaration.<sup>20</sup>

The plea of the general issue is accord and satisfaction.

##### 6. Reference.

After judgment of *quod computet*, which is to the effect that the accounts be rendered and computed, the case may be referred and

<sup>12</sup> Sweigart v. Lowmarter, 14 S. & R. 200.

<sup>13</sup> M'Adam v. Orr, 4 W. & S. 550.

<sup>14</sup> Gratz v. Phillips, 1 Binney, 588.

<sup>15</sup> Wright v. Hopkins, 3 D. R. 240.

<sup>16</sup> Sweigart v. Lowmarter, 14 S. & R. 200.

<sup>17</sup> James v. Browne, 1 Dallas, 339.

<sup>18</sup> Wright v. Guy, 10 S. & R. 227; Steffen v. Hartzell, 5 Wharton, 448.

<sup>19</sup> Barde v. Wilson, 3 Yeates, 149.

<sup>20</sup> Wright v. Guy, 10 S. & R. 227.



final judgment be entered on the award, under act of June 16, 1836, P. L. 715.<sup>21</sup> A general reference will not be invalidated because the arbitrators pass upon some matters "in variance between the parties"—not strictly within this action.<sup>22</sup> Their power is equitable and they may frame their award in the nature of a decree with conditions to meet the equities of the case.<sup>23</sup>

Their duty is to state the account and the amount they find to be due on it.<sup>24</sup> They must annex the account to their award and cannot afterwards leave it in the office of the prothonotary.<sup>24a</sup>

#### 7. Reference to auditors.

Section 18 of the act of Oct. 13, 1840 (P. L. 1841, p. 7), provides:

"In all actions of account render, now pending or which may hereafter be brought, after it shall have been found, or admitted by the pleadings that the defendant is liable to account to the plaintiff, it shall be in the discretion of the court in which the same is or shall be pending, to either appoint auditors and proceed according to the practices and usages of the common law, or direct a jury to be impanelled to settle the accounts of the parties, and find the balance due the plaintiff or defendant. And on the application of either of the parties and interrogatories filed, it shall be lawful for the court to require the adverse party to disclose, on oath, his knowledge of such facts, as shall, in the opinion of said court, be necessary for a just and equitable adjustment of the controversy; and on the party being so called on, and refusing to answer, on the requisition of the court, the fact stated by the adverse party, in his interrogatory, shall be taken as admitted; and the parties shall have power to compel the production of such books, papers and documents, either in court or before the auditors, as may be necessary for a just and equitable settlement of the controversy, according to the provisions of the 1st section of the act of the 27th February, 1798, entitled 'An act extending the powers of the supreme court and courts of common pleas.'"

The auditors may award that the balance found due shall be paid in installments.<sup>25</sup> They should include all matters of account down to the time of the hearing<sup>26</sup> and state the items specifically.<sup>27</sup> Their finding is final except for misconduct.<sup>27a</sup>

The judgment *quod computet*, being interlocutory only, no appeal lies from it.<sup>28</sup> But when it is confessed the defendant cannot plead in bar a pending bill in equity between the same parties on the same

<sup>21</sup> Barde v. Wilson, 3 Yeates, 149.

<sup>22</sup> Odenwelder v. Odenwelder, 1 Wharton, 108.

<sup>23</sup> Barde v. Wilson, 3 Yeates, 149.

<sup>24</sup> Odenwelder v. Odenwelder, 1 Wharton, 108.

<sup>24a</sup> Clement v. Rohrbach, 15 Pa. 116.

<sup>25</sup> Geary v. Cunningham, 10 S. & R. 230.

<sup>26</sup> Tutton v. Addams, 45 Pa. 67.

<sup>27</sup> Finney v. Harbeson, 4 Yeates, 514.

<sup>27a</sup> Little v. Stanton, 32 Pa. 299; Stewart v. Bowen, 49 Pa. 245.

<sup>28</sup> Beitler v. Zeigler, 1 P. & W. 135.

<sup>29</sup> Tutton v. Addams, 45 Pa. 67.

account and oust the jurisdiction of the auditors.<sup>29</sup> Under the old practice and before the act of 1842, if the defendant failed to appear and render an account on the day set by the auditors, the plaintiff could take out a *capias ad computandum* and hold him to bail.<sup>30</sup>

The courts will favor an agreement of the parties giving the auditors full power in the premises.<sup>31</sup>

The proper practice is to file exceptions before the auditor, and naturally he will be obliged to pass upon them and report them to court, whereupon further action may be had. Exceptions filed after the report is made are too late.<sup>32</sup> Any issue of fact or law should be raised before the auditor and a request be made for his finding thereon or that he certify it to court for trial.<sup>33</sup> Where a report is referred back to the auditor to correct an error in calculation, he has no authority to grant a re-hearing.<sup>34</sup>

If the defendant has any matter of discharge it is his duty to present and prove it in the first instance.<sup>35</sup> He may demur or take issue and if there are questions for a jury the auditor will certify the issues to the court. For refusal on the part of the auditor the party aggrieved may apply by petition to the court.<sup>36</sup>

#### 8. Powers of jury and court.

The act of April 4, 1831, P. L. 492, provides:

"In all actions of account render, now pending or to be brought, the jury before whom the same shall be tried, shall have full power to settle the accounts of the parties, and find in favor of the plaintiff, or one or more of the defendants, such sum or sums as shall appear to be due: and the court in which said action is pending, or any judge thereof, may make such orders upon any of the parties, in relation to books, documents or papers, as may appear to be necessary, for a full and equitable adjustment of the controversy."

The issues will be tried as in other cases. It has been held not to be error to send out with the jury a bare calculation of the account as proved, without comments.<sup>37</sup> The jury may assess the amount due without there having been a formal entry of judgment *quod computet*,<sup>37a</sup> as that is implied in the general finding.<sup>37b</sup> In the amount to be found and for which judgment may be entered the plaintiff is not limited by the amount laid in the declaration.<sup>38</sup> A tenant in common may recover reasonable interest against his

<sup>29</sup> *Kepple v. Zantzinger*, 3 Yeates, 83.

<sup>31</sup> *Brown v. McFarland's Exr.*, 41 Pa. 129.

<sup>32</sup> *Moore v. Hunter*, 4 Yeates, 358; *Gratz v. Phillips*, 3 Binney, 474; *Crousillat v. McCall*, 5 Binney, 433.

<sup>33</sup> *Little v. Stanton*, 32 Pa. 299.

<sup>34</sup> *Stewart v. Bowen*, 49 Pa. 245; *Henneigh v. Kramer*, 50 Pa. 530.

<sup>35</sup> *Newbold v. Sims*, 2 S. & R. 317; *Bradley v. Hughes*, 2 T. & H. Pr. Sec. 1702.

<sup>36</sup> *Miller v. Anspach*, 2 T. & H. Pr. Sec. 1705.

<sup>37</sup> *Kelly v. Kauffman*, 18 Pa. 351.

<sup>37a</sup> *McLean v. Wade*, 53 Pa. 146.

<sup>37b</sup> *McFadden v. Erwin*, 2 Wharton, 37.

<sup>38</sup> *Gratz v. Phillips*, 5 Binney, 564.

co-tenant, from the time when the money should have been paid over.<sup>39</sup> The ordinary rule as to costs following suit applies, and the court may order the loser to pay the auditor's fees and charges.<sup>40</sup>

#### 9. Execution.

Upon a judgment for plaintiff, and execution, the defendant may claim the benefit of the \$300 exemption of the act of April 9, 1849, P. L. 533.<sup>41</sup> In the case of an auditor's award for the defendant, it has been held that an action can be maintained;<sup>42</sup> but there is no good reason why the court should not enter judgment and award execution.

#### 10. Action by legatee for bequest.

Section 50 of the act of Feb'y 24, 1834, P. L. 83, provides:

"It shall be lawful for any person to whom any bequest of money or other goods or chattels, may be made by last will or testament, to commence and prosecute an action of debt, detinue, account render, or an action on the case for the recovery thereof, after it becomes due, against the executors of such will, having in their hands sufficient assets to pay all the just debts of the testator, and the legacies by him bequeathed."

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<sup>39</sup> *Sieger v. Sieger*, 209 Pa. 65.

<sup>40</sup> *Harrison v. Warner*, 3 Luz. L. R. 225.

<sup>41</sup> *McTague v. Rehill*, 2 Montg. Co. 35.

<sup>42</sup> *McCall v. Crousillat*, 3 S. & R. 7.

## ASSUMPSIT.

### CHAPTER XXXV.

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#### 1. Character of the action.

Assumpsit<sup>1</sup> was formerly an action in the nature of case, to recover damages for the breach of promises express or implied which were verbal or parol.<sup>2</sup> It was of very wide application, but since the new procedure acts it absorbs everything *ex contractu*, except account render and this may by leave of court be changed into assumpsit;<sup>3</sup> and claims on a specialty and a simple contract may be joined.<sup>3a</sup>

The many cases which arose upon the distinctions once drawn between assumpsit, and other forms of action, are now only of historical interest. Whoever wishes to spend time in tracing these distinctions may find all the cases grouped under their appropriate heads in Vol. 2 of Pepper & Lewis' Digest of Decisions at col. 1629 *et seq.* Only the salient features essential to present practice will be considered here.

Assumpsit affords a form of action for almost every case where the

<sup>1</sup> From *assumere* — to take as granted.

<sup>2</sup> Selwyn's *Nisi Prius*, Tit. Assumpsit; Stephen on Pleading, sections 18, 40.

<sup>3</sup> See "Account Render," *supra*.

<sup>3a</sup> Guenther v. Guenther, 15 D. R. 1.

defendant has received money which he ought to pay, *ex aequo et bono*, to the plaintiff.<sup>4</sup>

And where several parties engage in a transaction, such as the purchase of property and one of them by confederating with another to make profit out of it for themselves, there is an implied promise to share with the others and assumpsit will lie as for money had and received to plaintiff's use.<sup>5</sup> The same principle applies to a trust company with whom a contractor has deposited money to be paid a material man, when the materials are delivered.<sup>6</sup>

Also where the manager of a gas company wrongfully diverts gas from its company's mains into the mains of another whereof he is president.<sup>7</sup>

The owner of a ground rent may sue the owner of the land in assumpsit for taxes which he was compelled to pay, to save his tenure.<sup>8</sup>

But mesne profits cannot be recovered in this form, the remedy being trespass.<sup>9</sup>

Assumpsit will lie for a sum charged on land, as purchase money left in the hands of the purchaser, interest thereon to be paid to the widow of the former owner during her life. The judgment in such case will be general against the original owner, but *de terris* only as against the *terre-tenant*.<sup>10</sup>

Where a defendant ought to have received money but by fraudulent collusion it remains in the hands of another, assumpsit will lie as for money had and received, the same as if he had actually received it.<sup>11</sup>

## 2. Where there is an element of tort—Waiver.

Where there is an element of tort but the tort arises out of contract, assumpsit will lie; as in breach of promise of marriage;<sup>12</sup> and where a bailee of goods neglects to take proper care of them and they are injured or lost.<sup>13</sup> The tort in such cases may be waived, though it is not so of cases purely in tort.<sup>14</sup> It is said that where a party might have maintained trover and he settled by taking a note, he has waived the tort and his right to sue in tort is gone absolutely.<sup>15</sup> The owner of chattels which were wrongfully sold by the plaintiff in replevin, may waive the tort and may sue for the value of the goods in assumpsit.<sup>16</sup>

If the goods were stolen and sold by the thief, the owner may

<sup>4</sup> *Sommer v. Sommer*, 10 Lanc. Bar, 81; *Owens v. Goldie*, 213 Pa. 579.

<sup>5</sup> *Humbird v. Davis*, 210 Pa. 311; *Owens v. Goldie*, 213 Pa. 579.

<sup>6</sup> *McAvoy v. Comth., Etc., Ins. Co.*, 27 Supr. C. 271.

<sup>7</sup> *McCullough v. Ford, Etc., Co.*, 213 Pa. 110.

<sup>8</sup> *Frank v. McCrossin*, 33 Supr. C. 93; *Caldwell v. Moore*, 11 Pa. 58.

<sup>9</sup> *Reilly v. Crown Pet. Co.*, 213 Pa. 595.

<sup>10</sup> *Dull v. Slater*, 31 Supr. C. 488.

<sup>11</sup> *Owens v. Goldie*, 213 Pa. 579.

<sup>12</sup> *Harding v. Lee*, 12 D. R. 49.

<sup>13</sup> *Zell v. Dunkle*, 156 Pa. 353.

<sup>14</sup> *York Trust Co. v. Moul* (No. 2), 15 York, 137.

<sup>15</sup> *Reynolds v. Fenton*, 2 Phila. 298.

<sup>16</sup> *Barley v. Beegle*, 29 Supr. C. 635.

waive the tort and sue for the value of the goods.<sup>15</sup> For fraud in the sale of a mining claim, perpetrated by defendant's agent, the tort may be waived and suit brought to recover the money paid.<sup>16</sup>

### 3. Consolidation of forms of action.

The act of May 25, 1887, P. L. 271<sup>17</sup> consolidated debt and covenant with assumpsit. Hence, wherever debt was the remedy before, assumpsit will now lie,<sup>18</sup> and so also where covenant was formerly employed.<sup>19</sup>

### 4. Requisites to maintain it.

In every agreement by parol the consideration and the promise are essential constituents and must be averred and proved.<sup>20</sup> There must be privity of contract between the parties.<sup>21</sup> A voluntary act, although beneficial to another, if done without request will not support an action for compensation.<sup>22</sup>

Where there is no contractual relation between the parties and one pays out money voluntarily for a subscription of another he cannot recover as for money had and received.<sup>23</sup>

And where A purchases property from B which is claimed by C there is no joint liability of A and B in assumpsit.<sup>24</sup>

### 5. Remedy, when by bill.

Assumpsit, as a rule will not lie in account between several parties, where the balance has not been ascertained, the remedy being in equity.<sup>25</sup>

### 6. The consideration.

Contracts under seal import a consideration. For these the old form of action was covenant, while on simple contracts where the amount was certain, definite, and where provided by statute, as in suits upon bonds and for penalties the action was debt. A consideration has been defined to be something proceeding from the party, to whom or for whose benefit the promise is made<sup>26</sup> and the least spark of benefit or accommodation has been held to be sufficient to support an assumption.<sup>27</sup> The benefit may be to a third

<sup>15</sup> O'Neill v. Brown, 17 D. R. 1062.

<sup>16</sup> Whitney v. Haskell, 216 Pa. 622.

<sup>17</sup> Vol. 1, p. 389, for the act *in extenso*.

<sup>18</sup> Taylor Boro' v. Central, Etc., Co., 8 D. R. 92. (See Kirk v. Hartman, 63 Pa. 97.)

<sup>19</sup> Vaughn v. Van Storch, 1 Luz. L. Obs. 3.

<sup>20</sup> P. & L. Dig., vol. 3, col. 3916.

<sup>21</sup> Wells v. Stewart, 5 Binney, 325; Allen v. Irwin, 1 S. & R. 549; Finney v. Finney, 16 Pa. 380; Kountz v. Holthouse, 85 Pa. 235.

<sup>22</sup> Anderson v. Hamilton Twp., 25 Pa. 75; Bryant v. Spring Brook Twp., 5 Luz. L. R. 203.

<sup>23</sup> Bloom v. Gourley, 35 Supr. C. 116.

<sup>24</sup> Rowan v. Rowan, 29 Pa. 181.

<sup>25</sup> Burton v. Trainer, 27 Supr. C. 626; Stayman v. Carlisle Bank, 2 Am. L. J. 35.

<sup>26</sup> Violet v. Patton, 5 Cranch (U. S.), 150.

<sup>27</sup> Austyn v. McLure, 4 Dallas, 226; Mercer v. Lancaster, 5 Pa. 160;

person, or the consideration may have been some loss or detriment to the promiser.<sup>28</sup>

Where the promises are mutual, each is a sufficient consideration for the other<sup>29</sup> if they are laid as simultaneous.<sup>30</sup> A request may, however, be implied from the circumstances and the beneficial character of the consideration.<sup>31</sup>

Where a service has been rendered and a benefit received a subsequent promise to pay on the moral obligation, will support an action.<sup>32</sup> Or an antecedent promise to contribute to the building of a church, ripens into a consideration, when the church is built in accordance with the understanding and intent of the parties<sup>33</sup> or where the promise is based on conditions which are performed.<sup>34</sup>

But a subscription to a church when no congregation is formed will not be held binding.<sup>35</sup>

It is peculiarly a function of our Court of Common Pleas in cases which come very close to the line of chancery or equity to recognize equitable principles under the common law forms and these generally find application in cases where one has money which another in good conscience ought to have. This doctrine was learnedly discussed in the earlier cases, reference to which must be had.<sup>36</sup>

### 7. The *præcipe*.

This action is begun by *præcipe*, which has been explained in Vol. I, p. 391.<sup>1</sup> The *præcipe* may be accompanied with the plaintiff's statement and a copy for service with the summons. But if there is need for haste, as where the defendant is about to leave or the statute of limitations to come in, the *præcipe* should be filed with the prothonotary and the summons issued at once and placed in the hands of the sheriff, with such instructions as may be deemed important. An attorney is presumed to know these "little things" when he is admitted to the bar.

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Harlan v. Harlan, 20 Pa. 303; Muirhead v. Kirkpatrick, 21 Pa. 237. In Austyn v. McLure, Brackenridge said the court blew out the "spark."

<sup>28</sup> Hamaker v. Eberley, 2 Binney, 506.

<sup>29</sup> Young v. Snyder, 3 Grant, 151; Flannery v. Dechert, 13 Pa. 505; Carrier v. Dilworth, 59 Pa. 406.

<sup>30</sup> Whitall v. Morse, 5 S. & R. 358; Stoevers v. Stoevers, 9 S. & R. 434; Chambers v. Davis, 3 Wharton, 40.

<sup>31</sup> Reeside v. Reeside, 49 Pa. 322.

<sup>32</sup> Hemphill v. McClimans, 24 Pa. 367; Landis v. Royer, 59 Pa. 95.

<sup>33</sup> Ryerss v. Trustees of Presbyterian Congn., 33 Pa. 114.

<sup>34</sup> Hart's Est., 13 Phila. 226.

<sup>35</sup> Phillips v. Jones, 20 Pa. 260; Chambers v. Calhoun, 18 Pa. 13.

<sup>36</sup> Moses v. Macferlan, 2 Burrow, 1005; Lee v. Gibbons, 14 S. & R. 105; Comth. v. Alexander, 14 S. & R. 257; Ludlam's Est., 13 Pa. 188; Edgar v. Shields, 1 Grant, 361; Christ Church Hospital v. Phila., 24 Pa. 229; Caldwell v. Moore, 11 Pa. 58.

<sup>1</sup> See also vol. I, p. 114; p. 266, par. 27.

8. Form of præcipe and statement on a promissory note and for goods sold and delivered.

J. P. Redington } In the Court of Common Pleas of Lackawanna  
v. } County.  
Paul Clemens. } No. 846.

Sept. T., 1904.

Issue summons in assumpsit returnable *sec leg.*

T. P. Hoban,  
Plaintiff's Attorney.  
Aug. 4, 1904.

To John F. Cummings, Esq.,

Prothonotary.

*Plaintiff's Statement of Claim.*

I. The plaintiff, J. P. Redington, claims of the defendant, Paul Clemens, the sum of three hundred dollars with interest thereon from the 29th day of October, 1901, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

The defendant on the 29th day of July, 1901, at the county aforesaid, made his promissory note, whereof the following is a copy:  
"\$300.00. Scranton, Pa., July 29, 1901.

Three months after date I promise to pay to the order of J. P. Redington, three hundred  $\frac{00}{100}$  dollars at Scranton Savings Bank.  
Value received. Paul Clemens."

No. —. Due —.  
(Stamped) "Discounted bills  
Scranton Savings  
Bank."

Endorsed "Oct. 29. 6082.

Jos. P. Redington."

And having delivered the said promissory note to the plaintiff, the defendant became liable for the payment of the same, according to the tenor and effect thereof.

The said promissory note was duly presented for payment at the said Scranton Savings Bank, in the city of Scranton, said county, and payment of the same duly demanded of a proper person according to the tenor of said note, but payment thereof was refused and the defendant has always refused to pay the amount of said note or any part thereof.

II. And also the further sum of two dollars for goods sold and delivered by the plaintiff to the defendant in the city of Scranton, said county, at his special request; said goods having been sold and delivered to said defendant by the plaintiff at the time and in the amount specified in the following copy of plaintiff's original account with defendant taken from the plaintiff's book of original entries:

"1901

June 17, 1901, 1 mirror..... \$2.00"

The total amount of plaintiff's claim against defendant is three hundred and two dollars (\$302.00) with interest thereon from October 29, 1901, which sum, with interest as aforesaid, is unpaid and



justly due from said defendant to said plaintiff and which said defendant has refused to pay.

T. P. Hoban,  
Attorney for Plaintiff.

Aug. 4, 1904.

The above is a good form where the copy of the instrument is embraced in the statement, in which case it is not necessary to attach a copy as required by section 3 of the act of May 25, 1887, P. L. 271, which re-enacts section 5 of the act of March 21, 1806, P. L. 561.<sup>2</sup> The whole subject of plaintiff's statement is fully discussed in Vol. I, ch. 28, and for other forms of statement, see p. 482, par. 88; p. 483, par. 90; p. 483, par. 91.

#### 9. Notice of filing of statement.

The subject of filing of statement and notice thereof, as well as taking judgment for want of an appearance or want of an affidavit of defense is fully covered in Vol. I, "Plaintiff's Statement," and "Affidavit of Defense." It is sufficient to add here that when the statement is not served, but filed, notice of the filing must be given to the defendant. This should be in writing and duly served as required by the rule of court.

In Philadelphia, Rule 29 provides:

"If a party entitled to notice has not employed an attorney, it shall be sufficient to serve a copy of notices, pleadings and papers on the party or his bail to the sheriff, or special bail if there is any; but if an attorney is employed, and marked on the record, all notices, pleadings and papers shall be served on him except where an act of assembly or rule of court directs otherwise."

(Compare your rule with this.)

#### 10. Form of Affidavit of defense.

J. P. Redington	}	In the Court of Common Pleas of Lackawanna
v.		County.
Paul Clemens.	}	No. 846.
		September T., 1904.

Paul Clemens the defendant in the above case being duly sworn according to law deposes and says that he has a just and legal defense to the plaintiff's demand for three hundred dollars with interest and costs, founded on a promissory note purported to have been made by the defendant to the plaintiff, J. P. Redington, a copy of which note is set forth in the plaintiff's statement filed in the above cause, the nature and character of which is as follows:

1. At the date borne by the said note, and for some time previous thereto, the defendant was employed by and in the service of one Peter A. Lubignac, in the silk business, in the city of Scranton; that at the request of the said Lubignac and as a matter of accommodation to him, he at divers times before, and to the best of his belief, after the date borne by said promissory note, signed several promissory notes but avers that the said notes were always signed by him in blank and for the accommodation of his employer only, and that no consideration ever passed to him from the said Lubignac

<sup>2</sup> See vol. 1, p. 445, par. 15; p. 446, par. 16.

therefor; that it was expressly agreed between the defendant and the said Lubignac, that he, Lubignac, should fill in the amounts and insert his own name therein as payee.

2. That the defendant never had any business dealings of any nature with the plaintiff, except what is hereinafter confessed, and that no consideration ever passed from the plaintiff to the defendant upon which to base said note and that he never delivered the said note to the plaintiff.

3. The defendant verily believes and expects to be able to prove on the trial of this case, that the note now held by the plaintiff is one of the notes signed in blank for the aforementioned Lubignac, and that the same was not filled in strict conformity and accordance with the authority given.

4. That if the note now held by the plaintiff and upon which this action is founded is not one of the series of notes signed in blank for said Lubignac, the same then is a forgery and is base and fraudulent.

5. That it was never designed by the defendant to make J. P. Redington the payee in any of the notes signed for Lubignac and the defendant never delivered to said Lubignac a complete instrument in which the name of J. P. Redington was inserted as payee, and never delivered to J. P. Redington an incomplete instrument to be filled in by him. That all notes signed by the defendant for said Lubignac were accommodation instruments which the said Lubignac agreed to pay when due; that he had no knowledge that the plaintiff had such note in his possession, no notice having ever been given him, and that the plaintiff is not a holder for value in due course.

7. As to the remaining portion of the plaintiff's claim, to-wit: the sum of two dollars, with interest and costs, the same is admitted to be true and correct and the defendant hereby confesses judgment for the same.

All the above the defendant believes and expects to be able to prove on the trial of the case.

Paul Clemens.

Sworn to, etc.

Henry W. Mulholland,  
Notary Public. }  
Com. expires Jan'y 19, 1907. }

Filed and endorsed,  
J. P. Quinnan, P. D.

# **11. Judgment for want of an affidavit or a sufficient affidavit of defense.**

If no affidavit of defense is filed within fifteen days after service of notice of filing of the plaintiff's statement; or on or before the return day where a copy of the statement has been served on the defendant "not less than fifteen days before the return day of the writ, judgment may be entered on præcipe filed for the amount of the plaintiff's claim."<sup>3</sup> In case an affidavit of defense is filed which is deemed insufficient judgment cannot be entered summarily, but the plaintiff must take his rule on the defendant to show cause

<sup>3</sup> Act April 22, 1889, P. L. 41.

why judgment should not be entered for want of a sufficient affidavit of defense.<sup>4</sup>

If the defendant demurs to the statement no judgment can be taken for want of an affidavit pending the demurrer.<sup>5</sup> If judgment be for the defendant on the demurrer, it must be on motion and not by filing a *præcipe*.<sup>6</sup>

#### 12. Form of *præcipe* for judgment by default.

Lize Kuppenheaver } In the Court of Common Pleas of Northumberland County.  
v. }  
Harry Kolb. } No. \_\_\_\_ Term, 19\_\_.

Enter judgment by default for want of an affidavit of defense, against the defendant Harry Kolb, for the sum of (\$1000) one thousand dollars, with costs.

S. B. Boyer, P. Q.  
July 15, 1910.

To \_\_\_\_ , Esq.  
Prothonotary.

#### 13. Rule for judgment for want of sufficient affidavit of defense.

John Johnson } Court of Common Pleas of Snyder County.  
v. }  
Hans Hansen. } No. \_\_\_\_ Term, 1910.

Enter rule on defendant Hans Hansen returnable next regular return day, to show cause why judgment should not be entered against him in above entitled cause, for amount of plaintiff's claim, with costs, for want of a sufficient affidavit of defense, *sec. leg.*

Jay G. Weiser, P. Q.

To \_\_\_\_ , Esq.,  
Prothonotary.

The rule issued conforms to the *præcipe* and may be served by the sheriff, or counsel for defendant may accept service. The practice on this rule is treated of in Vol. I, pages 548-9.

#### 14. Judgment for part of claim.

By act of May 31, 1893, P. L. 185, judgment may be taken for such amount as the defendant in his affidavit of defense admits to be due, with leave to proceed for the residue, which is done on motion; and by the act of July 15, 1897, P. L. 276, when the court adjudges a portion of the affidavit of defense insufficient in law, it may direct judgment to be entered for the plaintiff for such portion of his claim as the affidavit of defense fails to affect, with execution, and as to the remainder the cause will proceed to issue and trial.

(See Vol. I, p. 550-1.)

<sup>4</sup> West v. Simmons, 2 Wharton, 261, under section 2 of act of Mar. 28, 1835, P. L. 88; Sharpless v. Stirman, 4 D. R. 569; Hellman v. Horn, 1 Kulp, 138.

<sup>5</sup> Sinclair v. Evans, 5 D. R. 384.

<sup>6</sup> Covey v. R. Co., 14 D. R. 512. (For the practice on rule, see vol. 1, p. 548-9.)

### 15. Pleas.

It is provided by section 8 of the act of 1887, *supra*, that:

"The defendant in the action of assumpsit shall be at liberty, in addition to the plea of '*non assumpsit*' to plead payment, set-off, and also the bar of the statute of limitations and no other pleas. \* \* \* The defendant shall plead to the said actions within fifteen days after the return day, and, in default thereof, the court may, on motion, direct the prothonotary to enter the plea of the general issue at any time; the pleadings in all courts to be subject to the rules of the respective courts as to notice of special matter."

Thus while the act, *supra*, abolished "special pleading" in the flare of trumpets, it preserved the system in the whispering gallery by reserving it under the garment of "notice of special matter."

This subject is so thoroughly gone over in Vol. I, chapter 33, p. 569, *et seq.*, that it will be merely noticed here. Besides the rules of court in each jurisdiction are made the law of the forum in this respect.

The general issue is "*non assumpsit*," which meant that the defendant did not promise or undertake as the plaintiff alleged and under it the defendant has a wide latitude for defense and may amend to suit the nature of the case.<sup>7</sup> This plea may be allowed to be entered *nunc pro tunc* on the trial or later, to make up the issue.<sup>8</sup> Where the defense is a special one it should now be set out in the affidavit of defense which is considered under the new procedure as a pleading. Formerly, if the defendant had a particular defense, equitable in its character, he pleaded it specially, or with notice of special matter which required him under the rules of court to give notice of it to the plaintiff before the trial, so that he could be prepared to meet it.<sup>9</sup>

As to the plea of "*non assumpsit*" and its present scope, see Vol. I, p. 574, para. 13, 14; "payment," Vol. I, p. 575, par. 15, and p. 578, par. 29; "payment with leave," Vol. I, p. 576, par. 17; equitable defenses, Vol. I, p. 576, par. 16; set-off, p. 579, par. 24; tender, p. 582, par. 29; *lis pendens*, former recovery and *res judicata*, p. 582, par. 30; estoppel, p. 585, par. 34; statute of limitations, p. 586, par. 35; jurisdiction, p. 586, par. 38; pleas in bar, p. 587, par. 39; abatement, p. 571, par. 6.

As to the manner of pleading, it may be entered, *breve*, by the attorney on the record signing his name, he being an officer of the court and responsible for his action; or, as is the usual practice now, draw up a plea in form and file it, when the prothonotary will enter it.

### 16. Preparation for trial, etc.

The steps from issue to trial in any form of action have been carefully traced in Vol. I, and reference is made thereto, as applicable generally to assumpsit. The same is true of the trial and successive steps which are considered *supra* in this volume.

<sup>7</sup> *Stewart v. Kelly*, 16 Pa. 160.

<sup>8</sup> *Blose v. Schultes*, 11 Northam. 307.

<sup>9</sup> For illustrations, see *Erwin v. Leibert*, 5 W. & S. 104; *Uhler v. Sanderson*, 38 Pa. 128.

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**17. Assumpsit on official bonds.**

The act of June 14, 1836, P. L. 638, is still in force as to suits upon official bonds, only the form of action being changed to assumpsit, and it applies as well to the bond taken in the name of the county (as by a county treasurer) as to that in the name of the commonwealth.<sup>10</sup>

Section 6 is as follows:

"Every bond and obligation which shall be given to the commonwealth by any public officer, or by any person appointed under authority of law to execute any public trust; also every bond which shall be given by any executor, administrator, guardian, committee, assignee, receiver or trustee, with intent, in every of the said cases, to secure the faithful execution of the respective offices, employment or trust, and for the use of all such persons and bodies politic and corporate, as may be affected by the official acts or neglect of such officer or person, may be sued and prosecuted in the manner following, to-wit:

I. The writ shall in such case be issued in the name of the commonwealth, and the names of the persons by whom the same shall be sued out, shall be suggested as plaintiffs therein, and such persons shall be liable for the costs of the suit, in like manner as plaintiffs in other cases.

II. If two or more persons having several interests, shall join in suing such writ, it shall be lawful for them to declare separately thereon, and set forth in their declarations, respectively, the breaches of the condition of such bond or obligation, which shall have been made to their particular injury, or they may join in declaration thereon, and afterwards, in their replications or otherwise, according to the course of practice in like cases, set forth upon the record the breaches of the condition aforesaid.

III. It shall be lawful for any other person to whom a cause of action shall have accrued on such bond or obligation, at any time before judgment, upon a suggestion filed with leave of the court, to be made a party plaintiff in such writ, and thereupon he may declare and set forth the breaches of condition of such bond or obligation, to his particular injury as aforesaid.

IV. The obligors, in any such bond or obligation, may plead performance of the condition thereof, so far as it respects the person by whom such writ was sued, or any of them, and if such fact be confessed or found, such persons shall be debarred of their actions upon that writ.

V. If several persons shall join as aforesaid in any such writ, and if issues be taken by them separately from each other, against the defendants, it shall be lawful for them to have a separate trial thereof, or, at their election, such issues may be tried at the same time, and if they be issues in fact, by one and the same jury.

VI. The parties to any issue taken as aforesaid, shall be liable for the costs of the trial thereof, in like manner as if they only were parties in the proceeding.

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<sup>10</sup> *Monroe County v. Ellenberger*, 34 Supr. C. 22, distinguishing *Comth. v. Schadt*, 214 Pa. 592, and following *Lehigh County v. Gossler*, 24 Supr. C. 406.

VII. If judgment, upon all issues taken as aforesaid, be rendered for the defendants, such judgments, and the pleadings and proceedings upon which they shall be founded, shall not estop, debar or otherwise affect the action which any other person or body politic or corporate, may at any time have upon such bond, nor shall such judgment debar any action which the said plaintiffs may have therein, for any subsequent breach or cause.

VIII. If final judgment be rendered against the defendants upon any issue taken as aforesaid, such judgment shall be as follows, to-wit:

First, For the commonwealth in the amount of such obligation or bond.

Second, For the plaintiff in such issue, in the amount of damages assessed, and for the costs accrued between such plaintiff and the defendants.

IX. The judgment of the commonwealth as aforesaid, shall remain for the satisfaction of all persons entitled to the benefit of the bond or obligation upon which it was rendered, and for all and singular the like uses and purposes; but the said judgment shall not be a lien upon the real estate of the defendants, unless the commonwealth shall have commenced the action, nor shall execution thereof be had, except in the manner hereinafter provided.

X. The judgment for the plaintiff in such issue as aforesaid, shall be a lien upon the real estate of the defendants, to the amount thereof, and such plaintiff may have execution thereof, on a writ of *scire facias*, or other action thereon, in like manner as may be had in the case of judgments in other personal actions.

XI. In all cases where the condition of any such bond shall be broken, after a judgment rendered for the commonwealth as aforesaid, it shall be lawful for the party aggrieved to proceed by writ of *scire facias* upon such judgment, suggesting his interest therein, to assess and recover the damages which he shall have sustained, in the manner herein before provided in the case of the breach of the condition of a bond taken to secure the performance of a covenant, after a judgment had upon such bond.

XII. Every judgment rendered for the plaintiff in any such writ of *scire facias*, shall be of like effect to all intents and purposes, as judgments obtained by plaintiffs in other personal actions.

XIII. It shall be lawful for the sureties in any bond as aforesaid, to pay into court, at any time after suit brought thereon, as aforesaid, the whole amount of the penalty of the bond, with all costs of suit up to that time, and thereupon they shall be discharged from all further liability by reason thereof; but nothing herein contained shall debar any person of his action or of his execution against the officer, trustee or other person for whom such security was given, for any damages which shall not be paid out of such bond.

#### 18. Practice under this act.

The bond is for the use of any one interested in its enforcement.<sup>11</sup>

<sup>11</sup> Comth. v. Snyder, 1 Supr. C. 286; Comth. v. Allen, 2 Supr. C. 175; Kittanning Boro' v. Mast, 15 Supr. C. 51; Lehigh County v. Gossler, 24 Supr. C. 406.

The treasurer's bond to the county is for the use of a borough or township and his sureties will be held under this act at their suit,<sup>12</sup> although the party did not come in on the writ under par. 3 of the above section.<sup>13</sup>

On a bond given for the support of a married woman, no assignment or authorization by an officer of the commonwealth is necessary, to maintain the suit.<sup>14</sup> Upon a bond of a committee of a lunatic, the suit is in *assumpsit*, and the commonwealth must be the plaintiff, but it is not necessary to prove that the commonwealth was injured.<sup>15</sup> This act does not alter the act of 1803, as to suits on recognizances.<sup>16</sup> Where one sued in his own name, amendment by adding the commonwealth was allowed, even after the statute of limitations had run, as the cause of action remained unchanged. The commonwealth may bring a separate suit against each obligor.<sup>17</sup> A decree of the Orphans' Court, when unappealed, fixes the liability of a guardian, and there can be no defense to a suit on his bond except payment.<sup>18</sup> The pendency of a suit on an official bond is a bar to another: the party must proceed by *scire facias*.<sup>19</sup>

The limitation of actions, as by the act of April 4, 1797, does not apply to an original administration bond, but to an additional bond given pursuant to an order of court.<sup>20</sup>

The plaintiff may recover damages up to the time of judgment, but not in excess of his judgment.<sup>21</sup> The judgment is first for the commonwealth in the amount of the penalty in the bond; second for the use plaintiff in the amount found due him by the jury.<sup>22</sup>

#### 19. Suits on justice's and constable's bonds.

The requirement of thirty days' notice before suing a justice of the peace, as under the act of March 21, 1772, does not apply to a suit on his official bond,<sup>23</sup> nor to a constable's bond when sued upon it for his official nonfeasance or malfeasance.<sup>24</sup> The bond of the justice is broken when demand is made and refused.<sup>25</sup> A constable's bond is broken when he returns "no goods" and there are enough goods to satisfy the writ.<sup>26</sup>

Judgment may be taken for want of an affidavit of defense in a suit upon such bond, and the court will control the same as in other cases.<sup>27</sup>

<sup>12</sup> *Monroe County v. Eilenberger*, 34 Supr. C. 22.

<sup>13</sup> *Monroe County v. Eilenberger*, 34 Supr. C. 28.

<sup>14</sup> *Comth. v. Snyder*, 1 Supr. C. 286.

<sup>15</sup> *Comth. v. Patterson*, 13 Supr. C. 136.

<sup>16</sup> *McMicken v. Comth.*, 58 Pa. 213.

<sup>17</sup> *Clement v. Comth.*, 95 Pa. 107.

<sup>18</sup> *Comth. v. Gracey*, 96 Pa. 70.

<sup>19</sup> *Comth. v. Straub*, 35 Pa. 137; *Comth. v. Cope*, 45 Pa. 161.

<sup>20</sup> *Comth. v. Patterson*, 8 Watts, 515; *Miltenberger v. Comth.*, 14 Pa. 71.

<sup>21</sup> *Karch v. Comth.*, 3 Pa. 269.

<sup>22</sup> *Miltenberger v. Comth.*, 14 Pa. 71.

<sup>23</sup> *Comth. v. Frailey*, 69 Pa. 260.

<sup>24</sup> *Comth. v. Yeisley*, 6 Supr. C. 273.

<sup>25</sup> *Comth. v. Frailey*, *supra*.

<sup>26</sup> *Comth. v. Yeisley*, *supra*.

<sup>27</sup> *Comth. v. Yeisley*, *supra*.

**20. Suits on mortgages upon purchase money, rentals or royalty on coal or mineral conveyances or leases.**

The act of May 13, 1889, P. L. 197, provides for "mortgages upon the purchase money, rentals or royalty, reserved by the grantors or lessors in conveyances or leases of coal or other minerals, in, under or upon any land, together with the right to mine or carry away the same, during a term of years or perpetually, as long as the coal and other minerals will last"; for recording and lien of the same, and enforcement by an action in assumpsit.

Section 4 is as follows:

"In case of default in the payment of any installment of principal or interest by the mortgagor, as the same may fall due, the mortgagee may have an action of assumpsit to recover the full amount secured by the mortgage, and if judgment shall be recovered an execution in the nature of an attachment may issue against the defendant in the said action, in which the grantee or grantees in the conveyance or lease may be made garnishees, which shall bind the said payment, rentals or royalties, until sufficient shall have accrued to pay the full amount of the said judgment with interest and cost. And after service of the attachment, payment shall be made to the attaching creditor by the garnishees of such purchase money, rental or royalty, as the same falls due, until the said judgment with interest and cost is fully paid. And in case of neglect or refusal on the part of the garnishees to pay in the manner hereinbefore provided, the plaintiff in the judgment may have the same remedies to enforce payment as the defendant in the judgment has under the terms and conditions of the original conveyance or lease."

**21. Breach of promise to marry.**

A suit for breach of promise to marry is in the form of assumpsit and not trespass,<sup>1</sup> although an action in form of case was sustained.<sup>2</sup> A *capias ad respondendum* may still issue, since it is excepted in the act of 1842, and defendant may be held to special bail on affidavit, as allowed under the rule of court, by the judge.<sup>2a</sup> Plaintiff must not only state the promise to marry in her affidavit, but also that she accepted it and that he has broken it;<sup>3</sup> although it has been held that tender of performance may be waived by the acts of the defendant.<sup>4</sup>

In this action a promise may be inferred from such attentions on his part as usually characterize matrimonial engagements; but the opinions or inferences of witnesses from the conduct of the parties are not admissible as evidence of mutual promises. The character of the parties is not directly involved, and where the defendant shows immoral or even immodest conduct by the plaintiff, such

<sup>1</sup> *Ellis v. Guggenheim*, 20 Pa. 287; *Von Storch v. Griffin*, 77 Pa. 504; *Donovan v. Foley*, 5 D. R. 91; *Harding v. Lee*, 12 D. R. 49; *Keim v. Brumbach*, 29 Supr. C. 557; *Weaver v. Kline*, 10 Lanc. L. R. 25.

<sup>2</sup> *Lecky v. Blosser*, 24 Pa. 401; *Wagenseller v. Simmers*, 97 Pa. 465.

<sup>2a</sup> *Wagenseller v. Simmers*, 97 Pa. 465.

<sup>3</sup> *Snedden v. Gann*, 16 C. C. 47; *Ellis v. Guggenheim*, 20 Pa. 287.

<sup>4</sup> *Wagenseller v. Simmers*, *supra*.



evidence is not sufficiently rebutted by the presumption of good conduct. Said Woodward, J.:<sup>5</sup> "It is the legal as well as moral duty of parties who have plighted their mutual vows, and are looking to a marriage, to preserve themselves pure and blameless; and if a woman engaged to be married will prostitute her person to another man, it will bar her action for breach of the marriage contract. But if she be not guilty of crime, but suffer undue liberties to be taken of her person, whereby her reputation is degraded, this fact may be shown in mitigation of the damages she claims."

General character is no answer to specific acts in breach of promise.<sup>6</sup>

A contract to marry without specification of time means reasonable time, and in determining what is reasonable time, the age of the parties, their pecuniary ability and circumstances generally will be considered.<sup>7</sup> A man is not bound by a contract to marry a lewd woman, and the sufficiency and legality of the consideration, in this behalf are put in issue by the plea of *non assumpsit*.<sup>8</sup>

So under this plea a man may prove that the woman was incapable of consummating marriage in its common law aspects, by reason of a genital deformity which she refused to have removed.<sup>9</sup>

Being an action *ex contractu*, it is error to exclude evidence that the cause was included in a settlement before an alderman.<sup>10</sup> The defendant against whom a judgment is recovered is entitled to claim the benefit of the exemption law against the execution.<sup>11</sup>

A promise to marry a minor, although the consent of the parents or guardian was not obtained, binds the party<sup>12</sup> and the contract is not void because the engagement was made on Sunday.<sup>13</sup> But if the consideration is illegal as where A. promises B. to marry her if he may have intercourse with her, the contract is void.<sup>14</sup>

Where a couple had been divorced, but soon after agreed to live together, in the presence of witnesses and thereafter cohabited, it was a valid marriage at common law.<sup>15</sup>

After the presumption of death has arisen, a spouse has a right to contract to marry and may maintain an action for the breach of the contract.<sup>16</sup>

## 22. Evidence.

The proof need not show any set words or express promise, if from the facts and circumstances a promise may be fairly implied.<sup>17</sup>

<sup>5</sup> Leckey v. Bloser, 24 Pa. 401; Bowers v. Cummins, 1 Pitts. L. J. 82.

<sup>6</sup> Leckey v. Bloser, *supra*.

<sup>7</sup> Wagenseller v. Simmers, 97 Pa. 465.

<sup>8</sup> Von Storch v. Griffin, 77 Pa. 504; Welker v. Metcalf, 209 Pa. 373; McFadden v. Reynolds, 20 W. N. C. 312.

<sup>9</sup> Gring v. Lerch, 112 Pa. 244.

<sup>10</sup> Schubkagel v. Dierstein, 131 Pa. 46.

<sup>11</sup> Keim v. Brumbaugh, 29 Supr. C. 557.

<sup>12</sup> Beelman v. Roush, 26 Pa. 509.

<sup>13</sup> Fleischman v. Rosenblatt, 20 C. C. 512; Markley v. Kessering, 2 Penny. 187; Gangwere's Est., 14 Pa. 417.

<sup>14</sup> Baldy v. Stratton, 11 Pa. 316.

<sup>15</sup> Neafie's Est., 12 D. R. 749; Comth. v. Haylow, 17 Supr. C. 541.

<sup>16</sup> Miller v. Jacobs, 18 Montg. Co. 185.

<sup>17</sup> Von Storch v. Griffin, 77 Pa. 504; Johnson v. Smith, 3 Pitts. 184.

But it will not be implied from meretricious or illicit relations,<sup>18</sup> nor from slight circumstances not connecting the defendant directly with them.<sup>19</sup> The promise may be shown by the admissions of the defendant; and after refusal to marry, no tender is necessary.<sup>20</sup> Where there is some confusion as to what was promised a verdict of a jury finding that there was a promise to marry will not be disturbed.<sup>21</sup> The plaintiff may prove her acceptance of the proposal by showing her preparations and that she had fixed a day for the ceremony.<sup>22</sup> It is sufficient evidence of the breach when the defendant declares to plaintiff's mother his refusal<sup>23</sup> and plaintiff need not before suit make an offer to marry him.<sup>24</sup>

One arrested may be discharged under the insolvent laws.<sup>25</sup> The statute of limitations begins to run from the time defendant declares his intention not to marry plaintiff, and the suit must be brought within six years.<sup>26</sup> The compromise of a suit is a valid consideration for a promissory note.<sup>27</sup> It is no defense that he was a married man when he made the promise, unless this fact was known to plaintiff when the promise was made.<sup>28</sup> Nor will the action be barred by a release obtained on the covinous and false promise that the defendant will marry plaintiff.<sup>29</sup>

### 23. Measure of damages.

The jury may consider the station, means and condition of the parties, in estimating the damages.<sup>30</sup> They may take into account the character of maintenance and support the defendant would be likely to give his wife,<sup>31</sup> and the disappointment and laceration of feelings in consequence, which plaintiff suffered.<sup>32</sup> The inability of defendant to pay is no reason why the damages awarded should be held excessive.<sup>33</sup> Punitive damages are allowed where plaintiff was seduced under the promise of marriage;<sup>34</sup> and although seduction may not be given in evidence in this action, "the conduct of the defendant before, at the time, and after his refusal to perform his promise, must be taken into view; as, for example, when he exhibited wanton cruelty, unnecessary and heartless exposure of his victim's infamy, harassing her feelings, and boasting of his triumph over

<sup>18</sup> *Hay v. Graham*, 8 W. & S. 27; *Bleiler v. Koons*, 132 Pa. 401.

<sup>19</sup> *Weaver v. Bachert*, 2 Pa. 80.

<sup>20</sup> *McCormick v. Robb*, 24 Pa. 44.

<sup>21</sup> *Lehman v. Sakemiller*, 14 York, 109.

<sup>22</sup> *Moritz v. Melhorn*, 13 Pa. 331; *McCormick v. Robb*, *supra*.

<sup>23</sup> *Stott v. Toledo*, 2 W. N. C. 98.

<sup>24</sup> *Weaver v. Cline*, 12 C. C. 363.

<sup>25</sup> *Craig's Case*, 2 Phila. 391.

<sup>26</sup> *Hushour v. Nye*, 4 Dauphin Co. 109.

<sup>27</sup> *McClure v. Mansell*, 4 Brewster, 119.

<sup>28</sup> *Stevenson v. Pettis*, 12 Phila. 468.

<sup>29</sup> *Ettinger v. Jones*, 139 Pa. 218.

<sup>30</sup> *Ellis v. Guggenheim*, 20 Pa. 287; *Weaver v. Bachert*, 2 Pa. 80.

<sup>31</sup> *Schubkagel v. Dierstein*, 131 Pa. 46.

<sup>32</sup> *Markley v. Kessering*, 2 Penny. 187.

<sup>33</sup> *Lehman v. Sakemiller*, 14 York, 109.

<sup>34</sup> *Gring v. Lerch*, 112 Pa. 244; *Baldy v. Stratton*, 11 Pa. 316; *Paul v. Frazier*, 3 Mass. 73.

her virtue, and exposing her to the scoffs of a pitiless world.”<sup>25</sup>

Said Judge Anthony: “The wounded spirit, the unmerited disgrace and the probable solitude which would be the consequence of desertion after a long courtship, are considered to be legitimate claims for pecuniary consideration.”<sup>26</sup>

#### 24. Form of statement in breach of promise to marry.

Mary C. H.	} In the Court of Common Pleas of Lycoming County.	
v.		
A. F.		
	No. 251,	January Term, 1874.

Lycoming County, ss.

M. C. H., the plaintiff in the suit, by her attorneys, O. H. Reighard and W. R. Bierly, complains of A. F., the defendant in this suit, who has been attached to answer the said plaintiff in an action of breach of promise of marriage, for that whereas, heretofore, to-wit, on or about the twenty-sixth day of February, A. D. one thousand eight hundred and seventy-two, at the county aforesaid, in consideration that the said plaintiff being then and there sole and unmarried, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to marry him the said defendant, when she the said plaintiff should be thereunto afterwards requested, he the said defendant undertook, and then and there faithfully promised to marry the said plaintiff when he the said defendant should be thereunto afterwards requested; and the said plaintiff avers that she, confiding in the said promise and undertaking of the said defendant, hath always from thence hitherto remained and continued, and still is sole and unmarried and hath been for and during all the time aforesaid, and still is ready and willing to marry him the said defendant, to-wit: at the county aforesaid, whereof the defendant hath always there had notice. And although after the said plaintiff, after the making of the said promise and undertaking of the said defendant, to-wit, on the day and year aforesaid, at the county aforesaid, requested the said defendant to marry the said plaintiff, yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff, in this respect, did not nor would at the said time, when he was so requested, as aforesaid, or at anytime before or afterward marry the said plaintiff, but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do, to-wit, at the county aforesaid. And the said plaintiff further avers that she, confiding in the said promise and undertaking of the said defendant hath always from thence, hitherto remained and continued and still is sole and unmarried, and hath been for and during all the time aforesaid, and still is ready and willing to marry him the said defendant, to-wit, at the county aforesaid, whereof the said defendant hath always there had notice; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf,

<sup>25</sup> Rogers, J., in *Baldy v. Stratton*, 11 Pa. 316.

<sup>26</sup> *Baldy v. Stratton*, *supra*.

after the making of his promise and undertaking, to-wit, on or about the fifth day of December, A. D. 1873, at the county aforesaid, wrongfully and injuriously married one M. A. A. contrary to his last mentioned promise and undertaking so by him made as aforesaid, to-wit: at the county aforesaid.

[A count may be added as was here of a promise to marry in a reasonable time, averring that such reasonable time has elapsed.]

To the damage of the said plaintiff of five thousand dollars lawful money of the United States of America, and therefore she brings this suit.

O. H. Reighard,  
W. R. Bierly,  
Plaintiff's attorneys.

Filed January 16, 1875.

## 25. Actions by and against tenants in common in oil.

The general principle is that tenants in common cannot sue each other except in account.

But the act of May 6, 1891, P. L. 41, provided a remedy in assumpsit. Section one provides as follows:

"That from and after the passage of this act, any person or persons performing labor of any kind whatever, or furnishing materials for, upon or about any drilling, pumping or producing oil or gas well, shall have the right to bring suit in assumpsit against any joint owner, joint tenant or tenant in common holding an interest in and operating such drilling, pumping or producing oil or gas well, to recover from such joint owner, joint tenant or tenant in common, the *pro rata* share due and owing by such joint owner, joint tenant or tenant in common for any labor done, or materials furnished, in, upon or about such drilling, pumping or producing oil or gas well, and the interest of such joint owner, joint tenant or tenant in common, shall be subject to levy and sale upon any execution issued to enforce collection of any claim under this act, after judgment obtained by due process of law.

## 26. Joint owner may sue joint owners to recover.

Section two provides:

"Any joint owner, joint tenant or tenant in common, paying the *pro rata* share of the necessary expenses of any drilling, producing or pumping oil or gas well for any other joint owner, joint tenant or tenant in common, holding an interest in and operating such drilling, pumping or producing oil or gas well, shall have or possess all the rights of action, as provided in the first section of this act, to the same extent as is given hereby to the person or persons performing the said labor or furnishing such materials: *Provided*, That no joint owner, joint tenant or tenant in common shall be required by this act to pay any share of the expenses of operations commenced and carried on without his authority or consent.

## 27. Limitation of act.

The above act is limited, first, to claims by strangers who furnish labor or materials to several parties jointly interested in oil operations; and, second, to a claim by one of several joint owners against another joint owner whose share has been paid. It does not apply to the settlement of accounts of tenants in common in an

oil lease who are also partners in the oil business. The remedy is in equity.<sup>87</sup>

In such action by a tenant in common against his co-tenants, he cannot recover for their share of expense of pumping done by him against their consent. There must be a contract either express or implied.<sup>88</sup>

#### 28. Form of statement in assumpsit.

For value of goods destroyed by fire while in possession of a tradesman.

Joseph J. Pauksztis and Charles Brazis, trading as Joseph J. Pauksztis & Co. v. The Raeder Blank Book, Lithographing and Printing Co.	}	In the Court of Common Pleas of Lu- zerne County, Penn. No. 431,                      January Term, 1901.  Assumpsit, Claim \$4,525.48, with interest from November 1st, 1901.
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#### PLAINTIFFS' STATEMENT.

Plaintiffs, Joseph J. Pauksztis and Charles Brazis, trading as Joseph J. Pauksztis & Co., by their attorney, William N. Reynolds, Jr., complain of the defendant, The Raeder's Blank Book, Lithographing and Printing Company, and set forth their cause of action in assumpsit as follows:

Plaintiffs are resident citizens of the Borough of Plymouth, Luzerne county, Pa., and were at the time of the occurrences herein-after set forth.

Defendant is a corporation duly incorporated and doing business under and by virtue of the laws of the State of Pennsylvania, and at the times hereinafter specified was engaged in a general lithographing, printing and book-binding business in the said county, with its place of business in said City of Wilkes-Barre, Pa.

Said plaintiffs at the solicitation of the defendant, on or about the 24th day of August, 1900, permitted said defendant to come to said plaintiff's place of business in said Borough of Plymouth and take therefrom and remove to said defendant's place of business in said City of Wilkes-Barre, certain large quantities of valuable manuscripts, to-wit:

1,500 copies of "Mythia Pasakos in Legendos," part I, 8 vo.	
book, containing 192 pages, net value 48½c each.....	\$ 727.50
3,000 copies of same, part II, each book containing 128	
pages, net value 34 2-3c each.....	1,039.98
1 copy of translation of said part II, from German language	
into Lithuanian.....	175.00

<sup>87</sup> Johnston v. Price, 172 Pa. 427.

<sup>88</sup> Murtland v. Callihan, 2 Supr. C. 340.

2,100 copies of "Lativu Tauta Kita Kart ir Siandien," an  
 8 vo. book, of 349 pages, net value \$1.23 each..... 2,583.00  
 Total net value..... \$4,525.48

Said goods were taken by said defendant to its place of business in the usual conduct of its business for the purpose of covering and binding the same into books, for which said defendant was to be compensated by said plaintiffs, and, at the time the said business was solicited by said defendant, said defendant undertook and agreed to keep same insured while in the said defendant's place of business, and the said plaintiffs were then and there assured that it would be unnecessary for them to have said goods insured and were deterred from doing so by the assurance of said defendant that it was unnecessary as the said defendant in its line of business, carried insurance sufficient to cover all the goods of its patrons and sufficient to cover the said goods of said plaintiffs.

Further, it then and there became and was the well known duty of said defendant, in the exercise of due care, to carry insurance upon said goods of said plaintiffs so left with said defendants in trust in the line of their said business, and to have kept the same insured while they were so held by said defendant on its premises in its business establishment, against probable loss by fire while there.

That it was the further duty of said defendant to exercise due care to see that said goods of said plaintiffs were properly protected from fire or danger from fire in their said place of business, but that said defendant well knowing its duties in said premises did wholly neglect the same, and did carelessly and negligently permit a fire to break out upon said premises and negligently permitted said goods to be then and there consumed by fire to the plaintiff's loss in the value thereof.

Said plaintiffs prior to the institution of this case, demanded compensation of said defendant for the said loss, which said defendant refused and still doth refuse and neglect to pay. Wherefore said plaintiffs claim the said sum of \$4,525.48, with interest from November 1st, 1901,

Wm. Reynolds, Jr.,  
 Plaintiffs' Attorney.

*Amended statement.*

By leave of court plaintiff was permitted to amend his statement as to some particulars, among them being the date of the fire. But the substance of the statement remained as above.

**29. Form of affidavit of defense.**

Joseph J. Pauksztis and  
Charles Brazis, trading  
as Joseph J. Pauksztis  
& Co.

v.

The Raeder Blank Book,  
Lithographing and  
Printing Co.

In the Court of Common Pleas of Lu-  
zerne County,  
No. 431, January Term, 1901.

***Luzerne County, ss:***

Personally appeared John W. Raeder, who being duly sworn, deposes and says, that he is the general manager of the Defendant Company, and as such is conversant with the company's business, such as is referred to in this case. He admits that certain printed matter, which may have been that which is described in the plaintiffs' statement, was delivered to the Defendant Company, and was cared for by the Defendant Company for the gratuitous accommodation of the plaintiff until such time as the plaintiff might desire to have the same bound. The defendant denies that there was any understanding or contract or assurance given by it to the plaintiff, that the material brought to it was to be insured, or that the defendant should, in any respect, be liable for the safe keeping thereof.

Deponent further avers that Defendant Company has never been in the habit of insuring goods of its customers, in its possession, and that there is no such custom among those engaged in a similar business; and deponent further denies that there is any liability on the part of the defendant for any loss resulting to the plaintiff from the fire, which destroyed its own and the plaintiffs' goods, on or about the first day of November, 1900.

Deponent further denies that the fire which occasioned the loss, was in any respect due to the negligence of the defendant; the said fire was purely accidental, and not occasioned by any negligence of the defendant.

Deponent avers that defendant has a full and complete defense to the whole claim and demand of the plaintiff, as set forth in the original affidavit of defense filed, and in this additional affidavit filed, because of the plaintiffs having amended their statement or declaration.

Sworn and subscribed before me  
this 19th day of October, 1904.

John W. Raeder.

Mary E. Dean,  
Notary Public.  
Commission expires 18th April, 1907.

**DEFENDANT'S PLEA.**

21 June, 1904, defendant pleads "Non-assumpsit."

See Pauksztis v. Raeder, 212 Pa. 403.

as follows:

## CHAPTER XXXVI.

### ATTACHMENT AND LIEN ON VESSELS.

1. Creation of lien.
2. Time of lien.
3. What classes entitled.
4. Proceeding by libel.
5. Parties may join against same vessel.
6. How parties may be added.
7. Consolidation of suits in judgment.
8. Form of libel.
9. Form of attachment.
10. Vessel seized in admiralty not to be attached.
11. Notice of attachment by publication.
12. Bond for release of vessel.
13. Proceedings on return of writ.
14. Liens, etc., on western rivers.
15. Priority of claims.
16. Three months' wages preferred.
17. Limitation on certain suits.
18. Lien, when note, etc., taken.
19. Remedies.
20. Rules in Allegheny county — answer to libel.
21. Bail.
22. Answer to libel of intervenor.
23. Verification.
24. Exceptions to answers.
25. Interrogatories and answers.
26. Exceptions to answers.
27. Who may have lien.
28. Distinction between land and maritime jurisdiction.
29. U. S. jurisdiction.
30. Condition of bond for release.
31. Form of petition to join after seizure.
32. Procedure as in admiralty.
33. Disputed facts to be tried by a jury.
34. Decree and execution.
35. Decree of sale.
36. Distribution of proceeds.
37. Libel *in rem* in U. S. District Court.
38. Form of libel in U. S. District Court.
39. Monition — form of.
40. Interlocutory decree and reference.
41. Stipulation for libellant's costs.
42. Claimant's answer.
43. Exceptions to answer for insufficiency.
44. Memorandum overruling exceptions.

#### 1. Creation of lien.

Section 1 of the act of June 24, 1895, P. L. 251, amending the act of June 13, 1836, P. L. 616, provides:

"Ships and vessels of all kinds built, repaired, fitted, furnished and supplied with necessities for navigation within this commonwealth shall be subject to a lien for all debts contracted by the builders, masters, owners, agents or consignees thereof for work done or materials and supplies found or provided in the building, repairing, fitting, furnishing, supplying or equipping of the same, in preference to any other debt due from the builders, masters, owners, agents or consignees thereof.<sup>1</sup>

<sup>1</sup> This has been construed by the U. S. C. C. of Ap. in the *Steamboat Vigilant*, 16 D. R. 229. The act of June 13, 1836, which this supplies, was held to be constitutional in *Scull v. Shakespeare*, 75 Pa. 297.



## 2. Time of lien.

"Section 2. The lien aforesaid shall continue for and during the period of one year next after the work is done or the materials and supplies are furnished or provided to such ship or vessel and no longer."

The lien thus given is not affected by the bankruptcy of the owner.<sup>2</sup> The general maritime laws of the United States furnish no lien for supplies or repairs to a domestic vessel. The foundation of every proceeding *in rem* in admiralty is a maritime lien. This being established the jurisdiction of the District Courts of the United States attaches to enforce the same, and they will enforce the lien provided by state laws.<sup>3</sup>

## 3. What classes entitled.

"Section 3. The lien for work done and materials and supplies furnished as aforesaid shall exist in favor of all ship-builders, merchants, dealers, tradesmen and mechanics for all work done or materials and supplies furnished or provided in the building, repairing, fitting, furnishing, supplying or equipping of such ships or vessels."

The proviso saves the act of April 20, 1858, P. L. 363, which regulates such liens on the Allegheny, Monongahela and Ohio rivers, *infra*.

The classes entitled to lien were extended by act of March 31, 1837, P. L. 122, to include steam engine and boiler makers who furnish engines or boilers to vessels; by section 33 of the act of April, 1838, P. L. 634, to venders of copper sheathing; and by act of March 22, 1861, P. L. 182, to manufacturers of iron. A vender of copper sheathing was however restricted to copper sheathing for his lien.<sup>4</sup>

The privilege is not confined to a resident of the state; nor need the contract be made within the state.<sup>5</sup> It is a *jus in re* which can be enforced wherever the admiralty jurisdiction of the United States extends beyond the state where the lien was created. A maritime lien, unlike one at common law, can exist without possession and is good against a *bona fide* purchaser or mortgagee.<sup>6</sup>

The contract to build a vessel is, however, not a maritime contract and it is subject to the *lex loci*.<sup>7</sup> A recovery against the contractor does not preclude a material man from filing a lien.<sup>8</sup> But the one who claims a lien for materials must show that the contract was for a particular vessel, and that they were used in the repair or construction thereof; or placed in the vessel or delivered to the owner.<sup>9</sup> A contractor who builds a cabin on the hull of a steamboat is entitled to a lien.<sup>10</sup>

<sup>2</sup> Shoemaker v. Norris, 3 Yeates, 392.

<sup>3</sup> The Steamboat Vigilant, 16 D. R. 229.

<sup>4</sup> Merchant v. The Brig Odorilla, 5 W. N. C. 288.

<sup>5</sup> Low v. "Clarence S. Bement," 2 C. C. 430.

<sup>6</sup> The Steamboat Vigilant, 16 D. R. 229.

<sup>7</sup> Baizley v. Brig. Odorilla, 121 Pa. 231.

<sup>8</sup> Odorilla v. Baizley, 128 Pa. 283.

<sup>9</sup> The Young Sam, 20 Law L. 608; Hays v. Rees, 93 Fed. R. 984.

<sup>10</sup> Steamboat Dictator v. Heath, 56 Pa. 290; under act of 1858, *infra*.

**4. The libel.**

Section 3 of the act of June 13, 1836, P. L. 617, provides:

"Any of the said persons, having done work or provided materials, may file a libel in the office of the prothonotary of the \* \* \* Court of Common Pleas of the proper county wherein the cause of action shall arise, or in any county where the said ship may be found, against such ship or vessel, her tackle, furniture and apparel."

**5. Parties may join against same vessel.**

"Section 4. All or any of the said persons may join in one libel for the recovery of all their claims, in the same manner as mariners are permitted by the usages of courts of admiralty, to join in one suit for the recovery of their wages."

But a joint libel cannot be filed against two or more coal-boats.<sup>11</sup>

**6. How parties may be added.**

"Section 5. Whenever a libel shall be filed by any person as aforesaid, it shall be lawful for any other person or persons having a claim as aforesaid, to apply to the court by petition, at any time during the pendency of the action, to become a party libellant, and upon due proof of his claim, as aforesaid, he shall be received and permitted to prosecute his claim jointly with the other persons who commenced the action."

**7. Consolidation of suits.**

"Section 6. If more than one suit shall be brought as aforesaid, against the same ship or vessel, by all or any of the said person or persons, the court shall cause the said actions to be consolidated into one definite sentence or decree, comprehending all such debts as shall be duly supported."

What the above means is that all the cases shall be heard together and one final sentence or decree be entered as if they had all joined in one action.

**8. Form of libel.**

To the Honorable the Judge of the Court of Common Pleas, —, in and for the county of —:

The libel of Seth Tudor of —, in said county respectfully represents:

That within a period of one year last past, to-wit: On or about the — day of —, A.D. 19—, and during a month preceding, at the port of —, in the county aforesaid, your libellant, at the special instance and request of one Richard Vaux, owner [or master, etc.] of the vessel called "Mary Rogers," furnished materials and performed work and labor in the repairing, furnishing and equipping of the said brig, schooner or vessel called "Mary Rogers," of Philadelphia, of — tons and upwards, then lying at a wharf at — aforesaid, where she still remains.

That for his said labor and materials so furnished the said vessel

<sup>11</sup> Parkinson v. Manny, 2 Grant, 521.

upon its faith and credit, there is still due your libellant the sum of — dollars as will appear in detail by the bill of particulars hereto annexed and made a part hereof.

Wherefore your libellant prays that the said brig [schooner] or vessel, with her tackle, furniture and apparel, may be attached, condemned and sold, by process of this honorable court, for the payment of the said sum due him; and that the owner, the master and all others concerned in said vessel, may be warned to appear and show cause why the prayer of your petitioner should not be granted.

Seth Tudor.

Sworn to, etc.

Forest N. Magee,  
Proctor for libellant.

Upon filing the libel a complete bill of particulars, day, month and year, should be attached in every case showing the name of the owner or master and also the vessel on whose credit the same was furnished. This must be presented to a judge of the Court of Common Pleas having jurisdiction, who will endorse thereon.

Attachment awarded; bail fixed at \$—.

— — —,  
Judge.

Having been so allowed, a præcipe will be filed which may be in form as follows:

Seth Tudor

v. The Brig Mary Rogers, Richard Vaux, owner, and Rhys Lloyd, master.	}	In the Court of Common Pleas of — County.
--	---	--

Issue attachment, with clause of summons to Richard Vaux, owner, and Rhys Lloyd, master, bail in \$—, returnable *sec. leg.*

Forest N. Magee,  
Proctor for Libellant.

To — — —, Esq.,  
Prothonotary.

— — —, 19—.

The attachment in the form, *infra*, should be placed in hands of the sheriff, with instructions as to the location of the vessel, etc.

#### 9. Form of attachment.

"Section 7. Upon the filing of a libel as aforesaid, supported by the oath or affirmation of the libellant, it shall be lawful for him to have a writ of attachment to be made according to the following form, to-wit:

[Seal] — County, ss:

The Commonwealth of Pennsylvania,

To the sheriff of said county, greeting:

We command you that you arrest, attach and safely keep the schooner —, of — tons burthen or thereabouts, lying at —, of which A. B., late of —, is master [or otherwise sufficiently describing the vessel to be attached] her tackle, apparel and furniture, and that you summon A. B. [the master or owner who contracted the debt for which the vessel is attached], if he be found within your bailiwick, to appear before our Court of Common Pleas to

be holden at —, in and for said county, on the — day of —, A. D. 19—, then and there to answer the libel of C. D. who demands against the said schooner and the said A. B. the owner [or the master thereof] the sum of — dollars, for materials found [or as the case may be, for work done, etc.] for the building of the said schooner, to-wit: For [setting forth the claim briefly as in the libel], which sum the said C. D. averreth is wholly due; and how you shall have executed this writ, make known to our said judges, at the day and place aforesaid, and have you then and there this writ.

Witness, etc.

**10. Vessel seized in Admiralty not to be attached.**

"Section 8. But no writ of attachment shall be issued against any vessel as aforesaid, which shall have been seized by process of any court of the United States having admiralty jurisdiction, while the same shall be actually held by virtue thereof nor against any vessel which shall have been sold by order of such court, for any debt contracted as aforesaid previously to the time of such sale: *Provided*, Nevertheless, that if the payment of such debts shall be decreed by the said court, the lien shall continue until the payment thereof shall be enforced, by the process of such court."

**11. Notice of attachment by publication.**

"Section 9. Immediately after the execution of any writ of attachment as aforesaid, the officer executing the same, shall cause notice thereof to be given, in one newspaper published within the city or county, once a week during six successive weeks, and every such notice shall contain:

First, the name of the ship or vessel attached, the name of the port or place to which she belongs and the name of her last commander.

Second, that such ship or vessel will be sold for the payment of debts contracted for work done, or for materials provided in the building, repairing, fitting, furnishing or equipping of the same [as the case may be] unless the owner, consignee, commander or some person in their behalf, shall appear and pay the same, or otherwise obtain the discharge of such ship or vessel, within three months from the first publication of such notice.

Third. In every such notice, he shall require all persons having a lien for any debts contracted as aforesaid, to file the same, within three months from the first publication of such notice, or be debarred from prosecuting their claims, under such writ of attachment."

**12. Bond for release of vessel.**

"Section 10. If the owner or master of any ship or vessel attached as aforesaid, or his or their agent, shall enter into a bond to the commonwealth, with sufficient sureties, to be approved of by the court from which the process issued, or by a judge thereof, with condition to answer all the demands aforesaid, which shall be at that time filed against the same, and fully to satisfy and pay all such of them as shall be discharged from the attachment, as aforesaid, and be permitted to proceed on her voyage."

The giving of bond as above discharges the vessel from the lien and proceedings on the attachment will not hold the vessel.<sup>12</sup> The remedy is upon the bond.<sup>13</sup>

### 13. Proceedings on return of writ.

"Section 11. Upon the return of any such writ, such further proceedings may be had for the recovery of the debts aforesaid, as are usually had in courts of admiralty, and for the recovering of mariner's wages, and other debts actually contracted upon the high seas."

Such lien will be enforced by the federal courts in admiralty;<sup>14</sup> for which practice, see *infra*.

### 14. Liens and attachment of vessels on western rivers.

Section 1 of the act of April 20, 1858, P. L. 363, provides:

"All ships, steamboats or vessels navigating the rivers Allegheny, Monongahela or Ohio, in this state, shall be liable and subject to a lien in the following cases:

First. For all the wages due to hands or persons employed, whether as master, clerk or otherwise, on board such ships, steam or other boats or vessels, for work and labor done, or for services rendered on board or for the same.

Second. For all debts contracted by the owner or owners, agent, consignee, master, clerk or clerks of such ships, steam or other boats, or vessels of whatever kind, character or description, for and on account of work and labor done, or materials furnished, by boat-builders, engine-builders, boiler-makers, lumbermen, boat, store and provision furnishers, carpenters, blacksmiths, mastmakers, block-makers, ropemakers, sailmakers, chairmakers, furniture-makers and venders, riggers, joiners, carvers, plumbers, painters, upholsterers, ship-chandlers, coppersmiths, brass-founders, coopers and venders of sailcloth and canvas, in the building, repairing, fitting, furnishing or equipping such ships, steam or other boats or vessels of whatsoever kind, character or description, as hereinbefore specified and enumerated.

Third. For all bills, bonds, notes, bills of exchange, or all or any other acknowledgment or obligation of indebtedness for and on account of such ships, steam or other boats or vessels as hereinbefore specified and enumerated, signed and given, or purporting to be signed and given, in the name or for or on account of such ships, steam or other boats or vessels, and owned by any owner or owners, agent, consignee, master, clerk or clerks of the same, to any of the classes above enumerated, whether the same be signed and given on account of work or labor done, or materials furnished, in the building, repairing, fitting, furnishing, equipping or insuring such ships, steam, or other boats or vessels as hereinbefore specified or enumerated: *Provided*, That the lien of the same shall continue in favor and to the benefit of all and every party or parties whomsoever, into

<sup>12</sup> *Shakespear v. Cain*, 5 W. N. C. 392.

<sup>13</sup> *Rhinedollar v. Deklyne*, 2 T. & H. Pr., section 2125.

<sup>14</sup> *The Steamboat Vigilant*, 16 D. R. 229.

whose hands the same may have passed by transfer, assignment or otherwise.

Fourth. For all sums due for wharfage or anchorage of any such ships, steam or other boats or vessels of whatsoever kind, character or description, as hereinbefore specified and enumerated.

Fifth. For all demands or damages accruing from the non-performance or malperformance of any contract of affreightment, or of any other contract entered into by the owner or owners, agent, consignee, clerk or clerks of any such ships, steam or other boats or vessels, as hereinbefore specified and enumerated, touching the transportation of person or property, or for all damages or for injuries done to the same, in any way or manner, by such ships, steam or other boats or vessels as hereinbefore specified and enumerated.

#### 15. Priority of claims.

Section 2. These classes of claims shall have priority according to the order in which they are above specified and enumerated, and the liens under this act shall have precedence of all other liens and claims against any such ships, steam or other boats or vessels, as hereinbefore specified and enumerated, and owing by the owner or owners thereof, in relation thereto or on account of the same: *Provided*, No precedence or priority of claim or lien shall exist or obtain, between any of the parties enumerated and specified in the second class, other than as the same shall exist and obtain by operation of law.

#### 16. Three months' wages only.

Section 3. No more than three months' wages shall be recovered in any suit upon a lien in the first class above specified and enumerated; and every person claiming a lien in that class shall commence his suit within sixty days after three months' wages shall have become due and owing as aforesaid; and in case there shall not be three months' wages due and owing, or if the contract for service shall have terminated in a shorter time than three months as aforesaid, then the same shall be commenced within sixty days after the same is due and owing, and within sixty days after the conclusion and termination of such contract.

#### 17. Limitation on certain suits.

Section 4. All suits upon liens in any other than the first class above enumerated, shall be commenced within two years after said materials are furnished, or work and labor done, or within two years after the date of the last item in the account upon which the action is founded; and any neglect or failure to commence suit, by virtue of this or the last preceding section, shall discharge such ships, steam or other boats or vessels as hereinbefore specified and enumerated, from the lien of the demands so claimed as aforesaid.

#### 18. Lien preserved when note, etc., taken.

Section 5. The taking or receiving of any note, bill of exchange or other writing, in settlement of a debt comprehended in any of the above enumerated classes, shall in nowise invalidate the lien given by this act, but the same shall exist in full force and effect, as if no

such note, bill of exchange or other writing had been given: *Provided*, That the time for which the same be given be within the time of the lien as allowed and fixed by this act.

#### 19. Remedies.

Section 6. All the remedies under this act shall be the same in manner and form of application and execution, as such remedies are carried out and obtained in the law to which this is a supplement.<sup>1</sup>

To create a lien it is necessary to deliver the supplies to the owner, or into the vessel.<sup>2</sup> A lien is obtained for coal delivered;<sup>3</sup> or for building a cabin on the hull of a steamer.<sup>4</sup> A lien is given though contracted beyond the state.<sup>5</sup> The priority given by section 2 is superior to a purchase money mortgage.<sup>6</sup> The account mentioned in section 4 is a continuous account and not separate accounts consolidated.<sup>7</sup>

#### 20. Rules of court in Allegheny county — Answer to libel.

Rule 28, Allegheny County, is as follows:

"If the defendant appears, he shall file his answer to plaintiff's libel within ten days after the return day. If he makes default the court will proceed *ex parte* and pronounce the proper decree."

#### 21. Bail.

Rule 54, Allegheny County, provides as follows:

"Bail bonds in cases of attachment of vessels may be approved by the commissioner of bail in the same manner and subject to the same rules as bail for stay of execution."

#### 22. Answer to libel of intervenor.

Rule 29, Allegheny County, is as follows:

"When another party is admitted by petition he shall serve a copy of his libel or claim on the defendant or his attorney, and the defendant shall file his answer thereto in ten days thereafter; but the court may enlarge the time for answering, on sufficient cause shown."

#### 23. Verification.

Rule 30, Allegheny County, provides as follows:

"No claim or answer shall be filed unless it be verified by the affidavit of the party or his agent."

#### 24. Exceptions to answers.

Rule 31, Allegheny County, is as follows:

"Within ten days after filing the answer or claim the libellant may

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<sup>1</sup> What act is not indicated.

<sup>2</sup> *Hays v. Rees*, 93 Fed. R. 984.

<sup>3</sup> *The Venture*, 33 Pitts. L. J. 187.

<sup>4</sup> *Steamboat Dictator v. Heath*, 56 Pa. 290.

<sup>5</sup> *Mfg. Co. v. Steam Dredge*, 45 Pitts. L. J. 387.

<sup>6</sup> *The Venture*, 33 Pitts. L. J. 187. (But see *The J. E. Rumbell*, 148 U. S. 1.)

<sup>7</sup> *Rees v. Jutte*, 153 Pa. 56.

file exceptions thereto for insufficiency or irrelevant matter, a copy of which exceptions shall be served on defendant's counsel, and the exceptions shall be placed immediately on the argument list."

#### 25. Interrogatories and answers.

Rule 32, Allegheny County (Digby's R. C. 37), provides:

"Any party may propound interrogatories to any other party within twenty days after the answer is filed and perfected; a copy of which interrogatories shall be served on the attorney of the party by whom they are to be answered. If he object to the interrogatories he shall notify the party serving the same, and they shall be submitted to the judge for his allowance. The interrogatories allowed shall be filed with the prothonotary and notice thereof given; and the party shall file his answers thereto in ten days after such notice, in default whereof, if libellant, the libel shall be dismissed; if defendant, the answer shall be treated as a nullity."

#### 26. Exceptions to answers.

Rule 33, Allegheny County, provides:

"Answers to interrogatories may be excepted to in the same manner as answers to libels or claims."

#### 27. Who may have a lien.

Chief Justice Agnew said:<sup>a</sup>

"The lien given by the act of 13th of June, 1836, for work done and materials furnished in the building of ships and vessels of all kinds, is expressly confined to certain classes of tradesmen and mechanics, to-wit: [naming them, see *supra*]. These are the individuals who actually do the work and furnish the materials for building and equipping the vessel and evidently are not the general contractor who agrees to build the vessel for another. As to him, no lien is necessary, for he can always provide for his own security by his contract, and is not bound to deliver the vessel until paid for her, unless he choose by his agreement to do so. This is the very ground of the decision of *Walker v. Anshutz*, 6 W. & S. 519, a case directly in point."

#### 28. Distinction between land and maritime jurisdiction.

Continuing, Chief Justice Agnew in the same case<sup>b</sup> says:

"It is contended that a lien such as this, incurred in the building of a vessel, is not within the jurisdiction of a state court, but falls within the Federal jurisdiction, under the constitution of the United States and must be enforced in an admiralty court. We do not think so. A contract to build a vessel is a contract to be performed on land, falling within ordinary common law, and belongs to the state jurisdiction. It differs not from a contract to build a wagon or a railroad car, made between citizens of the same state, and cannot be drawn into the Federal courts, because the vessel is intended to become a subject of maritime law. Whatever question

<sup>a</sup> *Scull v. Shakespear*, 75 Pa. 307.

<sup>b</sup> *Scull v. Shakespear*, *supra*.



may arise as to those liens, which the act of 1836 seeks to enforce against a finished vessel, after she has entered her appropriate element, certainly there can be none as to liens, upon a vessel for work and materials entering into her construction, before she has passed within the dominion of maritime law. Some *dicta* and District Court decisions to the contrary were over-ruled in *People's Ferry Co. v. Beers*, 20 Howard 393; *Roach v. Chapman*, 22 Howard, 129."

### 29. Maritime jurisdiction.

The contract for the construction of the vessel is not a maritime matter.

But after the vessel has been built and is in the maritime jurisdiction, the lien given for supplies furnished and repairs done by the act of 1895, *supra*, is enforceable in the U. S. District Court of a different district than the one in which the contract was made and the burden of showing that no lien was contemplated but that the supplies were not furnished on the credit of the vessel is upon the owner or master of the vessel.<sup>10</sup>

Admitting the lien, it can be enforced anywhere that the vessel may be. Said Judge Cross: "It is a *jus in re*, and the very opposite of a personal right; an interest in the thing itself is conferred, which can be followed notwithstanding a change of ownership, and even as against a mortgagee; it is a property right which once conferred upon a party could not be taken away from him without invading his constitutional rights. It is a right which he can assert against all the world, and which, under the general principles of admiralty law, can be asserted in any jurisdiction where the vessel may be found."<sup>11</sup> It was held by *Lacombe*<sup>11a</sup> that a lien will not attach to a vessel unless it appear that the supplies or repairs, as the case may be, were furnished on the credit of the vessel and not the personal credit of the owner or master.

### 30. Condition of bond for release.

If the owner or master gives bond for release, it will be in the usual form of a bond to the commonwealth, in the amount fixed by the court, with a condition as follows:

The condition of this obligation is such, that whereas the said brig "Mary Rogers" has been attached and held under divers writs of attachment issued out of the Court of Common Pleas of the County of —, to — term, 19—, at the suit of Seth Tudor, upon his libel filed in said court on the — day of —, 19—, to number — Term, 19—, according to the acts of assembly in such case made and provided,

Now, know ye, that if the said brig "Mary Rogers" and the owner and master thereof shall answer all the demands aforesaid which shall at this time be filed against the said brig and shall satisfy all such demands as shall be proved and recovered in said suit [or

<sup>10</sup> *The Steamboat Vigilant*, 16 D. R. 229; 151 Fed. R. 746; *Peale v. The Steamboat Vigilant*, 81 C. C. A. 371.

<sup>11</sup> *The Steamboat Vigilant*, *supra*; 151 Fed. R. 747.

<sup>11a</sup> *The Golden Rod*, 151 Fed. R. 6-8.

suits] against said vessel, or the owners thereof, under and by virtue of the said attachment, then this obligation to be void, but otherwise, to be and remain in full force and virtue.

### 31. Form of petition to join, after seizure.

Where other claimants entitled to a lien on the vessel wish to join, after seizure they may be allowed to do so by the court on petition, under section 4 of the act of 1836, *supra*, in form as follows:

The petition and libel of Willis Reed respectfully sheweth:

That within the last year [follow the premises in the form of libel] and said sum being so justly due and yet unpaid the said vessel called "Mary Rogers," her tackle, apparel, and furniture, became by reason thereof and by virtue of the act of assembly in such case made and provided, liable and remains so, to your libellant for said sum of money; of all which said Richard Vaux, the owner, had notice.

That the said vessel is now lying in the port of —, in the county of —, and within the jurisdiction of this court and that the said "Mary Rogers," her tackle, apparel and furniture have been attached by virtue of the attachment issued out of this court, at the suit of Seth Tudor, upon a libel by him filed in due form of law to No. —, — term, 19—, which action is now pending. Therefore your libellant prays that he may be allowed to join as libellant and be permitted to prosecute his claim in said action jointly with the said Seth Tudor, and that he may have therein, adjudged to him the amount of his said claim out of the proceeds of the sale of said vessel, her tackle, apparel and furniture, with monition to all persons concerned and especially to the said Richard Vaux, as is usual in the like cases; and that your libellant may have such other relief in the premises as to justice may seem meet,

And he will ever pray as in duty bound.

Willis Reed.

James Joyce,

Proctor for Libellant.

[Affidavit of truth of petition.]

Upon this being presented to a judge, if allowed, he will endorse thereon such allowance and the name of petitioner will be added to the record as a co-plaintiff; but if the court does not allow it, a "monition" or rule to show cause will be awarded to be served upon the defendants, the practice upon which will be the same as on other rules to show cause.

### 32. Procedure as in Admiralty.

The procedure in the cause after return of seizure by the sheriff, is according to the rules of admiralty practice in the United States District Court, to which reference is here made, since the same are liable to change.<sup>12</sup>

<sup>12</sup> *Shakespear v. "Maggie Cain,"* 3 W. N. C. 167; *Scull v. Shakespear,* 75 Pa. 297; affirmed U. S. Supreme Court.

**33. Disputed facts to be tried by a jury.**

Section 12 of the act of 1836, *supra*, provides:

"All questions of fact which shall arise under this act, shall be tried by a jury of the county, forthwith, upon the joining of an issue therein by the parties, unless they shall agree by writing filed, to refer the same to arbitrators, by rule of court."

**34. Decree and execution.**

Section 13 of the act of 1836, *supra*, provides:

"The said court shall have power to pronounce the same interlocutory and final sentence or decree upon such libel, and upon the petition of any other person concerned and enforce the same, by the like writ, or other compulsory process, as a court of admiralty might in like cases."

This anomalous adoption of practice of U. S. Court by the state courts was within the power of the legislature under the first constitution.<sup>13</sup> An appeal will lie from final decree.<sup>14</sup>

**35. Decree of sale.**

Section 14 of the act of 1836, *supra*, provides:

"At any time after three months elapsed from the first publication of the notice of the attachment, as aforesaid, the court may proceed to make an order and decree for the sale of such ship or vessel, or of the tackle, apparel and furniture thereof, if the amount necessary to be raised can be satisfied by the sale of the same, without selling the vessel, and thereupon, the court shall award, upon motion, a writ of sale to be made, according to the following form, to-wit:

[L. S.] — County, ss:

The Commonwealth of Pennsylvania,

To the sheriff of said county, greeting:

Whereas, lately, by our writ of attachment, we commanded you. &c. [reciting the writ and return] and afterwards such proceedings were had in our said court, that the said A. B. [C. D. etc.] obtained the judgment and decree of the said court to recover the sums respectively due to them, to be levied by the sale of the said vessel, amounting in the whole to the sum of — dollars; we therefore command you that you expose the said schooner —, her tackle, apparel and furniture [if the order be to sell the tackle, &c., without the vessel, say her tackle, apparel and furniture] to sale by public vendue or outcry, and the money arising from the sale of the said vessel [or as the case may be, tackle, apparel and furniture], you have before our judges, at —, the — day of —, 19—, next.

Witness, etc.

**36. Distribution of proceeds.**

Section 16 of the act of 1836, *supra*, provides:

"If the proceeds of any ship or vessel sold aforesaid, shall not be sufficient to satisfy all the liens against such vessel, as aforesaid,

<sup>13</sup> *Shakspeare v. "Maggie Cain,"* 3 W. N. C. 167.

<sup>14</sup> *The Portland*, 2 S. & R. 197; *Selser v. Dialogue*, 4 W. N. C. 10; *Keyser v. Dialogue*, 4 W. N. C. 12.

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the same shall be distributed, *pro rata*, among all the creditors aforesaid, whose claims shall be filed in the office of the prothonotary of the court, previously to the decree of sale, as aforesaid."

### 37. Libel in Rem in the U. S. District Court.

The vessel being in commission and under the maritime jurisdiction, the U. S. District Court is the forum in which the lien may be enforced.<sup>15</sup> The forms of procedure in the case of the steamer "Vigilant" have been kindly furnished the editor by the attorneys and are given below, as illustrating the practice in that court.

### 38. Form of libel in U. S. District Court.

Samuel Bell, Jr., and Sommers N. Smith, Receivers, Neafie & Levy,	} United States District Court, District of New Jersey. In Admiralty.
v. Steamer "Vigilant."	

Libel in Rem.

To the Honorable Judges of the District Court of the United States in and for the District of New Jersey. Sitting in Admiralty:

The libel and complaint of Samuel Bell, Jr., and Sommers N. Smith, receivers duly appointed by the Court of Common Pleas of Philadelphia County, State of Pennsylvania, for the Neafie & Levy Ship and Engine Building Company, of the City of Philadelphia, against the Steamboat "Vigilant," whereof — — — now is or late was master, against the said steamboat, her tackle, apparel, furniture, boilers and engines and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime, sheweth:

First. That the said steamboat "Vigilant," in the month of June, 1905, being in the port of Philadelphia, and standing in need of repairs in order to render her seaworthy and competent for her voyages to and from the fishing banks off the coast of New Jersey and elsewhere, the libellant did, at the request of the said master, contract and undertake properly to repair the same, so that she should be competent for such voyages. That the particulars of repairs will fully appear in the account hereto annexed, amounting in the whole to the sum of five hundred and ninety-one 26-100 dollars (\$591.26), none of which has been paid.

Second. That the above repairs and services were necessary for the said steamboat, and that they were furnished on the credit of the steamboat, as well as of her owners and master.

That the said steamboat is now in the port of Anglesea, within the District of New Jersey.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process of attachment in due form of law, according to the course of this Honorable Court in

<sup>15</sup> The Steamboat Vigilant, 16 D. R. 229; 151 Fed. R. 746.

causes of admiralty and maritime jurisdiction, may issue against the said steamboat, her tackle, apparel, furniture, boilers and engines, and that the said — — master, and all other persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the repairs aforesaid and for such other relief to the libellant as shall to law and justice appertain, and also to condemn the said steamboat, her tackle, apparel, furniture, boilers and engines, and the party intervening therefor in costs.

Sworn to, etc.

Willard M. Harris,  
Proctor for Libellant.

[Account annexed, day and detail.]

*Amendment of Libel.*

The above libel was later amended by inserting between Par. 1 and 2:

"That since the filing of the said libel, libellants have learned that the "Vigilant" is a vessel of the state of Pennsylvania, enrolled and the managing owner thereof residing in the city of Philadelphia, and they therefore claim a lien against said steamboat for the value of their repairs under the laws of the state of Pennsylvania."

### 39. Monition.

The following is the form of monition issued out of the U. S. District Court:

The President of the United States of America to the Marshal of the District of New Jersey, Greeting:

*Whereas*, A libel was filed in the District Court of the United States, for the District of New Jersey, on the twenty-ninth day of November, in the year of our Lord one thousand nine hundred and five, by Samuel Bell, Jr., and Sommers N. Smith, receivers Neafie & Levy Ship and Engine Building Company, against the steamboat "Vigilant," her engines, boilers, machinery, tackle, apparel and furniture, in a cause of contract, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamboat or vessel, her engines, boilers, tackle, etc., may be cited in general and special, to answer the premises, and all proceedings being had, that the said steamboat or vessel, her engines, boilers, tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are therefore hereby commanded to attach the said steamboat or vessel, her engines, boilers, tackle, etc., and to detain the same in your custody, until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court to be held at Trenton, in and for the District of New Jersey, on the nineteenth day of December next, at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same,

and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this Writ.

(L. S.) Witness, the Honorable William M. Lanning, Judge of said Court, at the City of Trenton, in the District of New Jersey, this twenty-ninth day of November, in the year of our Lord one thousand nine hundred and five, and of our Independence the one hundred and thirtieth.

George T. Cranmer, Clerk.

Monition returnable December 19, 1905.

Willard M. Harris, Proctor for Libellant.

Returned and filed December 5, 1905, at 12 o'clock M.

George T. Cranmer, Clerk.

Boat in custody.

Thomas J. Alcott,

U. S. Marshal,

per Semple, Deputy.

#### 40. Interlocutory decree and reference.

The marshal having returned upon the monition issued in the above entitled cause, that he has attached the said steamboat, her tackle, etc., under a prior monition, and that the same was already in custody, and has given due notice to all persons claiming the same, that the Court would, on this day proceed to the trial and condemnation thereof, should no claim be interposed therefor, and the usual proclamation being made, and no person appearing or interposing a claim to the said steamboat, her tackle, etc.,

Now, on motion of Willard M. Harris, proctor for the libellant, it is ordered, adjudged and decreed that the defaults of all persons be, and the same are, hereby entered herein.

And on like motion it is also further ordered that it be referred to George T. Cranmer, a commissioner of this court, to ascertain and compute the amount due the libellant for the causes in this libel alleged, and to report thereon to this court with all convenient speed.

W. M. Lanning, Judge.

Filed December 19, 1905, at 10 o'clock A. M.

George T. Cranmer, Clerk.

#### 41. Stipulation for libellant's costs.

Entered into Pursuant to the Rules and Practice of this Court.

Whereas, A libel was filed in this court, on the — day of —, in the year of our Lord one thousand nine hundred and —, by Samuel Bell, Jr., and Sommers N. Smith, Receivers of Neafie & Levy Ship and Engine Building Co., of Philadelphia, against the Steamboat "Vigilant" for the reasons and causes in the said libel mentioned, and praying that said vessel may be condemned, etc., and the said libellant and John H. Mathis, surety parties hereto, hereby consenting, and agreeing that in case of default or contumacy on the part of the libellant or surety execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars:

Now, Therefore, It is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty

dollars, conditioned that the libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or in case of appeal, by the appellate court.

Samuel Bell, Jr.,  
Sommers N. Smith,  
Receivers.  
John H. Mathis.

Acknowledged and sworn to.

A similar stipulation for claimant's costs is entered.

**42. Claimant's answer.**

To the Honorable William M. Lanning, Judge of said Court:

The answer of Lewis A. Conwell of the City of Philadelphia, in the State of Pennsylvania, trustee in bankruptcy of the estate of Theodore D. Harvey, bankrupt, to the libel of Samuel Bell, Jr., *et al.*, receivers of Neafie & Levy, alleges as follows:

1. Upon the 31st day of October, 1905, a petition in involuntary bankruptcy was filed in the United States District Court for the Eastern District of Pennsylvania, Cause No. 2373, against Theodore D. Harvey, and upon the 20th day of November, 1905, the said Theodore D. Harvey was duly adjudged a bankrupt in said proceedings. Upon the 23d day of December, 1905, at a regular meeting of creditors of the said Theodore D. Harvey, bankrupt, held before Edward F. Hoffman, referee, your respondent was duly elected trustee of the estate of said Theodore D. Harvey and his bond as such trustee has been filed and approved.

2. Your respondent upon his election as trustee was vested by operation of law with all of the estate and property of the said bankrupt of whatsoever nature and wheresoever situate.

3. Among the assets of the said estate coming into the hands of your respondent as aforesaid was an interest, being a half or a greater interest, in the steamer "Vigilant," which is at present moored at Grassy Sound in the District of New Jersey, against which the libel in this case has been filed.

4. Your respondent has made careful investigation and examination of the facts in regard to the said libel and is advised, believes and expects to be able to prove that he has a just, full and legal defense to the whole and every part of the claim of the said libellant, of the following nature and character, to-wit:

The claim of the libellant is for work and labor, being repairs done and performed upon the said steamer "Vigilant" by the said libellants during the spring of 1905. Said work was done at the instance of the said Theodore D. Harvey, individually, and as a result of a special contract between him and the said libellants made at the City of Philadelphia, Pennsylvania, which was and is the residence of the said Theodore D. Harvey and of the said libellants and the home port of the said steamer "Vigilant." Said work, labor and repairs were not done and performed upon the credit of the said steamer "Vigilant" but were performed for the said Theodore D. Harvey, individually.

Your respondent therefore avers that the libellant has no just claim or lien against the said steamer "Vigilant" either under the mari-

time law of the United States or under the statutes of any state thereof.

Wherefore, the respondent prays that the Court will be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

Sworn to, etc.

Lewis A. Conwell,  
Trustee.

#### 43. Exceptions to answer for insufficiency.

Exceptions taken by the libellant to the answer of Lewis A. Conwell, trustee in bankruptcy of the estate of Theodore D. Harvey, bankrupt, part owner of the steamboat "Vigilant," to the libel of Samuel Bell, Jr., and Sommers N. Smith, receivers, etc., in a cause of contract, civil and maritime:

First. For that the respondent has not well and sufficiently answered the allegations in the libel and amendment thereto, but on the contrary admits the repairs and the value thereof, but states that they were made as a result of a special contract with the said Theodore D. Harvey, without setting up the explicit terms of said special contract, or of any understanding, contract or agreement by which libellants relinquished their right of lien against said vessel under the laws of the State of Pennsylvania.

In all of which particulars the said answer is imperfect, insufficient and evasive, and the libellant therefore excepts thereto and prays that the Court will direct the said Lewis A. Conwell to put in a further and better answer or in default thereof that a decree be entered for the amount stipulated in said libel with interest and costs.

Willard M. Harris,  
Proctor for Libellant,  
January 25, 1906.

Filed January 26, 1906, at 11 o'clock A. M.

George T. Cranmer, Clerk.

#### 44. Memorandum overruling exceptions to the answer.

Cross, District Judge. Exceptions have been filed to the answers in both of the above cases. The exception is very general and is founded upon the insufficiency of the answer. It is mainly, however, directed to new matter set up in avoidance of matter alleged in the libel. Exception does not lie in such a case, and insofar as it alleges insufficiency in the answer, it lacks certainty and definiteness.

"An exception to an answer for insufficiency should state the charges in the bill, the interrogatory applicable thereto, to which the answer is responsive, and the terms of the answer *verbatim*, so that the court may see whether it is sufficient or not." *Brooks v. Byam et al.*, Fed. Cases No. 1947; *Crouch v. Kerr*, 38 F. R. 549, 550; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.*, 43 F. R. 391; *Schultz v. Phenix Insurance Co.*, 77 F. R. 375, 390; *Benedict's Admiralty*, section 470.

The exceptions in both cases will therefore be overruled, but without costs.

Joseph Cross, Judge.

Filed February 15, 1906, at 11 o'clock A. M.

George T. Cranmer, Clerk.



## CHAPTER XXXVII.

### AUDITA QUERELA AND OTHER OLD FORMS.

1. A common law writ.
2. Writ of annuity.
3. Writ of entry *sur disseisin*.

#### 1. A common law writ.

It was said by the great Tilghman:<sup>1</sup> "I do not believe that a writ of *audita querela* was ever issued in Pennsylvania; yet, if now issued, I presume no lawyer would question its legality." And Justice Duncan said:<sup>2</sup> "*Audita querela* would lie in such a case, and wherever that writ would lie, the court would grant relief on motion. So universal is the course of granting summary relief, that it has driven out of use and rendered obsolete the writ of *audita querela*." Mitchell, J., said:<sup>3</sup> "It was early held that remedy by rules had supplanted the ancient *audita querela* and writ of error *coram nobis* and the constant tendency of modern practice has been to enlarge rather than to restrict their operation." This writ has been defined to be a form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment, amounting to a discharge, and which would not have been and cannot be taken advantage of otherwise.<sup>4</sup> It must be petitioned for and leave given specially in the court where the judgment is entered.<sup>5</sup> It may be applied for even after the court has refused relief on motion, but it is not a supersedeas to the execution unless so specially ordered.<sup>6</sup> It cannot avail as to matters before judgment;<sup>7</sup> and it does not lie against the commonwealth.<sup>8</sup>

#### 2. Writ of annuity.

Annuity is an action which lies for the recovery of an annuity, or yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only; and it may be brought by the grantor or his heirs or his or their grantees against the grantor or his heirs.<sup>9</sup>

<sup>1</sup> Witherow v. Keller, 11 S. & R. 274.

<sup>2</sup> Share v. Becker, 8 S. & R. 239. *Audita querela* — complaint has been heard.

<sup>3</sup> Park Bros. & Co. v. Oil City, Etc., 204 Pa. 453; Stevenson v. Virtue, 13 Supr. C. 103; Fisher v. Hestonville, Etc., Co., 185 Pa. 602.

<sup>4</sup> Parker, C. J., in Thatcher v. Gammon, 12 Mass. 267.

<sup>5</sup> Newhart v. Wolfe, 102 Pa. 561.

<sup>6</sup> Emery v. Patton, 9 Phila. 125.

<sup>7</sup> McLean v. Bindley, 114 Pa. 559.

<sup>8</sup> Comth. v. Berger, 8 Phila. 237.

<sup>9</sup> Coke on Litt. 1446.

It has been variously claimed that this action was superseded by debt which was combatted by Gibson, J.;<sup>10</sup> and by covenant or chancery.<sup>11</sup> If by covenant or debt, then it is now embraced in assumpsit. The defenses were denial of the grant or release.

The judgment in the action is for the recovery of the annuity, the arrears, damages and costs. It was said by Gibson, J.:<sup>12</sup> "On the judgment" (for the annuity), "which is executory, the plaintiff has a *scire facias* to recover all arrears, whether due at the time of the impetration of the writ of annuity, or growing due afterwards." This was an action in assumpsit.

### 3. Writ of entry sur disseisin.

A writ of entry *sur disseisin* may be maintained in Pennsylvania; but if issued the party will be held to the strictest form, and if he describe the land in his writ differently from in his declaration it will be a fatal variance; and if he fails to aver the value, it will also be bad on demurrer.<sup>13</sup>

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<sup>10</sup> Gochanauer v. Cooper, 8 S. & R. 191.

<sup>11</sup> — v. —, 3 Woodes. 83.

<sup>12</sup> Gochanauer v. Cooper, 8 S. & R. 191.

<sup>13</sup> Witherow v. Keller, 11 S. & R. 271. (See form of Narr.)

## CHAPTER XXXVIII.

### CHARTERS OF CORPORATIONS OF THE FIRST CLASS.

1. Formation and powers.
2. Classification.
3. Corporations of the first class.
4. Mode of incorporation — contents of certificate.
5. Curative act as to religious corporations — 1907.
6. Notice of intention to apply.
7. Form of notice.
8. Form of proof of publication.
9. Requisites of publication.
10. Practice in presenting charter.
11. Rules in Allegheny county.
12. Form of charter.
13. Certificate of incorporation, acknowledgment and recording.
14. Form of decree of court.
15. Form of certificate of record.
16. Character of corporation.
17. Corporate name.
18. Objects of incorporation.
19. The subscribers.
20. Capital stock and place of business.
21. Directors and income.
22. By-laws and government.
23. Members.
24. Constitution, form, etc.
25. Amendments.
26. Consolidation.

#### 1. Formation and powers.

Section one of the act of April 29, 1874, P. L. 73, provides:

"That corporations may be formed under the provisions of this act by the voluntary association of five or more persons, for the purposes, and in the manner mentioned herein, and when so formed each of them by virtue of its existence as such, shall have the following powers, unless otherwise specially provided:

*First.* To have succession by its corporate name for the period limited by its charter, and when no period is limited thereby, or by this act, perpetually, subject to the power of the general assembly, under the constitution of this commonwealth.<sup>1</sup>

*Second.* To maintain and defend judicial proceedings.

*Third.* To make and use a common seal and alter the same at pleasure.

*Fourth.* To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by law.

*Fifth.* To appoint and remove such subordinate officers and agents as the business of the corporation requires and to allow them a suitable compensation.

*Sixth.* To make by-laws not inconsistent with law, for the management of its property, the regulation of its affairs and the transfer of its stock.

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<sup>1</sup> On this reserved power see "Eminent Domain," Vol. IV. And also Police Power, State and Federal, Bierly, 1907; Rees Welsh & Co., Phila.

*Seventh.* To enter into any obligation necessary to the transaction of its ordinary affairs."<sup>2</sup>

## 2. Classification.

Section 2 of the act, *supra*, divides all corporations (except municipal or quasi-municipal) into two classes, the first being corporations not for profit, and the chartering of which by the Court of Common Pleas, brings such within the scope of this volume.

## 3. Corporations of the first class.

Those of the first class by the amendment of July 15, 1897, P. L. 283, are for:

"I. The support of public worship.

"II. The support of any benevolent, charitable, educational or missionary undertaking.

"III. The support of any literary, medical or scientific undertaking, library association, or the promotion of music, painting or other fine arts.

"IV. The encouragement of agriculture and horticulture.

"V. The maintenance of public and private parks, and of facilities for skating, boating, trotting and other innocent or athletic sports, including clubs for such purposes, and for the preservation of game and fish.

"VI. The maintenance of a club for social enjoyments.

"VII. The maintenance of a public or private cemetery.

"VIII. The erection of halls for public or private purposes.

"IX. The maintenance of a society for beneficial or protective purposes to its members from funds collected therein.

"X. The support of fire engine, hook and ladder, hose or other companies for the control of fire.

"XI. For the encouragement and protection of trade and commerce.

"XII. For the formation and maintenance of military organizations.

"XIII. For the maintenance of a society for the improvement of the streets and public places in any city, borough or township in this commonwealth.

"XIV. For receiving and holding property, real and personal, of and for unincorporated religious, beneficial, charitable, educational and missionary societies and associations, and executing trusts thereof.

"(XV. To the above are added by the act of June 26, 1895, P. L. 327, educational institutions, colleges, etc., with powers to grant degrees.)

"Each of the said corporations may hold real estate to an amount the clear yearly value or income whereof shall not exceed twenty thousand dollars."

## 4. Mode of incorporation — Contents of certificate.

Section 3 of the act of 1874, *supra*, provides:

"The charter of an intended corporation must be subscribed by

<sup>2</sup> As this is not a treatise on corporate rights, powers and duties, reference is here made to Savage on Pennsylvania Corporations, 1907, in 2 vols. Rees Welsh & Co., Phila.

five or more persons, three of whom at least must be citizens of this commonwealth, and shall set forth:

"I. The name of the corporation.

"II. The purpose for which it is formed.

"III. The place or places where its business is to be transacted.

"IV. The term for which it is to exist.

"V. The names and residence of the subscribers and the number of shares subscribed by each.

"VI. The number of its directors and the names of and residences of those who are chosen directors for the first year.

"VII. The amount of its capital stock, if any, and the number and par value of shares into which it is divided."

##### 5. Curative act as to religious corporations.

The act of May 1, 1907, P. L. 132, amending section 7 of the act of June 2, 1887, P. L. 298, which amended the 7th section of the act of April 26, 1855, P. L. 330, is as follows:

"Section 7. That whensoever any property, real or personal, shall hereafter be bequeathed, devised or conveyed to any ecclesiastical corporation, bishop, ecclesiastic or other person, for the use of any church, congregation or religious society, for religious worship or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or enure, than subject to the control and disposition of the lay members of such church, congregation, or religious society, or such constituted officers or representatives thereof as shall be composed of a majority of lay members, citizens of Pennsylvania, having a controlling power according to the rules, regulations, usages or corporate requirements thereof, so far as consistent herewith: *Provided*, It shall be lawful for the majority of the male members, of lawful age, of any unincorporated church, congregation, or religious society, to choose for their trustee or trustees any other person or persons than a layman; and whenever not previously declared, to declare the manner in which the title to their trust property shall be held and conveyed, subject, however, to all the terms and conditions upon which the same may have been bequeathed, devised, or conveyed to such unincorporated church, congregation or religious society; and upon due proof of such consent, any court having jurisdiction over trusts may direct the legal title to be conveyed accordingly; but nothing herein contained shall authorize the diversion of any property from the purposes, uses and trusts to which it may have been heretofore lawfully dedicated, or to which it may hereafter, consistently herewith, be lawfully dedicated: *And provided*, All charters heretofore granted for any church, congregation, or religious society, without incorporating therein the requirement that the property, real and personal, of such corporation shall be taken, held and enure subject to the control and disposition of the lay members thereof, but which are in other respects good and valid, and shall be in all respects as good and valid, for all purposes, as if the said requirement had been inserted therein when the said charters were originally granted; and the title to all property, real and personal, heretofore bequeathed, devised or conveyed to such church, congregation, or religious society, or which may have heretofore been granted or conveyed by such corporation, shall be firm and stable forever,

with like effect as though the said requirements had been contained in the charter of such corporation when the same was originally granted: *Provided*, That all property, real and personal, held by such existing corporation shall enure and be held subject to the control and disposition of the lay members thereof, or such constituted officers or representatives thereof, as shall be composed of a majority of lay members, citizens of Pennsylvania, having a controlling power according to the rules and regulations, usages, or corporate requirements thereof, with like effect as though such provision had been inserted in the charter of such corporation when originally granted. any other or different provision therein notwithstanding."

This act was intended to be curative.

It was held that a charter which did not follow the act of June 2, 1887, P. L. 298, in respect to the control of a majority of the lay members was fatally defective.<sup>2a</sup>

#### 6. Notice of intention to apply for charter.

Section 3 of the act of 1874, *supra*, is, in part, as follows:

"Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county, for three weeks, setting forth briefly the character and object of the corporation to be formed and the intention to make application therefor."

Section 2 of rule 65½ of Allegheny County, provides:

"The notice of intention to apply for a charter, shall, in addition to the matters required by statute, set forth the number and term of the proceeding and the day and hour when the application is to be presented to the court, for approval."

Rule II of Luzerne County requires that the "notice shall set forth the term and number of the proceeding, and the time when and place where to be heard, and proof that these requirements have been complied with must be submitted to the court at the time the charter is presented."

[Compare your rules of court.]

In counties where there is a legal publication, it must also be published in the same.

#### 7. Form of notice of application.

In the Court of Common Pleas of — County: No. —, — Term, 19—.

To all whom it may concern:

Notice is hereby given that an application will be made to Hon. —, President Judge of the Court of Common Pleas of — County, on the — day of —, A.D. 19—, at — o'clock — m. for a charter of incorporation for the [*name of corporate body*], the character and object of which are [here insert the language of act designating the particular object] and for said purposes to have, possess and enjoy all the rights and privileges accorded such corporation by the acts of assembly in such case made and provided.

—,  
Solicitor,  
July 21, 1910.

<sup>2a</sup> St. David's Church, *in re*, 11 D. R. 549.

### 8. Proof of publication — Form.

County of —, ss.

David M. Brit being duly sworn says that he is the publisher of the *Seymour Cresset*, a newspaper of general circulation, published and printed weekly in said county of —, and that notice of intention to apply for a charter of a certain corporation named —, a copy of which is hereto annexed was inserted in each issue of said newspaper for three successive weeks previous to the date fixed for the presentation of said application, to-wit on [specifying the date of each issue].

Sworn to, etc.

David M. Brit.

### 9. Requisites of publication.

Unless such notice is published in two newspapers, the application will be refused.<sup>3</sup> A trade sheet is not a newspaper;<sup>4</sup> nor need it be published in a German newspaper under act July 2, 1895, P. L. 426,<sup>5</sup> but in Philadelphia the notice must also be inserted in the *Legal Intelligencer*.<sup>6</sup> The notice must be open to inspection by the public.<sup>7</sup> It must state briefly the object and character of the corporation and specify the time when it will be presented to court.<sup>8</sup> If the parties had actual notice and appeared before court, they will be held to have waived their exception as to the form of the notice.<sup>9</sup>

### 10. Practice in presenting charter.

The act of 1874 is silent in regard to the presentation of an application to court or a judge when a copy of the proposed charter is filed, but the rules of court which require the number and term of the application to appear in the notice, assume that an application has been made and filed and an order of publication with a time and place of hearing fixed therein, made, as was the prior practice.

It was said by Arnold, J.:<sup>10</sup>

"Notice of the application should state briefly, but correctly, the character and object of the corporation and set forth the particular court to which the application is to be made, stating that the charter has been filed, giving the term and number of the proceeding, and the time when the application is to be heard, so that exceptions to it may be accurately directed, and the case should be placed on the motion list. The notice should be published in two newspapers of general circulation, and the *Legal Intelligencer* also; and the charter should be filed in the office of the prothonotary and remain there for inspection during the whole time the publication is being made."<sup>11</sup>

<sup>3</sup> *Enterprise, Etc., Assn's Ap.*, 10 Phila. 380; *St. Luke's, Etc., Church*, 17 Phila. 261.

<sup>4</sup> *West, Etc., Co. v. New, Etc., Co.*, 21 C. C. 369.

<sup>5</sup> *Charter Notices*, 17 C. C. 169.

<sup>6</sup> *Appln. for charter*, 11 Phila. 200.

<sup>7</sup> *Church, etc.*, 8 W. N. C. 357.

<sup>8</sup> *Sowego, Etc., Co.*, 4 D. R. 181; *St. Ladislaus, Etc., Soc.*, 19 C. C. 25.

<sup>9</sup> *Penn El. L. Co's Ap.*, 16 C. C. 502.

<sup>10</sup> *Appln. of St. Luke's M. E. Church*, 17 Phila. 261.

<sup>11</sup> Citing *Enterprise, Etc., Assn.*, 10 Phila. 380; *Church of the Holy Communion*, 14 Phila. 121; section 43, rules of C., Phila.

**11. Rules in Allegheny county.**

Section 1 of rule 65½, Allegheny County, provides:

"All applications for charters of incorporation shall, upon allowance by the court, be filed with the prothonotary 21 days before the day to be fixed in the advertisement, and, except in cases for the incorporation of religious societies, or when a special order dispensing therewith has been made by the court, shall be accompanied by a deposit with the prothonotary, of \$100, to secure costs and expenses."

*Commissioner to Take Testimony.*

Section 3. In all cases in which such deposit has been made, the application shall, after the day so fixed for presentation to the court, be referred to a commissioner to take testimony relative to the organization purposes and location of the proposed corporation and the methods by which it is proposed to carry out its objects, and make report of the same, for the purpose of enabling the court to determine the lawfulness of the proposed corporation and whether or not it is likely to be injurious to the community."

**12. Form of charter.**

Each charter will vary according to the specific object for which it is desired. Following is a general form:

Whereas, we, the undersigned, being citizens of the Commonwealth of Pennsylvania, whose names are subscribed to this charter or certificate of incorporation, have associated ourselves together for the purposes and upon the terms and by the name herein stated, under the provisions of an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, in the year of our Lord, one, thousand eight hundred and seventy-four, and the several supplements thereto, we do therefore set forth and declare that:

I. The name of the corporation is —.

II. The purposes for which this corporation is formed are —.

III. The business of this corporation will be transacted in the —, of —, and county of —, State of Pennsylvania.

IV. The corporation shall have perpetual succession by its corporate name [or, name a definite term].

V. There is no capital stock nor are there any shares of capital stock; and the names and residences of the subscribers appear by their signatures hereunto.

VI. The number of the directors of the corporation is fixed at —, and the names and residences of those who are chosen directors for the first year are as follows: [names and residences].

VII. The corporation has no capital stock. Fees for membership and annual dues from members will be assessed as the corporation by its by-laws may determine, which fees and dues will be applied to promoting the purposes for which the corporation is formed.

Witness our hands, this — day of —, 19—.

Names.

Residences.

Before the subscriber, Recorder of Deeds in and for the county of —, came Tod Wag, Sid Teel and Will Weal, all of whom subscribed the foregoing articles of incorporation, and in due form



of law acknowledged the same to be their act and deed, as well as the act and deed of their associate subscribers, according to the act of assembly in such case made and provided.

In testimony whereof I have hereunto set my hand and affixed my official seal the — day of —, A. D. 19—.

\_\_\_\_\_,  
Recorder of Deeds.

### 13. Certificate of incorporation, acknowledgment and recording.

Section 3 of the act of 1874, *supra*, in part provides:

"The said certificates of incorporation of the first class shall be acknowledged by at least three of those who subscribe to them before the recorder of deeds of the county in which the business of the incorporation is to be transacted, to be their act and deed, and the same being duly certified under the hand and official seal of the said recorder of deeds, shall be presented to a law judge of the said county, accompanied by proof of the publication of the notice of such application, who is hereby required to peruse and examine said instrument, and if the same shall be found to be in the proper form, and within the purposes named in the first class specified in the foregoing section, and shall appear lawful and not injurious to the community, he shall endorse thereon these facts, and shall order and decree thereon that the charter is approved, and that upon the recording of the said charter and order, the subscribers thereto and their associates, shall be a corporation for the purposes and upon the terms therein stated, and the said order and charter shall be recorded in the office for the recording of deeds in and for the county aforesaid, and from thenceforth the persons named therein and subscribing the same, and their associates and successors, shall be a corporation by the name therein given."

### 14. Form of decree of court.

County of —, ss:

And now, — — —, the foregoing certificate of incorporation having been duly acknowledged before the recorder of deeds of — county, and the same having been certified under his hand and official seal, and having been duly presented to me, the undersigned, a law judge in and for said county, accompanied by proof of publication in due form, of the notice of this application, its time and place, and I do certify that I have perused and examined said instrument and that I find it in proper form and within the purposes named and authorized by law and that the same appears to be lawful and not injurious to the community.

It is therefore, now ordered and decreed that the said charter be and the same hereby is approved, and that upon the recording thereof and this order, the subscribers thereto and their associates shall be a corporation for the purposes and upon the terms therein set forth, by the name therein given.

\_\_\_\_\_,  
Judge. [Seal.]

**15. Form of certificate of record.**

Recorded in the office for the recording of deeds, etc., in and for the county of —, in the record of charters [No. or Letter] page —, on the — day of —, 19—.

Witness my hand and seal of office this — day of —, A. D. 19—.

Recorder of Deeds, etc.,  
[Seal.]

**16. Character of corporation.**

The Court of Common Pleas cannot grant a charter for any corporation primarily for profit;<sup>12</sup> but it may incorporate a baseball club with incidental profits.<sup>13</sup> A charter may be granted for the promotion of a particular trade as well as trade and commerce generally,<sup>14</sup> but a cult in opposition to the established practice of medicine and surgery, by "Christian Science," consisting of treatment of diseases by inaudible prayer, may not be incorporated;<sup>15</sup> nor a schismatic religious society under condemnation of the parent society.<sup>16</sup> An application for a charter for a purely social club, without a bar or liquor annex, when the dues are payable for the benefit of the members and to charity cannot be refused, like a liquor license, on the ground that it is "not necessary."<sup>17</sup> The organization of clubs to retail liquors, once common, is no longer encouraged, though furnishing meals to members may be a proper incident.<sup>18</sup> In the same spirit, the court may make a requirement that no liquor be sold or gambling be allowed;<sup>19</sup> or it may refuse the charter, even if the drinking of intoxicating liquors appears to be allowed incidentally.<sup>20</sup>

The incorporation of foreign societies to promote their foreign customs in their foreign language is not in harmony with the spirit of American institutions nor embraced in the object of the law.<sup>21</sup> One Jacksonian judge refused a charter because the name was foreign as well as a part of the document itself.<sup>22</sup>

Charter for a hunting and fishing club was refused because it did not appear that the applicants had any proprietary rights in the territory they proposed to cover with their corporate net.<sup>23</sup>

Charters have been refused to political clubs,<sup>24</sup> but such clubs

<sup>12</sup> West Hill Land Co., 1 Del. Co. 431; Richmond, Etc., Co., 9 C. C. 172.

<sup>13</sup> Players' Natl. League Base Ball Club, 25 W. N. C. 187.

<sup>14</sup> Roofing, Etc., Assn., 200 Pa. 111.

<sup>15</sup> First Church of Christ, Scientist, 205 Pa. 543.

<sup>16</sup> Church of the Mother of God, 5 Lack. L. N. 128.

<sup>17</sup> Deutsch-Amerikanischer Volksfest-Verein, 200 Pa. 143.

<sup>18</sup> Young Men's Republican Club, 12 D. R. 584; Grant Club, 20 C. C. 592; East End Social Club, 8 D. R. 272.

<sup>19</sup> Slavic Citizens' Club, 14 D. R. 588.

<sup>20</sup> Celtic Club Charter, 15 D. R. 630; Forty-seventh Ward Republican Club, 17 D. R. 509.

<sup>21</sup> Hungarian Protective Society, 16 D. R. 80; Germania Sangerbund, 12 C. C. 89.

<sup>22</sup> Societa Italiana, Etc., 24 C. C. 84.

<sup>23</sup> Sullivan County, Etc., Club, 16 D. R. 650.

<sup>24</sup> Monroe Republican Club, 6 D. R. 515; Union League, Etc., 1 Del. Co. 21; Alpha Assn., 15 W. N. C. 208.

have also been incorporated, when the name did not disclose a political object.<sup>25</sup>

Charters have been refused to a society to recover stolen property;<sup>26</sup> marriage aid association;<sup>27</sup> and where the only purpose is "social enjoyment" without more;<sup>28</sup> or where the purpose does not fall within the specifications of the law;<sup>29</sup> or where a society was subject to a supreme society and could transact its business as well without a legal charter.<sup>30</sup>

Or where the object disclosed was such that the court could not clearly certify that the corporation would not be injurious to the community.<sup>31</sup> It is no objection that two applications, in legal form, disclose the same legal purpose;<sup>32</sup> nor that it is but an amendment of an existing charter which has not been complied with.<sup>33</sup>

A stock exchange may be chartered under the clause "encouragement and protection of trade and commerce."<sup>34</sup> But the act of June 1, 1907, P. L. 359, put the bucket shops out of business.

A charter has been granted to a private park association for skating, boating and athletic amusements;<sup>35</sup> and to a cemetery company,<sup>36</sup> but not to an association of accountants to promote intercourse and friendship.<sup>37</sup> A charter has been refused where the object was against public policy,<sup>38</sup> also where it had several separate objects.<sup>39</sup> There must be some apparent advantage or necessity, or it will be refused.<sup>40</sup> Under the act of Feb'y 18, 1869, P. L. 201, the court would not grant a charter to a real estate club for the benefit of its stockholders only.<sup>41</sup>

The decisions as to charters by the courts under prior laws are instructive where pertinent.<sup>42</sup>

### 17. Corporate name.

The name of a corporation is its trade mark. It should be distinctive and indicate the purpose of the body.<sup>1</sup> So, when a name

<sup>25</sup> Charters of Clubs, 46 Leg. Int. 380; 8 C. C. 392.

<sup>26</sup> Solebury, Etc., Assn., 3 C. C. 637.

<sup>27</sup> Quaker City, Etc., 10 W. N. C. 467; Mutual Aid, Etc., 15 Phila. 625; Helping Hand, Etc., 15 Phila. 644.

<sup>28</sup> Burger's Military, Etc., 19 C. C. 651; P. & L. Dig., vol. 3, col. 4773; Penn Farmers' Club, 24 C. C. 415; LaFayette Club, 21 C. C. 243.

<sup>29</sup> Penna. State, Etc., Assn., 1 D. R. 763.

<sup>30</sup> Junior Order, Etc., 10 D. R. 5; Regina Elina, 14 D. R. 476.

<sup>31</sup> Prince of Peace Hospital, 11 D. R. 242.

<sup>32</sup> Pittsburg Pub. School, Etc., Assn., 17 D. R. 867.

<sup>33</sup> St. Joseph's, Etc., 35 Supr. C. 80.

<sup>34</sup> Pittsburg Stock Exchange, 43 Pitts. L. J. 308.

<sup>35</sup> Lake Wynola Assn., 3 C. C. 626.

<sup>36</sup> Oakland Cemetery Co., 12 C. C. 145.

<sup>37</sup> Accountants' Assn., 5 D. R. 699.

<sup>38</sup> Electropathic Inst., 9 W. N. C. 31; Chinese Club, 1 D. R. 84; Zeisweiss v. James, 63 Pa. 465.

<sup>39</sup> Ev. Lutheran, Etc., Congs., 6 Montg. Co. 13; German Lutheran, Etc., Church, 9 C. C. 12.

<sup>40</sup> Duch Nove Doby, Etc., 12 C. C. 552; St. John, Etc., Soc., 13 Montg. Co. 95.

<sup>41</sup> Homestead Building Co., 10 Phila. 106.

<sup>42</sup> Permanent Relief Assn., 3 D. R. 236.

<sup>1</sup> Nether Providence Assn., 12 C. C. 666.

is sought it should not be so near like another corporate name as to be confounded with it.<sup>2</sup> If it is not similar enough to be confounding the charter will not be rejected.<sup>3</sup>

The name of a defunct corporation may be adopted;<sup>4</sup> or its unincorporated name may be utilized.<sup>5</sup> Judge Yerkes insisted that the name as well as the purposes should be expressed in the American instead of a foreign tongue.<sup>6</sup> Where there is a split in a society the same name will not do for both.<sup>7</sup> If the name is similar to that of another it may be excepted to by the aggrieved association.<sup>7a</sup> But an exceptant must set forth the names of those for whom a excepts.<sup>7b</sup>

### 18. Objects of incorporation.

The objects of a corporation and the means provided to carry them into effect must be clearly set forth in the certificate which is to become the charter.<sup>8</sup> It was held that to state it merely in the words of the act of 1874, as summarized there, is not explicit enough.<sup>9</sup> If funds are to be raised and expended, it should set forth the manner and purpose;<sup>10</sup> unless it be an educational or religious corporation.<sup>11</sup>

It should specify the particular clause of the law which authorizes its class.<sup>12</sup> If it be a club for social enjoyment it should designate the kind of enjoyment proposed. Judges who certify that it is innocent, have a right to know.<sup>13</sup> If it be a beneficial society, it must show that the funds will be derived from the members and how.<sup>14</sup> If it fails to disclose this, it will be rejected;<sup>15</sup> or if it fails to show that the funds are restricted to the purpose of the corporation.<sup>16</sup>

It must also show in what manner it is proposed to benefit its

<sup>2</sup> Sons of Progress, 14 W. N. C. 31; Waverly Ladies of the Red Cross, 12 C. C. 589; First Presby. Church of Harrisburg, 2 Grant, 240; St. Stan., Etc., Church, 12 D. R. 532.

<sup>3</sup> Columbus, Etc., Order, 27 W. N. C. 36; Eagle Chemical Co., 17 York, 193.

<sup>4</sup> Duquesne College, 12 C. C. 491.

<sup>5</sup> Societa Militare Italiana, 3 C. C. 441.

<sup>6</sup> Societa Italiana, Etc., 24 C. C. 84. But Mitchell, J., did not agree to this: Deutsch, Etc., 200 Pa. 143.

<sup>7</sup> United Brethren, Etc., 11 York, 89.

<sup>7a</sup> Iron City Lodge's Charter, 55 Pitts. 323.

<sup>7b</sup> St. Joseph's Beneficial, Etc., 35 Supr. C. 80.

<sup>8</sup> Natl. Literary Assn., 30 Pa. 150; Ind. Order of the Silver Star, 1 Luz. L. R. 768; Richmond, Etc., Coal Co., 9 C. C. 172. (See cases, 1 C. R. A., Pepper & Lewis' Sup., cols. 1372-3; Xantha, Etc., Assn., 8 D. R. 142.)

<sup>9</sup> McKees' Rocks, Etc., Assn., 19 C. C. 537.

<sup>10</sup> Skand. Brod Svea, 15 C. C. 516.

<sup>11</sup> Ev. Luth., Etc., Assn., 3 Foster, 33.

<sup>12</sup> Penna. Sportsman's Assn., 1 D. R. 763.

<sup>13</sup> Jacksonian Club, 11 C. C. 19; South Fork, Etc., Club, 4 D. R. 457; Americus Club, 6 D. R. 760.

<sup>14</sup> St. John's, Etc., Soc., 1 Lack. Jur. 73.

<sup>15</sup> Italian, Etc., Assn., 4 D. R. 357.

<sup>16</sup> German Genl., Etc., Assn., 30 Pa. 155.

members.<sup>17</sup> An application must show affirmatively on its face clearly that its purpose is lawful and not injurious to the community.<sup>18</sup> This appearing the court will not surmise that it may violate some law subsequently.<sup>19</sup>

The purposes must all be disclosed. A promise to declare them in the future is a nugatory presumption.<sup>20</sup> The requisites of the law must be in the certificate; they cannot be postponed or referred to the constitution, unless that also is incorporated.<sup>21</sup> If the association is for the purpose of carrying out a will, the court must have the will before it and examine it.<sup>22</sup>

#### 19. The subscribers.

An application will be refused unless it sets forth the names and residences of the subscribers.<sup>23</sup> All named as subscribers must actually sign, and if there are shares, the number each takes should be stated.<sup>24</sup>

The certificate should show that the subscribers are citizens of the United States and of the Commonwealth of Pennsylvania.<sup>25</sup> At least three of the subscribers and board of directors must be citizens of the commonwealth, and all, or at least a majority, citizens of the United States.<sup>26</sup> This government cannot clothe aliens with the functions of government. Under the act of April 9, 1879, P. L. 16, married women, being citizens and not aliens, may be the members of all corporations formed for purposes of learning, benevolence, charity and religion.<sup>27</sup> But independently of that if they are citizens of the United States and of Pennsylvania they may be corporators in any corporation.<sup>28</sup>

#### 20. Capital stock and place of business.

The requisite in regard to capital stock does not apply to a corporation of the first class, and need not be considered here.<sup>29</sup> But the place where the corporate business shall be transacted must be distinctly set out in the certificate; it cannot be inferred.<sup>30</sup>

<sup>17</sup> Sup. Temple, Etc., 17 Phila. 401; Natl. Endowment Co., 142 Pa. 450.

<sup>18</sup> North German Singing Society, 36 Pitts. L. J. 62; Braddock Club, 37 Pitts. L. J. 163.

<sup>19</sup> Evangl., Etc., Assn., 1 Leg. Rec. R. 133; Highland Cemetery Co., 4 D. R. 653.

<sup>20</sup> Journalist's Fund, Etc., 8 Phila. 272; Phila. Artisan's Inst., 8 Phila. 229.

<sup>21</sup> Skand. Brod Svea, 3 D. R. 235.

<sup>22</sup> Vaux's Ap., 109 Pa. 497.

<sup>23</sup> Red Men's, Etc., Assn., 10 Phila. 546; Odd Fellows' Hall Assn., 1 Lack. Jur. 181; United Brethren, Etc., Assn., 11 York, 89.

<sup>24</sup> Echo Park, Etc., Assn., 5 C. C. 383; Ev. Luth. Congn., Etc., 6 Phila. 64; Beneficial Assn., 19 York, 114.

<sup>25</sup> St. Ladislaus Rom. Cath., Etc., Assn., 19 C. C. 25.

<sup>26</sup> Chinese Club, 1 D. R. 84; C. Columbus, Etc., Assn., 47 Pitts. 47; Regina Elina, 14 D. R. 476.

<sup>27</sup> First Ind. Ladies' Aid Soc. of Bloomfield, 1 D. R. 754.

<sup>28</sup> Married Women Corporators, 18 C. C. 492.

<sup>29</sup> Ev. Luth., Etc., Assn., 3 Leg. Chron. 33; 1 Leg. Rec. 133; Fort Washington Historical Soc., 20 C. C. 84.

<sup>30</sup> Christ's Ev., Etc., 5 C. C. 121; Enterprise, Etc., Assn., 10 Phila. 380; German Brethren, Etc., 12 D. R. 479.

### 21. Directors and income.

The names of the directors for the first year must appear in the certificate,<sup>31</sup> and cannot be supplied by an "executive council"<sup>32</sup> nor by less than three directors.<sup>33</sup>

In Philadelphia on application for a church charter, the courts insist on having a limitation upon the yearly income aside from real estate, as was required by the act of Feb'y 20, 1854, P. L. 90.<sup>34</sup>

### 22. By-laws and government.

It is not necessary or in good form to insert the by-laws in the charter itself<sup>35</sup> nor such matters as the law provides for, as amendment.<sup>36</sup> If a clause be inserted giving power to make by-laws it must provide that they shall not be repugnant to the constitution and the law of the land.<sup>37</sup> The by-laws should accompany the application so the court may inspect them.<sup>37a</sup>

Charitable corporations, except churches, are not subject to the act of June 2, 1887, P. L. 298, providing that the corporate property shall be controlled by a majority of the laymen, but they are subject to the act of 1855.<sup>38</sup>

The charter of a church must conform to the act in regard to its government by directors or trustees.<sup>39</sup> The act of 1887 was amended in 1907, *supra*.

### 23. Members.

The rights and duties of members must be defined<sup>40</sup> and their qualifications;<sup>41</sup> and how new members will be admitted<sup>42</sup> and on what grounds members may be suspended or expelled;<sup>43</sup> unless it be a purely religious body.<sup>44</sup> A charter will be refused which permits minors to vote;<sup>45</sup> or provides for the expulsion of a member who enlists in the army or navy of the United States;<sup>46</sup> or

<sup>31</sup> St. John's, Etc., Soc., 1 Lack. Jur. 73; Societa Italiana, 24 C. C. 84.

<sup>32</sup> Marvine Ac. Fund, 3 C. P. R. 36.

<sup>33</sup> Germania Sangerbund, 12 C. C. 89.

<sup>34</sup> Mary, Etc., Church, 17 Phila. 306; St. Luke's M. E. Church, 17 Phila. 26; Church of the Reconciliation, 14 D. R. 587; Middletown Country Club, 30 C. C. 174.

<sup>35</sup> Mary, Etc., Church, *supra*; Stevedore's Beneficial Assn., 14 Phila. 130; Society Princ., Etc., 6 D. R. 486.

<sup>36</sup> Odd Fellows' Hall Assn., 1 Lack. Jur. 181. (But see Master Builders' Exch., 12 D. R. 670.)

<sup>37</sup> German Genl. Beneficial Assn., 30 Pa. 155.

<sup>37a</sup> Regina Elina, 14 D. R. 476.

<sup>38</sup> Roman Cath., Etc., Trustees v. Harrison, 12 W. N. C. 32; P. & L. Dig., vol. 3, col. 4791.

<sup>39</sup> German, Etc., Church, 5 C. C. 121-4; Ev. Luth., Etc., Church, 6 Phila. 64.

<sup>40</sup> German, Etc., Assn., 30 Pa. 155.

<sup>41</sup> Accountants' Assn., 18 C. C. 159.

<sup>42</sup> Permanent, Etc., Assn., 3 D. R. 236; Italian, Etc., Assn., 4 D. R. 357.

<sup>43</sup> Skand. Brod. Svea, 15 C. C. 516.

<sup>44</sup> United Brethren, Etc., 11 York, 89.

<sup>45</sup> Mary, Etc., Church, 17 Phila. 306.

<sup>46</sup> Mulholland, Etc., Assn., 10 Phila. 19.

for generally expressed offenses.<sup>47</sup> Beneficial associations which conform to the provisions of the act of April 6, 1893, P. L. 7, need not submit their whole constitution or how members are received or lost, in Philadelphia.<sup>47a</sup>

When a stock exchange applies it should show how members are received and money raised and be accompanied with its constitution.<sup>48</sup> Prior to 1874 all the members of beneficial associations were required to be citizens of the United States<sup>49</sup> and since then the reason for the law has increased a hundred fold, where the United States has been compelled to exercise its police power against the hordes of illiterate banditti and foreign anarchy.<sup>50</sup>

#### 24. Constitution, form, etc.

The constitution is the agreement of the incorporators as expressed in their certificate, which the judge must peruse and examine and approve—and therefore a “constitution” cannot be imported by reference.<sup>51</sup> The articles should be embraced on one sheet of paper or parchment and not several fastened together,<sup>52</sup> and may be typewritten under the act of June 18, 1895, P. L. 209. If it is clumsily written with numerous mistakes and interlineations it will be rejected.<sup>53</sup> They should be certified with the usual “Witness our hands, etc.”<sup>54</sup> When the court has entered an order refusing a charter it is an adjudication and the application cannot be withdrawn.<sup>55</sup> It is final and no appeal lies.<sup>56</sup> The parties applying must pay the fees of the prothonotary for making up the record.<sup>57</sup> If the court refers the application to a master to report upon it, his fee will be fixed by the court.<sup>58</sup>

#### 25. Amendments of charters.

Section 42 of the act of 1874, *supra*, as amended by the act of April 17, 1876, P. L. 37, provides:

“Section 42. As often as the corporations named in the first class specified in the second section of this act, including all such corporations now in existence, and academies, colleges and universities, shall be desirous of improving, amending or altering the articles and conditions of their charters, it shall and may be lawful for such corporations respectively, in like manner, to specify the improvements, amendments or alterations which are or shall be desired, and exhibit the same to the Court of Common Pleas of the

<sup>47</sup> Butchers' Beneficial Assn., 38 Pa. 298; P. & L. Dig., vol. 3, col. 4793.

<sup>47a</sup> Continental, Etc., Soc., 7 D. R. 167; *contra*, Right Worthy, Etc., 8 D. R. 127.

<sup>48</sup> Pittsburg Stock Exchange, 43 Pitts. L. 308.

<sup>49</sup> Alsatian Beneficial Assn., 35 Pa. 79; Journalists' Fund, 8 Phila. 272.

<sup>50</sup> Society Principesso, Etc., 6 D. R. 486.

<sup>51</sup> Skand. Brod. Svea, 15 C. C. 516.

<sup>52</sup> Alexander Presbyterian Church, 30 Pa. 154.

<sup>53</sup> St. Luke's M. E. Church, 17 Phila. 261.

<sup>54</sup> St. John's, Etc., Soc., 1 Lack. Jur. 73.

<sup>55</sup> Phila. Relief Assn., 7 W. N. C. 146.

<sup>56</sup> Vaux's Ap., 109 Pa. 497.

<sup>57</sup> Union, Etc., Church, 1 Chester Co. 459.

<sup>58</sup> Application for charter, 6 D. R. 605.

proper county in which said corporation is situated, as aforesaid, when, if said court shall be of opinion such alterations are or will be lawful and beneficial and do not conflict with the requirements of the statute to which this is a supplement, or of the constitution, it shall be the duty of said court to direct notice to be given as provided in the third section of the act, to which this is a supplement, of such application, and after decree made and such amendments are recorded, the same shall be deemed and taken to be a part of the charter of the said corporation."

A petition to amend should contain all the necessary facts leaving nothing to be inferred. Amendment is discretionary with the court, and will be reviewed only for abuse of discretion. Any member may appeal who is affected by the change.<sup>1</sup> A charter which permanently locates a college at a place cannot be so amended as to change its *situs*.<sup>2</sup> The appellate court will consider only the regularity of the record as brought up; but where no notice is given of the meeting at which the amendment is considered, it lacks the fundamental requisit of "a meeting duly convened after notice to all the members."<sup>3</sup>

But the court will not so amend the charter that its governing body will no longer comply with the act of 1874.<sup>4</sup> There must be a reason shown besides that it may do more business.<sup>5</sup>

#### 26. Consolidation of corporations.

By the act of April 17, 1876, P. L. 37, section 42 of the act of 1874 was amended by adding to it:

"And if any two or more such corporations shall desire to consolidate and merge with each other, or one or more within the other, upon application to the Court of Common Pleas of the county in which the corporation is situated, into which the one or more desire to merge or become consolidated with the same, proceedings shall take place as are required on application to amend; and upon decree being made by said court, and the same being recorded in said county, upon the terms specified in said application, the said corporations, with all their rights, privileges, franchises, powers and liabilities, shall merge and be consolidated into, by the name, style and title given to the same in such decree, and upon the terms, limitations and with the powers stated and conferred in said application and decree."

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<sup>1</sup> Grand Lodge, A. O. U. M., 110 Pa. 613.

<sup>2</sup> Thiel College's Ap., 216 Pa. 630.

<sup>3</sup> African M. E. Church, 28 Supr. C. 193, citing *Comth. v. Cullen*, 13 Pa. 133; *Ehrenfeldt's Ap.*, 101 Pa. 186; *Bagley v. Reno Oil Co.*, 201 Pa. 78.

<sup>4</sup> *Appn. Salem's Luth. Church*, 15 W. N. C. 567.

<sup>5</sup> *Bank of N. A.*, 2 C. C. 97.



## CHAPTER XXXIX.

### DETINUE.

- |   |                                  |
|---|----------------------------------|
| 1. Utility and infrequency of the action.                     | 8. Pleas.                        |
| 2. Nature of the action.                                      | 9. Form of affidavit of defense. |
| 3. Form of præcipe.   | 10. Replication.                 |
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| 5. Form of the writ.  | 12. Form of issue.               |
| 6. The declaration.   | 13. Plaintiff's proofs.          |
| 7. Form of declaration — supposititious finding and bailment. | 14. Finding of the jury.         |
|   | 15. Judgment and execution.      |

#### 1. Utility and infrequency of the action.

Although seldom invoked detinue has still some advantages over replevin, as on action for the recovery of a specific chattel the right of property to which is in the plaintiff, and a brief and succinct presentation of the practice here may serve to show its utility, where otherwise the plaintiff would be defeated of his right by his inability to give a large bond.

#### 2. Nature of the action.

This action lies for the recovery of the goods in specie, or in case of failure to do so, then the value, for the defendant may elect to deliver the specific thing sued for or pay the value thereof.<sup>1</sup> In this it differs from trover which is an action for the damages resulting from the wrongful conversion and detention of a chattel<sup>2</sup> rather than the thing itself. Writers, formerly, were divided in opinion as to whether it was an action *ex delicto* or *ex contractu*; but, from the fact that where the chattel was tortiously reduced to possession, a count could be added in debt in the *detinet*, it was determined that the action was wholly *ex contractu*. It was supported against an infant, and where two had possession of the chattel the action lay against them jointly.<sup>3</sup> A justice of the peace has no jurisdiction of this action.<sup>4</sup> As it lies only for a specific chattel, or chattels, the description in the præcipe, writ and pleadings must be definite, so that the identity of the thing or things demanded may be clear and indisputable. If not, it will be demurrable.<sup>5</sup> Being a remedy for the wrongful detainer of the goods, it is immaterial how the defendant got possession; he must be

<sup>1</sup> Selwyn's *Nisi Prius*, 1 Wharton's Ed. 545.

<sup>2</sup> *Alexander v. Goldstein*, 13 Supr. C. 518; *Beasley v. Allyn*, 15 Phila. 97.

<sup>3</sup> Archbold's Pleading, 75, Am. Ed., 7th Henry IV, 6.

<sup>4</sup> *Sprenkle v. Spots* (York Co.), Democratic Press, Dec. 6, 1825.

<sup>5</sup> 1 Chitty on Pleading, 92, p. 118\*; *Rementer v. Erwin*, 11 W. N. C. 194; 2 Penny. 407.

charged with wrongfully detaining it.<sup>6</sup> So it lies for detaining a specific chattel, held in pursuance of a bailment or other contract;<sup>7</sup> and one who has the absolute property and the immediate right of possession may maintain it, as an heir for an heirloom; or one for whose use a chattel was delivered to defendant.<sup>8</sup> As he must have the right to immediate possession the action cannot be brought by the reversioner before the reversion is ripe.<sup>9</sup> It cannot be maintained against an executor on the bailment of the testator unless the chattel came into the executor's possession;<sup>10</sup> and as against several executors if one alone has the possession the action must be brought against him as the actual possessor.<sup>11</sup> If the bailee lose the article before demand made, which demand is essential, the action will not lie.<sup>12</sup>

### 3. Form of præcipe.

A proper form of præcipe in this action is as follows:

Aileen Bertelle	}	In the Court of Common Pleas of Wayne County.
v.		
Allen Barnes.	}	No. ——— Term, 19—.

Issue writ in detinue in above entitled action, that said defendant justly and without delay render to said plaintiff one gold watch of the value of one hundred dollars and one diamond ring of the value of one thousand dollars, the property of plaintiff which said defendant unjustly detains.

— — —  
P. Q.

To ——— Esq.,  
Prothonotary.  
Date ———

### 4. The writ.

The writ follows the præcipe. In England the practice was to issue the writ demanding the rendering of certain goods and chattels, either with or without specifying them.<sup>13</sup> In case the writ did not specify them, it was important to supply it in the declaration with sufficient particularity to identify them.

### 5. Form of writ.

Following is a form:

The Commonwealth of Pennsylvania,

To ———, Esq., sheriff of the county of Wayne.

Command Allen Barnes late of said county, yeoman, that justly and without delay he render unto Aileen Bertelle certain goods and chattels, to-wit: one gold watch of the value of one hundred dollars and one diamond ring of the value of one thousand dollars,

<sup>6</sup> 1 Chitty on Pleading, p. 119,\* 120.\*

<sup>7</sup> Chitty on Pleading, p. 118.\*

<sup>8</sup> 2 Saunders' Pleading, 47, a. n. Chitty, *supra*.

<sup>9</sup> Gordon v. Harper, 7 T. R. 9 (Durnford & East).

<sup>10</sup> 3 Bibbs' Ken. Rep. 510.

<sup>11</sup> Brooke's Abr. Detinue, pl. 31.

<sup>12</sup> Brooke's Abr. Detinue, pl. 31.

<sup>13</sup> Stephen on Pleading, 14.

lawful money of the United States, which he unjustly detains from the said Aileen Bertelle, as it is said.

Witness, etc.

[Seal]

\_\_\_\_\_,  
Prothonotary.

If it be intended to join assumpsit in the action then it should be as follows:

That justly and without delay he render to the said Aileen Bertelle the sum of eleven hundred dollars, lawful money of the United States, which he owes to and unjustly detains from the said Aileen Bertelle; also that he render to the said Aileen Bertelle [the specific chattels as above].

#### 6. The declaration.

It was formerly held that the declaration need not aver the precise day of the bailment, or possession, if it be laid before suit brought, unless it be a material part of the contract; nor is the venue important since this is a transitory matter.<sup>14</sup> But the description of the property for the purpose of identity is important. It should be particular,<sup>15</sup> though it was held not to be necessary to state the date of a deed.<sup>16</sup> It was also held that where there were several articles it was not necessary to specify the value of each, though the jury must find the value of each,<sup>17</sup> and the better practice is to specify it in the narr.<sup>18</sup>

It is usual to declare in two counts (as in the form following): one on a real or supposititious finding, the other on a bailment. The first count is not traversible.<sup>19</sup> In all cases the plaintiff should lay a demand or special request, though in some old cases it was held unnecessary.<sup>20</sup> The better practice is to aver a special request for the rendering of possession of the specific article or articles detained.<sup>21</sup>

When a count in debt in the *detinet* (now assumpsit) was laid, it was only in cases of doubt as to the contract.

#### 7. Form of declaration — Two counts.

Dawson Hoopes	}	C. P. No. 1 June Term, 1909. No.
v.		
Clement R. Hoopes and Barton Hoopes, Jr.		

<sup>14</sup> 2 Chitty on Pleading, 285.

<sup>15</sup> 2 Saunders on Pleading, 74; Rementer v. Erwin, 2 Penny. 407.

<sup>16</sup> Alcorn Ex. Westbrook, 1 Wilson, 116.

<sup>17</sup> Pawly v. Holly, 2 Blackstone's R. 853.

<sup>18</sup> Holladay *et ux* v. Littlepage, 2 Munford (Va.), 539.

<sup>19</sup> 1 Chitty on Pleading, 121, *et seq.*; Atkinson v. Baker, 4 T. R. 229; Walker v. Jones, 2 Car. & M. 672.

<sup>20</sup> 1 New Rep. 140; Kettle v. Broomsall, Willes, 119.

<sup>21</sup> 7 Wentworth on Pleading, 635-6-7. In Bernbridge v. Turner, 2 Yeates, 429, where no demand had been made, the defendant taken on a capias was discharged on common bail, it not appearing that he got the possession tortiously.

## PLAINTIFF'S DECLARATION.

County of Philadelphia, ss:

Dawson Hoopes, plaintiff above named, complains of Clement R. Hoopes and Barton Hoopes, Jr., defendants above named, of a plea that they render to him a certificate for four hundred and sixty-three shares of the capital stock of Hoopes & Townsend Company, a corporation under the laws of the State of New Jersey, in the name of said plaintiff, of the value of one hundred and ninety-seven thousand and forty-nine dollars, lawful money of the United States of America, which the said defendants unjustly detain from him.

For that whereas the said Dawson Hoopes, heretofore, to-wit, on June 17, 1904, delivered to the said Clement R. Hoopes and Barton Hoopes, Jr., said certificate for four hundred and sixty-three shares of the capital stock of Hoopes & Townsend Company, a corporation under the laws of the State of New Jersey, in the name of said plaintiff, of great value, to-wit, of the value of one hundred and ninety-seven thousand and forty-nine dollars, lawful money aforesaid, to be delivered by the said defendants to the said plaintiff when they the said defendants should be thereunto afterwards requested; yet the defendants, although they were afterwards, to-wit, on July 15, 1909, at the county aforesaid, requested by the said plaintiff so to do, have not as yet delivered the said stock certificate to the plaintiff, but have hitherto wholly neglected and refused and still do neglect and refuse so to do, and still unjustly detain the same from the plaintiff.

And whereas also the said Dawson Hoopes, on, to-wit, June 17, 1904, was lawfully possessed of a certain certificate for four hundred and sixty-three shares of the capital stock of Hoopes & Townsend Company, a corporation under the laws of the State of New Jersey, in the name of plaintiff, of great value, to-wit, of the value of one hundred and ninety-seven thousand and forty-nine dollars, like lawful money, as of his own property, and being possessed thereof, he the said plaintiff, afterwards, to-wit, on June 17, 1904, aforesaid, at the county aforesaid, came into the possession of the said defendants by finding, yet the said defendants well knowing the said stock certificate to be the property of the said plaintiff, and of right to belong to and appertain to him, have not as yet delivered the said last mentioned stock certificate to the plaintiff, although they were afterwards, to-wit, July 15, 1909, aforesaid, requested by the plaintiff so to do, but have hitherto wholly refused so to do, and have detained, and still detain the same from the plaintiff, to-wit at the county aforesaid. To the damage of the said plaintiff of one hundred and ninety-seven thousand and forty-nine dollars.

And whereas also the said Dawson Hoopes, on to-wit, June 17, 1904, was lawfully possessed of a certain certificate for four hundred and sixty-three shares of the capital stock of Hoopes & Townsend Company, a corporation under the laws of the State of New Jersey, said stock certificate being in the name of the plaintiff, and of great value, to-wit, of the value of one hundred and ninety-seven thousand and forty-nine dollars, lawful money aforesaid as

of his own property, and being possessed thereof it was left by the plaintiff with the defendants for safe keeping in their vault at 1330 Buttonwood Street and which the said defendants promised and agreed to deliver to the plaintiff when they the said defendants should be thereunto afterwards requested; yet the defendants, although they were afterwards, to-wit, on July 15, 1909, at the county aforesaid, requested by the said plaintiff in writing so to do, replied that they held the said stock certificate under the concluding paragraph of article 4 of an alleged trust agreement dated June 17, 1904, and have not as yet delivered the said stock certificate to the plaintiff, but have hitherto wholly neglected and refused, and still do neglect and refuse so to do and still unjustly detain the same from the plaintiff. For greater certainty in the premises, a true and correct copy of the alleged agreement dated July 17, 1904, is hereto attached, made part hereof and marked Exhibit "A." The said alleged agreement only relates to or has reference to five hundred shares of stock of Hoopes & Townsend Company represented by another stock certificate; said plaintiff being the owner of nine hundred and sixty-three shares of the capital stock of said Hoopes & Townsend Company represented by two certificates, one for five hundred shares, and another for four hundred and sixty-three shares as aforesaid.

Wherefore plaintiff prays judgment.

John McClintock, Jr.,  
Attorney for Plaintiff.

State of Pennsylvania, } ss:  
County of Philadelphia }

Dawson Hoopes, plaintiff above named, being duly sworn according to law, doth depose and say that the facts set forth in the above and foregoing declaration, are true to the best of his knowledge and belief.

Sworn and subscribed to  
before me this — }  
day of —, A. D. 1909. }

#### 8. Pleas.

This is not an action which requires an affidavit of defense, unless there be a count in assumpsit.

If the defendant sees fit to file an affidavit he can do so. The following is a form in reply to the declaration above:

#### 9. Form of affidavit of defense.

Dawson Hoopes	}	C. P. No. 1, June Term, 1909. No. 4879.
v.		
Clement R. Hoopes and		
Barton Hoopes, Jr.		

#### AFFIDAVIT OF DEFENSE.

Commonwealth of Pennsylvania, } ss:  
City and County of Philadelphia }

Clement R. Hoopes and Barton Hoopes, Jr., the above named defendants, being duly affirmed according to law doth depose and

say that they have a just, true and legal defense to the whole of the plaintiff's claim of the following nature and character, to-wit:

That they do not have in their possession, nor did they ever have any certificate in the capital stock of Hoopes and Townsend Company, or of any other corporation or company belonging to the said plaintiff, Dawson Hoopes, for which as individuals they would be personally liable in this action, nor in any other action, either in law or equity, nor have they in their possession as individuals a certificate for four hundred and sixty-three (463) shares of capital stock of Hoopes and Townsend Company, as specified in the statement of claim filed by the plaintiff.

That they never saw such a certificate as so specified, nor have they any certificates, which in the aggregate would amount to four hundred and sixty-three (463) shares of the capital stock of Hoopes and Townsend Company stock, for which they would be personally liable in this action.

That they further deny and aver that the said Dawson Hoopes ever delivered to them as individuals a certificate for four hundred and sixty-three (463) shares of the capital stock of Hoopes and Townsend Company, nor do they hold any of the capital stock of Hoopes and Townsend Company, belonging to the plaintiff, Dawson Hoopes, which is or was to be delivered by them to said plaintiff, at his request.

Nor have they in their possession, as specified in plaintiff's statement, any certificate or certificates of the capital stock of Hoopes and Townsend Company, which the plaintiff casually lost and found by them, nor have they in their possession any certificate of the capital stock of Hoopes and Townsend Company, given to them by the plaintiff for safe keeping, nor did they ever agree or promise to deliver any stock to the plaintiff held by them under any agreement, more especially the stock specified in plaintiff's statement.

That said Dawson Hoopes never had issued to him a certificate of the capital stock of Hoopes and Townsend Company for four hundred and sixty-three (463) shares.

That said Dawson Hoopes was originally the owner of nine hundred and sixty-three (963) shares of Hoopes and Townsend Company, as evidenced by the issuing to him by said Company of certificate No. 4, of the stock book of said corporation, which said certificate No. 4 was by and with the consent and approval and authorization of the said Dawson Hoopes, divided in certificates Nos. 7, 8 and 9; No. 7 was for six hundred and sixty-three (663) shares; No. 8 was for two hundred and fifty (250) shares, and No. 9 for fifty (50) shares; the said fifty (50) shares, as evidenced by certificate No. 9, was under an agreement signed by the said Dawson Hoopes, dated the first day of March, A. D. 1904, transferred and sold by the said Dawson Hoopes to Hoopes and Townsend Company for five thousand dollars (\$5,000), in cash paid to him, said plaintiff, for the purpose of enabling him to pay a debt which he owed to a third party.

That certificate No. 7 was divided by issuing certificate No. 10 for five hundred (500) shares; the said five hundred (500) shares were incorporated in certificate No. 12, issued to the trustees under an agreement which is now the subject of an equitable proceeding

in the Court of Common Pleas No. 4, yet undetermined, is held in trust by trustees under said agreement for the purpose of carrying out its provisions, and over which the defendants in this case as individuals have no control.

The balance of said certificate or one hundred and sixty-three (163) shares was incorporated in certificate No. 11 of the stock book of said corporation:

That said certificates of stock No. 8 for two hundred and fifty (250) shares and the said certificate No. 11 representing one hundred and sixty-three (163) shares make a total in the aggregate of four hundred and thirteen shares of stock, which, also under said agreement is held in trust, and further that for the purpose of carrying out the said agreement of trust, the said plaintiff by an instrument in writing dated the 29th day of September, 1904, a copy of which is hereto attached, constitutes and appoints Clement R. Hoopes as president of Hoopes and Townsend Company, and his successor or successors in office, his true and lawful attorney irrevocable to sell, assign, transfer and set over at his discretion to Hoopes and Townsend Company all or any part of all stock standing in the name of the plaintiff or to his credits on the books of said corporation, as may be necessary to carry out and into effect clause 4 of said agreement, which said agreement is made a part of the plaintiff's statement of claim, and attached thereto and marked Exhibit "A," in which he further agrees that said stock is to be sold and transferred upon the basis of a valuation, as to be shown by the books of Hoopes and Townsend Company at the time of its last stock taking, made prior to the transfer, less twenty-five per cent (25%).

That this instrument in writing is for the interests of the *cestui trustent* in preserving their rights under the said agreement of separation, marked "Exhibit A," in plaintiff's statement, and which is the subject of a suit in equity now pending as above stated in the Court of Common Pleas No. 4.

So therefore it will be seen that the facts as set forth in the statement of the said plaintiff in this suit are false, and untrue in every particular, except that part which is marked "Exhibit A," and which is the subject of an equitable proceeding as above stated.

The Court of Common Pleas in Montgomery County in a similar proceeding dismissed the plaintiff's bill with costs.

That the facts in this affidavit of defense also show that the rights of other parties are more directly concerned than that of the defendants named therein, and it would be an act of injustice to them and to their rights as evidenced by the agreement ("Exhibit A" of plaintiff's statement), and the subsequent power of attorney hereto attached, to allow the plaintiff in this action to proceed any further.

If he has any rights whatever to any stock of his in Hoopes and Townsend Company, it will be seen by this court that he first must establish his right thereto in the equitable proceeding in which he is seeking to avoid said agreement and its provisions by having the same cancelled and made void, as prayed for in said bill. He has denied the existence of the letter agreement attached hereto, which is now for the first time made public in legal proceedings, but as

it was drawn by and under the supervision of his attorney A. S. L. Shields, Esq., and who vouched for the correctness of the copy furnished the said trustees, therefore this court will surely take cognizance of the fact that the averments set forth in the statement filed are false and untrue.

All of which facts as above set forth the defendants believe to be true and expect to be able to prove upon a trial of this cause.

(Signed) Clement R. Hoopes,  
Barton Hoopes, Jr.

Affirmed before me this 3d day of September, A. D. 1909.

(Signed) W. Carroll Fow,  
Notary Public.

#### 10. Replication.

Where the declaration avers a bailment and an engagement of the defendant to redeliver on request and the defendant pleads possession as security for a loan, the plaintiff may, without being chargeable with departure, reply that he tendered the debt and that the defendant afterwards and before bringing suit, although requested to re-deliver, wrongfully withheld the goods and still so doth withhold.<sup>21a</sup>

#### 11. General issue.

The plea of the general issue in this action is *non detinet*; i. e., that defendant does not detain the said goods in the said declaration specified, etc. This raises the issue of the plaintiff's right to the possession which is the gist of the action. It also raises the right to the property.<sup>22</sup> Under this plea defendant may show a gift;<sup>23</sup> or that plaintiff's title is derived from a fraudulent conveyance,<sup>24</sup> or that the statute has run against the writ.<sup>24a</sup>

It does not cover the right to challenge plaintiff's authority as administrator,<sup>25</sup> or that the goods were pawned to him for money which has not been paid.<sup>26</sup> These defenses must be pleaded specially.

#### 12. Form of issue.

Noah Frank  
v  
Eval Smith. }

Now, to-wit, January 12, 1910, defendant by his attorney, John B. Stevens, saith that he doth not detain the said goods and chattels in the said declaration specified or any or either of them or any part thereof in manner and form as the plaintiff hath above complained thereof against him, and of this the defendant puts himself upon the county, etc.

John B. Stevens, P. D.

<sup>21a</sup> Gladstone v. Hewitt, 1 Cr. & J. 565.

<sup>22</sup> Stephen on Pleading, 178.

<sup>23</sup> 1 Wharton's Selwyn, N. P. 547.

<sup>24</sup> Stratton v. Minnis, 2 Munford, 329.

<sup>24a</sup> Elam v. Bass' Exs., 4 Munford, 301.

<sup>25</sup> 4 Bibb (Ky.), 391.

<sup>26</sup> 1 Selwyn's *Nisi Prius* (Wh. Ed.), 547.



### 13. Plaintiffs' proofs.

The plaintiff must prove the goods detained as laid in his declaration. It was held that where the plaintiff proved a bond of a greater amount than the amount laid, the verdict must be for the defendant.<sup>27</sup> It is not material to prove the manner in which defendant gained possession. So, if the *narr* alleges a finding plaintiff may prove that the goods were delivered to an infant for a special purpose and the defendant refused to redeliver them.<sup>28</sup>

The plaintiff does not need to prove an absolute property in the chattel—a special property entitling him to the possession being sufficient.<sup>29</sup> But he must show a right to the immediate possession.<sup>30</sup> He need not show that he once had possession, either.<sup>31</sup> But he must prove possession by defendant prior to the issuance of the writ.<sup>32</sup> It is a matter of defense if the possession has legally passed from the defendant.<sup>33</sup>

There are some authorities which hold that a previous demand need not be proved;<sup>34</sup> but it has also been held that where the plaintiff does not show a previous demand on the issue of *detinet vel non* (having declared for damages) he cannot recover damages prior to the commencement of the action.<sup>35</sup>

### 14. Finding of the jury.

It is the duty of the jury to find the value of the chattel demanded and if there are several articles the value of each;<sup>36</sup> for, at the common law, if they find damages and costs, and no value, the defect cannot be supplied by a writ of inquiry. However, in some of the states a writ of inquiry has been awarded.<sup>37</sup> The jury may find the value and also damages for its wrongful detention.<sup>38</sup>

### 15. Judgment and execution.

The judgment upon the verdict is that the plaintiff do have and recover from the defendant the goods [specifying them] or the value thereof, if the plaintiff cannot have the goods, and his damages, to-wit: [amount found by the jury] and his full costs of suit.<sup>39</sup>

This action was maintained for negroes as chattels in the slave states prior to the war of 1861–5 and where a slave died after the commencement of the suit, the judgment was still in the alternative

<sup>27</sup> 1 Wharton's Selwyn's *Nisi Prius*, 547.

<sup>28</sup> 1 New Rep. 140; Selwyn's N. P., *supra*.

<sup>29</sup> 2 Saunder's Pleading, 47.

<sup>30</sup> Gordon v. Harper, 7 T. R. 9.

<sup>31</sup> Tunstal v. McClelland, 1 Bibb's Ken. R. 186.

<sup>32</sup> 3 Marsh's Ken. R. 186.

<sup>33</sup> Burnley v. Lambert, 1 Washington (Va.), 308 \* (398).

<sup>34</sup> 2 Hayward (N. C.), 186.

<sup>35</sup> Tunstal v. McClelland, 1 Bibb's Ken. R. 186, and see note 21, *supra*.

<sup>36</sup> Buller's N. P. 51, 10 Coke, 119; Higgenbotham v. Rucker, 2 Call 313 (N. C.).

<sup>37</sup> Cornwell v. Truss, 2 Munford, 195.

<sup>38</sup> Martin (N. C.), 18.

<sup>39</sup> 1 Wharton's Selwyn's N. P. 548, q. v.

for the chattel and the damages,<sup>40</sup> if defendant did not plead the death *puis darrein continuance*.<sup>41</sup> The execution, if a *feri facias*, authorizes the sheriff to seize the articles named as detained, if found, and if not to levy the value, damages and costs of the goods and chattels of the defendant; if a *capias ad satisfaciendum*, it authorizes the seizure of the goods or the person of the defendant.

Upon the judgment no action can be maintained,<sup>42</sup> except *scire facias*.<sup>43</sup>

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<sup>40</sup> Skipper v. Hargrove, Martin (N. C.), 74; Gentry v. Barnet, 6 Monroe, 113; Carrol v. Early, 4 Bibbs (Ky.), 270.

<sup>41</sup> Gilmer (Va.), 341.

<sup>42</sup> Foster v. Smoot, 1 Marshall (Va.), 394.

<sup>43</sup> Withers v. Withers, 6 Munford, 11.

## CHAPTER XL

### DOWER UNDE NIHIL HABET.

- |                                     |  |
|-------------------------------------|--|
| 1. Definition and nature of action. | 8. Tenant's plea.                                  |
| 2. Bar.                             | 9. Recovery where husband covinously gave up land. |
| 3. Minor widow's right.             | 10. Bail for stay of execution, on error.          |
| 4. Falls with the estate.           | 11. Form of præcipe.                               |
| 5. Assignment — quarantine.         | 12. Form of writ.                                  |
| 6. Action for wrongful withholding. | 13. Form of declaration.                           |
| 7. Demand necessary.                |  |

#### 1. Definition and nature of action.

1. Dower is the provision which the law makes for a widow out of the lands and tenements of her husband for her support and the nurture of her children.<sup>1</sup>

"Tenant in dower is where the husband of a woman is seized of an estate of inheritance and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life."<sup>2</sup> It is an interest in the land itself, and as such, is insurable.<sup>3</sup>

#### 2. Bar.

2. There must be a lawful marriage to germinate the right, and once sprung up only death or absolute divorce will destroy it. By the English law of Westminster, 2, if a woman deserted her husband and lived with her "*avouterer*," she lost her dower, unless her husband condoned the wrong and waived the taint, by voluntarily becoming reconciled to her.<sup>4</sup>

But this is not the law in Pennsylvania. Neither desertion nor adultery will bar dower, here.<sup>5</sup> While articles of separation will be binding, they will also bar dower, although a separate certificate of acknowledgment is not made according to the act of February 24, 1770. 1 Sm. L. 307.<sup>6</sup> An ante-nuptial contract against either husband or wife taking any part of the estate of the one who died first will be sustained.<sup>7</sup>

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<sup>1</sup> Coke on Litt., 30-a.

<sup>2</sup> 2 Blackstone, 129.

<sup>3</sup> Zehring's Est., 3 Supr. C. 243.

<sup>4</sup> See Robert's Digest British Statutes.

<sup>5</sup> Reel v. Elder, 62 Pa. 308; Nye's Ap., 126 Pa. 341; Holbrook's Est., 20 W. N. C. 79; Drinkler's Est., 151 Pa. 302.

<sup>6</sup> Kaiser's Est., 199 Pa. 269, reversing 14 Supr. C. 155.

<sup>7</sup> Krug's Est., 196 Pa. 484.

The widow may bar her right by accepting a devise under her husband's will which is plainly in lieu of dower;<sup>8</sup> and by electing to take the devise, though not formally filed in court.<sup>9</sup>

### 3. Minor widow's right.

At the common law a child was entitled to dower at nine years of age. Therefore a minor widow has a right to action but she must bring it by her next friend. Her dower is in addition to her share of the personalty under the law. To maintain the right actual seisin is no longer necessary, constructive seisin being raised from the right of entry. The estate of which she may be endowed is any estate of inheritance, which includes an equity of redemption and even a trust estate. In this respect dower and tenancy by the curtesy stand parallel.<sup>10</sup>

### 4. Falls with the estate.

The right of dower falls with the condition of the estate. If the inheritance be sold under a mortgage or for debts of the husband the right is extinguished; whether the sale be under execution, or by a testamentary power for such payment,<sup>11</sup> or a judicial sale in lunacy proceedings.<sup>12</sup> But the statute of 13 Edward I, ch. 4, A. D. 1285,<sup>13</sup> provides for the recovery of dower where by covin or default, the husband suffered a feigned recovery. Neither a voluntary assignment to pay debts,<sup>14</sup> nor an involuntary assignment for the benefit of creditors, divests it.<sup>15</sup>

### 5. Assignment — Quarantine.

According to the report of the judges upon the English statutes in force in Pennsylvania<sup>16</sup> a part of the act of 9 Henry III, ch. 7, 1225, was then in force here, to-wit: That the widow "shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her."<sup>17</sup>

### 6. Action for wrongful withholding.

By statute or ordinance of Merton, 20 Henry III, ch. 1, A. D. 1235, an action at law is provided for the wrongful withholding (it is termed "deforcement") of her dower. This is the part in force in Pennsylvania.<sup>18</sup> "First, Of widows which after the death of their husbands are deforced of their dowers, and cannot have

<sup>8</sup> Webb v. Evans, 1 Binney, 565; Cauffman v. Cauffman, 17 S. & R. 16; Heron v. Hoffner, 3 Rawle, 393; Preston v. Jones, 9 Pa. 456.

<sup>9</sup> Hamilton v. Buckwalter, 2 Yeates, 389; Light v. Light, 21 Pa. 407.

<sup>10</sup> Shoemaker v. Walker, 2 S. & R. 554; Reed v. Morrison, 12 S. & R. 18; Evans v. Evans, 9 Pa. 190.

<sup>11</sup> Mitchell v. Mitchell, 8 Pa. 126.

<sup>12</sup> Stewart v. Wagner, 29 Pitts. L. J. 359.

<sup>13</sup> Roberts' British Statutes, 185.

<sup>14</sup> Helfrich v. Overmyer, 15 Pa. 113.

<sup>15</sup> Eberle v. Fisher, 13 Pa. 326.

<sup>16</sup> Report of judges of the Supreme Court, Dec. 14, 1808, published by authority of the legislature, edited by Hon. Samuel Roberts.

<sup>17</sup> Roberts' Digest of British Statutes, p. 179.

<sup>18</sup> Roberts' Digest of British Statutes, p. 182.

their dowers or quarantine<sup>19</sup> without plea, whosoever deforce them of their dowers or quarantine of the lands, whereof their husbands died seised, and that the same widows after shall recover by plea; they that be convict of such wrongful deforcement, shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of our court, have recovered seisin of their dower, etc., and the deforcers shall be amerced at the king's pleasure."

#### 7. Demand necessary.

The form of action here is a writ of dower *unde nihil habet* and not a writ of right of dower, in which no damages are recoverable.

To sustain this action, a demand is necessary before bringing suit;<sup>20</sup> or the heir may plead "*semper paratus*," that he is now and always has been ready to assign her dower.<sup>21</sup> She may then reply that she did demand her right and put the matter at issue. The demand may be made of the heir at law though he be under age.<sup>22</sup>

#### 8. Tenant's plea.

By 3 Edward I, ch. 49, 1275,<sup>23</sup> in a writ of dower called *unde nihil habet*, the writ shall not abate by the exception of the tenant, because she hath received her dower of another man before her writ purchased unless he can show that she hath received part of her dower of himself and in the same town before the writ purchased. This had reference to an injustice of the common law by which if she received part of her dower from one tenant she was barred from receiving any from another in a different place.<sup>24</sup>

#### 9. Recovery where husband gave up land by covin — Defenses — Proof.

The statute of 13 Edward I, ch. 4, 1285,<sup>25</sup> was passed to remedy a mischief by which women were sought to be barred of their dower by feigned recoveries against their husbands. So, under it, she could have her dower notwithstanding a recovery by covin or default.<sup>26</sup> The important part of the statute is as follows: "In case where the husband, being impleaded for land, giveth up the land demanded unto his adversary by covin; after the death of the husband, the justices shall award the wife her dower, if it be demanded by writ. But in case where the husband loseth the land in demand by default, if the wife, after the death of her husband, demandeth her dower, it hath been proved that some justices have awarded unto the woman her dower, notwithstanding the default

<sup>19</sup> The right to remain in the mansion forty days.

<sup>20</sup> 1 Inst. 34.

<sup>21</sup> 1 Inst. 24.

<sup>22</sup> 2 Bacon's Abr. 150.

<sup>23</sup> Roberts' British Statutes, p. 184.

<sup>24</sup> 2 Inst. 261.

<sup>25</sup> Roberts' British Statutes, p. 185.

<sup>26</sup> 2 Inst. 347, 349.

which her husband made, other justices being of the contrary opinion and judging otherwise. To the intent that from henceforth such ambiguity shall be taken away, it is thus ordained in certain, that in both cases the woman demanding her dower shall be heard. And if it be alleged against her that her husband lost the land, whereof the dower is demanded by judgment, whereby she ought not to have dower, and then it be inquired by what judgment, and it be found that it was by default whereunto the tenant must answer; then it behooveth the tenant to answer further and to show that he had right, and hath in the foresaid land, according to the form of the writ that the tenant before purchased against the husband. And if he can show that the husband of such wife had no right in the lands nor any but he that holdeth them, the tenant shall go quit, and the wife shall recover nothing of her dower; which thing, if he cannot show, the wife shall recover her dower, etc."

#### 10. Bail for stay of execution on error.

Under clause 3 of the act 16 and 17, Charles II, ch. 8, 1664,<sup>27</sup> it is provided that in writs of error to be brought upon any judgment after verdict in any writ of dower or in the action of *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of dower or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued in default of the plaintiff or plaintiffs therein, or that the said plaintiff or plaintiffs be nonsuit in such writs of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum or sums of money as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had."

#### 11. Form of præcipe

Sara Somers	}	In the Court of Common Pleas of Luzerne County.
v.		
Jacob Guise.		

Issue writ of dower *unde nihil habet* in above entitled action, commanding Jacob Guise that justly and without delay he render to Sara Somers, widow, who was the lawful wife of John Somers, her reasonable dower which falleth to her out of the free-hold which was of the said John Somers, late her husband, in the city of Wilkes-Barre, County of Luzerne and state of Pennsylvania, whereof she has nothing as she says. Returnable, etc.

Edward Moore,  
Attorney for demandant.

To — — —, Esq.  
Prothonotary.

<sup>27</sup> Roberts' Digest, p. 39. (See section 7, act June 16, 1836, P. L. 762, for a substantial enactment of this law in "any civil action or proceeding," where a writ of error is taken.)

## 12. Form of writ.

Sara Somers } In the Court of Common Pleas of Luzerne County.  
 v. } No. —, — Term, 19—.  
 Jacob Guise. }

[Seal.]

The Commonwealth of Pennsylvania, to the Sheriff of Luzerne County, Greeting:

Command Jacob Guise that justly and without delay he render unto Sara Somers, widow, who was the wife of John Somers, now deceased, the reasonable dower which falleth to her of the freehold which was of the said John Somers, her late husband, in the city of Wilkes-Barre and County of Luzerne, whereof she hath nothing as she says, and whereof she complains that the said Jacob Guise deforces her; and unless he shall do so, and if the said Sara Somers shall give you security for prosecuting her claim with effect, then summon, by good summoners, the aforesaid Jacob Guise that he be and appear before our judges, at Wilkes-Barre in said county at a court there to be holden the — day of —, 19—, to show wherefore he will not. And have you then and there the names of these summoners and this writ.

## 13. Declaration, form.

Parties. } County of Luzerne, ss.  
 } Venue, etc.

Sara Somers, who was the wife of John Somers, deceased, late of Wilkes-Barre in said county, by Edward Moore, her attorney, demands against Jacob Guise the third part of the following described property, to-wit:

[— — — —] with the appurtenances situate in the city of Wilkes-Barre and county of Luzerne, as the dower of the said Sara Somers of the endowment of John Somers, deceased, heretofore her lawful husband, whereof she hath nothing, although demanded, etc.

Edward Moore,  
 Attorney for demandant.

## CHAPTER XII.

### EJECTMENT.

1. Character of the action.
2. Where ejectment will lie.
3. When it will or will not lie.
4. Equitable ejectment.
5. Parties to suit — tenants in common — ouster.
6. Substitution of parties.
7. Form of præcipe for summons.
8. Form of affidavit, with præcipe.
9. Form of summons in ejectment.
10. Tenants in common, minors and landlords as plaintiffs.
11. Sheriff to add names of those found in possession.
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57. Execution of writ.
58. Estrepement and mesne profits.
59. Alias and pluries writs.
60. Title by nonsuit, not conferred.

#### 1. Character of action.

The history and development of the action of ejectment, with its fictions and two verdicts are of no importance in a modern



treatise on practice, since section one of the act of May 8, 1901, P. L. 142, makes one verdict conclusive and a bar, whilst section 2 reduces the practice to the form of statement and answer like an action of assumpsit. Those interested in old forms are referred to the opinion of Ch. J. McKean in *Boyd's Lessee v. Cowan*, 4 Dallas, 138; *Huston on Land Titles*, Troubat & Haly's Pr., vol. 2, Title "Ejectment" and kindred works of the past.

Ejectment is a possessory action,<sup>1</sup> but two-fold in results—to determine the title to the land<sup>2</sup> as well as the right of possession;<sup>3</sup> and as an equitable remedy to enforce the specific performance of a contract, where the purchaser in possession fails to pay, either by setting him out or imposing equitable terms of payment.<sup>4</sup> It was said by Ch. J. Lowrie:<sup>4a</sup> "Ejectment always supposes a wrongful disseisin and makes the title to the possession the test of the wrongfulness."

## 2. Where ejectment will lie.

This chapter has to do with the adverse action of ejectment not the amicable form, which is treated of in Vol. I, p. 316—under Amicable Actions. It is necessary first to consider generally where ejectment is the proper action. At the common law it lay only for corporeal hereditaments, such as might be delivered by the sheriff under a writ of *habere facias possessionem*.<sup>5</sup> Consequently it would not lie for a ground rent reserved upon conveyance in fee;<sup>6</sup> nor for a strip of land covered by a party wall which is a mere easement.<sup>7</sup> But a person entitled to possession under an oil lease may maintain it;<sup>8</sup> as also a landlord against his tenant,<sup>10</sup> when the lease has expired,<sup>11</sup> whether or not he has given the three months' notice required to give a justice jurisdiction,<sup>12</sup> when the lease is for a definite period.

It has been held to lie against a railroad company when it enters without first paying or giving bond for the damages.<sup>13</sup> One who owns a mining right may maintain it.<sup>14</sup> It was held that the mortgagee may bring ejectment on his mortgage,<sup>15</sup> the remedy by *sci. fa.* not excluding it. So also, may the assignee of a mortgagee's

<sup>1</sup> *Osborn v. Osborn*, 11 S. & R. 55.

<sup>2</sup> *Morris v. Vanderen*, 1 Dallas, 64.

<sup>3</sup> *Cooper v. Smith*, 9 S. & R. 26.

<sup>4</sup> *Gause v. Wiley*, 4 S. & R. 509-28.

<sup>4a</sup> *Heffner v. Betz*, 32 Pa. 376.

<sup>5</sup> *Black's Lessee v. Hepburne*, 2 Yeates, 331.

<sup>6</sup> *Kenege v. Elliott*, 9 Watts, 258.

<sup>7</sup> *Robinson v. Gannis*, 2 W. N. C. 224.

<sup>8</sup> *Karns v. Tanner*, 66 Pa. 297.

<sup>10</sup> *Alden v. Lee*, 1 Yeates, 160.

<sup>11</sup> *Stoffit v. Troxell*, 8 W. & S. 340.

<sup>12</sup> *Evans v. Hastings*, 9 Pa. 273.

<sup>13</sup> *McClinton v. R. Co.*, 66 Pa. 404.

<sup>14</sup> *Turner v. Reynolds*, 23 Pa. 199.

<sup>15</sup> *Martin v. Jackson*, 27 Pa. 504; *Youngman v. Elmira R. Co.*, 65 Pa. 278; *Fluck v. Replogle*, 13 Pa. 406; *Smith v. Shuler*, 12 S. & R. 240. (See P. & L. Dig., vol. 5, col. 7447.)

administrator,<sup>16</sup> and the heirs of a surviving trustee,<sup>17</sup> which suits may be brought in their own names since the record need not set out in what right they sue.<sup>18</sup>

Ejectment will not lie by one for land in his own possession;<sup>19</sup> nor can it be made a substitute for timber trespass, plaintiff being in possession;<sup>20</sup> nor to cover anything but real estate; e. g., engines, cars, tracks, etc., about a mine cannot be embraced.<sup>20a</sup>

A widow cannot maintain it for her dower or interest under the intestate's law;<sup>21</sup> nor can she join with the heirs for her interest.<sup>22</sup> Her remedy is fixed by the acts of March 31, 1823, 8 Sm. L. 141, and the act of 1834, or by writ of dower;<sup>23</sup> or by the act of April 28, 1899, P. L. 120, providing for the collection of dower. The lessee of oil has only an incorporeal hereditament and if he never has had possession, cannot maintain ejectment although oil has been found.<sup>24</sup>

### 3. When ejectment will or will not lie.

The general principles have been stated above, but some particular applications are here given, as found in recent adjudications. Those who wish all the cases must refer to Pepper & Lewis' Digest of Decisions, vol. 5, and the Cross-Reference Annuals thereto.

The possession of the ancestor and heirs is sufficient to enable the plaintiff to maintain ejectment against an intruder.<sup>25</sup> Where the will does not work an equitable conversion the heirs may sue.<sup>26</sup> But ejectment will not lie for the proceeds or an interest therein;<sup>27</sup> nor to enforce a contract which is the consideration of a deed of conveyance.<sup>28</sup>

It was held that the trustees who hold the legal title for the *cestui que trust*, alone can maintain it.<sup>29</sup> The interest of a beneficiary under a trust deed working conversion for distribution is not subject to a lien of a judgment and the purchaser at sheriff's sale has no title for which he can maintain ejectment.<sup>30</sup> Where one buys land sold under a mortgage made prior to the location of a railroad under eminent domain, he takes it subject to the easement

<sup>16</sup> Simpson v. Ammons, 1 Binney, 175; McCall v. Lenox, 9 S. & R. 302.

<sup>17</sup> Crunkleton v. Evert, 3 Yeates, 570.

<sup>18</sup> Cooper v. Henderson, 6 Binney, 189.

<sup>19</sup> Kribbs v. Downing, 25 Pa. 399.

<sup>20</sup> Corley v. Pentz, 76 Pa. 57; Narehood v. Wilhelm, 69 Pa. 64; Becker v. Lebanon, Etc., R. Co., 195 Pa. 502; 11 Supr. C. 649.

<sup>20a</sup> Keystone Coal Co. v. Williams, 216 Pa. 217.

<sup>21</sup> Pringle v. Gaw, 5 S. & R. 536; Bratton v. Mitchell, 7 Watts, 113; Gourley v. Kinley, 66 Pa. 270.

<sup>22</sup> Hinckle v. Riffert, 6 Pa. 196.

<sup>23</sup> Strickler v. Sheaffer, 5 Pa. 240; Reed v. Reed, 5 Pa. 241n; Mohler's Ap., 8 Pa. 26.

<sup>24</sup> Kelly v. Keys, 213 Pa. 295.

<sup>25</sup> Beam v. Gardner, 18 Supr. C. 245.

<sup>26</sup> Stevenson v. Scott, 188 Pa. 234.

<sup>27</sup> Silverthorn v. McKinster, 12 Pa. 67.

<sup>28</sup> Adams v. Barrell, 26 Supr. C. 641.

<sup>29</sup> Wallace v. Wallace, 10 Am. L. R. 42.

<sup>30</sup> Sweeney v. Horn, 190 Pa. 237.

and ejectment will not lie against the railroad company.<sup>31</sup> It will not lie to enforce a lien existing when the land was conveyed absolutely.<sup>32</sup>

The owner of the soil subject to an easement, as a turnpike, for example, cannot bring ejectment against a street railroad company for illegal use of the road. His action is trespass.<sup>33</sup> The legal title although held in trust only, or on condition, will support ejectment even against those in possession entitled to the payments, without previous tender. But a *hab. fa.* will not be allowed to issue.<sup>34</sup> The illegal entry of land to cut timber is a trespass and ejectment is not the remedy.<sup>35</sup> Where the defendant is in possession under color of title, plaintiff cannot recover under a defective judgment; nor where he claims under a deed which is doubtful and it is shown on the trial that he acquiesced in the title and right of possession of defendant under an oil lease.<sup>37</sup> Where a tenant in common participated in the distribution at a sheriff's sale and failed to appeal from the final decree, he is concluded and cannot bring ejectment for his interest.<sup>38</sup> An action against a railroad company is not barred by a suit in trespass where the verdict was set aside.<sup>39</sup> Title to land cannot be tested by proceeding for a pluries writ of *hab. fa. pos.* under act of February 1, 1834, P. L. 26. The alias and pluries writs are to protect the plaintiff in his possession from re-entry or intrusion.<sup>40</sup>

#### 4. Equitable ejectment.

What is known in practice as equitable ejectment is practically a bill in equity,<sup>41</sup> and a petition for specific performance of a contract follows the principles of equity practice,<sup>42</sup> for which reason a further treatise of this branch is relegated to a succeeding volume.

#### 5. Parties to suit.

The general rule as to parties is that one who has the legal or equitable title must sue the one in possession; but the owner of the legal title cannot sue the equitable owner,<sup>43</sup> and this title must be in him when the writ issues;<sup>44</sup> although it be brought in the name of a warrantee without any beneficial interest in the land sued for.<sup>45</sup> It has been held that an heir may sue for land of

<sup>31</sup> Mack v. Eastern, Etc., R. Co., 10 D. R. 102.

<sup>32</sup> Adams v. Barrell, 26 Supr. C. 641.

<sup>33</sup> Becker v. Lebanon, Etc., R. Co., 195 Pa. 502; 11 Supr. C. 649.

<sup>34</sup> Howard v. Murray, 203 Pa. 464.

<sup>35</sup> Pentz v. Corley, 4 Walker, 368; Corley v. Pentz, 76 Pa. 57.

<sup>36</sup> Kountz v. Natl. Transit Co., 197 Pa. 398.

<sup>37</sup> Kennedy v. Forest Oil Co., 199 Pa. 644.

<sup>38</sup> Bowman v. Hoke, 30 Supr. C. 633.

<sup>39</sup> Mannerback v. Penna. R. Co., 16 Supr. C. 622.

<sup>40</sup> Phila. v. Hood, 3 Supr. C. 373.

<sup>41</sup> Peebles v. Reading, 8 S. & R. 491; Marlin v. Willink, 7 S. & R. 297; Muse v. Letterman, 13 S. & R. 171.

<sup>42</sup> Deitzler v. Mishler, 37 Pa. 82.

<sup>43</sup> Brolaskey v. McClain, 61 Pa. 146.

<sup>44</sup> Lawrence v. Hunter, 9 Watts, 64.

<sup>45</sup> Campbell v. Galbreath, 1 Watts, 70; Ross v. Barker, 5 Watts, 391.

which his ancestor died seised, but in the possession of another,<sup>46</sup> and the heir of a surviving trustee may sue for the land when not claiming adversely to the *cestui que trust*,<sup>47</sup> who may himself sue in his own name for land in possession of his trustee or another;<sup>48</sup> and in case of a dry trust, he may sue his trustee without a previous demand; but the trustee may relieve himself of costs by filing a disclaimer.<sup>49</sup>

Minors must sue by their guardians. The act of April 13, 1807, 4 Sm. L. 476, provided that all persons having an undivided interest in land whether as joint tenants, coparceners or tenants in common, may join and recover according to their interest and title. As to joint tenants it was held obligatory to join as they held *per my et per tout*.<sup>50</sup> But joint tenancy was abolished soon after (1812), except as to trust estates, and coparcenary titles are extinct in Pennsylvania. The act remains as to tenants in common, and it has been held that where there is an actual ouster a tenant in common may maintain ejectment against the grantee of his co-tenant.<sup>51</sup> Since the question of the right to action, in ejectment as well as trespass, by one tenant in common against the lessee or grantee of his co-tenant, is one of ouster it may be well to pause here, and briefly note what constitutes an ouster. At the common law one tenant in common could not be disseised by preventing him from taking the profits. Nothing short of an adverse, exclusive perception of profits for twenty-one years was sufficient to authorize the presumption of ouster or disseisin;<sup>52</sup> and where not originally hostile, the period is 38 years.<sup>53</sup> It is evidence of ouster if a tenant in common make public sale of his co-tenant's estate and purchases it.<sup>54</sup> One co-tenant may have ejectment against another co-tenant in case of actual disseisin or what amounts to it, as turning him out, or confession of lease, entry and ouster.<sup>55</sup> It was held that one co-tenant cannot bring an action for mesne profits against his co-tenant.<sup>56</sup> But a judgment in ejectment establishes the ouster.<sup>57</sup> An ouster, however, does not arise from a mere denial of title.<sup>58</sup> An action at law will lie where there has been an ouster, as where the property has been destroyed.<sup>59</sup> Courts only differ as to what is an ouster and what a mere trespass to the common right. In England it was held that the taking and carry-

<sup>46</sup> Webster v. Webster, 53 Pa. 161; Stevenson v. Scott, 188 Pa. 234.

<sup>47</sup> Crunkleton v. Evert, 3 Yeates, 570.

<sup>48</sup> Kennedy v. Fury, 1 Dallas, 72; Presbyterian Congn. v. Johnston, 1 W. & S. 9. (But see Wallace v. Wallace, 10 Am. Law Reg. 42.)

<sup>49</sup> Caldwell v. Lowden, 3 Brewster, 63.

<sup>50</sup> Milne v. Cummings, 4 Yeates, 577.

<sup>51</sup> Cumberland V. R. Co. v. McLanahan, 59 Pa. 23.

<sup>52</sup> Galbraith v. Galbraith, 5 Watts, 146.

<sup>53</sup> Nichol v. McFarlane, 3 Watts, 165; Gause v. Wiley, 4 S. & R. 508; upwards of 30 years.

<sup>54</sup> Lodge v. Patterson, 3 Watts, 74.

<sup>55</sup> Oates v. Brydon, 3 Burrow, 1895.

<sup>56</sup> Hare v. Furey, 3 Yeates, 13; Bennett v. Bullock, 35 Pa. 364.

<sup>57</sup> Walker v. Humbert, 55 Pa. 407.

<sup>58</sup> Filbert v. Hoff, 42 Pa. 97.

<sup>59</sup> McGill v. Ash, 7 Pa. 397; Trauger v. Sassaman, 14 Pa. 514.

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ing away of turf is such a destruction of the soil as is equivalent to an ouster.<sup>60</sup> Since the seisin of a tenant in common is not joint he may bring ejectment in his own name for his interest.<sup>61</sup>

The act of June 24, 1895, P. L. 237, gives the right to a tenant in common, out of possession, to sue one in possession. It is as follows:

"That in all cases in which any real estate is now or shall be hereafter held by two or more tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common not in possession, to sue for and recover from such tenants in common in possession, his or their proportionate part of the rental value of said real estate for the time such real estate shall have been in possession as aforesaid; and in case of partition of such real estate held in common as aforesaid the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their co-tenant or tenants are entitled."

A plaintiff in an amicable ejectment who thinks he has not been properly named should ask leave to amend, and not bring a new suit.<sup>61a</sup> Amendment as to parties will be allowed.<sup>61b</sup>

Under the act of April 9, 1849 (section 5), P. L. 526, the executors of their testator may bring ejectment in their names to enforce payment of the purchase money.

The person in actual possession is the one to make defendant, regardless of the kind of estate he claims.<sup>62</sup> However, for lands purchased at tax sale the purchaser may be sued although he never saw the land, and he may be served by publication, if a non-resident.<sup>63</sup> Unless a defendant is served a judgment against him will not stand.<sup>64</sup>

Several who hold distinct portions by different titles may be joined as defendants and each may defend his own right.<sup>65</sup>

## 6. Substitution of parties.

Since the action does not abate, the immediate successor or the person next in interest may be substituted and compelled to appear;<sup>66</sup> as, for a trustee, his devisees,<sup>67</sup> the plaintiff, his residuary devisees;<sup>68</sup> or in case of a pauper, the overseers of the poor.<sup>69</sup>

On sale or assignment after suit, the purchaser may be substituted

<sup>60</sup> *Wilkinson v. Haggarth*, 12 Q. B. 845.

<sup>61</sup> *Mobley v. Bruner*, 59 Pa. 481.

<sup>61a</sup> *Gilmer v. De Caro*, 13 D. R. 173.

<sup>61b</sup> *O'Neill v. Pollock*, 14 Luz. L. R. 149, following *Leeds v. Lockwood*, 34 Pa. 70; P. & L. Dig., vol. 5, cols. 7802-8.

<sup>62</sup> *Losee v. McFarland*, 86 Pa. 33.

<sup>63</sup> Section 4, act March 29, 1824, 8 Sm. L. 291.

<sup>64</sup> *Young v. Algeo*, 3 Watts, 223.

<sup>65</sup> *White v. Pickering*, 12 S. & R. 435; *Jones v. Hartley*, 3 Wharton, 178; *Wilson v. Guthrie*, 2 Grant, 111.

<sup>66</sup> *Darnes v. Welsh*, 7 S. & R. 202.

<sup>67</sup> *Hunt v. Crawford*, 3 P. & W. 42C.

<sup>68</sup> *Robb v. Simpson*, 2 W. N. C. 68.

<sup>69</sup> *Jester v. Overseers of Jefferson*, 11 Pa. 540.

under section 4 of act of April 26, 1850, P. L. 591, but the original plaintiff cannot be supplanted if he is unwilling.<sup>70</sup> Where a co-plaintiff buys the title of another, he is within the act. But he cannot recover any interest subsequently acquired to the date of the action.<sup>71</sup>

#### 7. Form of præcipe for summons in ejectment.

William L. Thomas, Plff., } In the Court of Common Pleas of  
v. } Lackawanna County.  
Michael McDonough, Deft. } No. 247, March T. 1909.

Issue summons in ejectment against the defendant to answer the complaint of the plaintiff that the defendant now has actual possession of a messuage or tract of land situate in the city of Scranton, county of Lackawanna and state of Pennsylvania, which is bounded and described as follows, to-wit: [Here describe the same by metes and bounds definitely.] Containing — more or less, with the appurtenances, the right of possession or title to which the plaintiff says is in him and not in the defendant. Returnable to next term.

George D. Taylor,  
Attorney for plaintiff.

Dated January 26, 1909.  
To Willard M. Bunnell, Esq.,  
Prothonotary.

#### 8. Form of affidavit accompanying the præcipe.

County of Lackawanna, ss.

William L. Thomas, being duly sworn according to law deposes and says that, to the best of his knowledge, information and belief, after due inquiry in the neighborhood of the tract of land involved in this action, Michael McDonough, the defendant named in the præcipe is the only claimant of said tract besides himself the said plaintiff, who claims that he is the true owner thereof.

Sworn to, etc.

William L. Thomas.

#### 9. Form of summons in ejectment.

This is the form provided by the act of 1806:

Lackawanna County, ss.

The Commonwealth of Pennsylvania, to the sheriff of said county, Greeting:

You are hereby commanded that you summon Michael McDonough, defendant, to appear before the judges of the Court of Common Pleas, in and for said county, to be holden in Scranton, on the third Monday of March, next, then and there to answer a certain complaint made by William L. Thomas, plaintiff, that he the said defendant now has in his actual possession a tract of land situate in the city of Scranton in said county, containing — acres, or thereabouts, bounded: [following description in præcipe], the right of possession or title to which he the said plaintiff says is in him

<sup>70</sup> Longbine v. Piper, 70 Pa. 378.

<sup>71</sup> Alden v. Grove, 18 Pa. 377; Schrack v. Zubler, 34 Pa. 38.

and not in the said defendant, all of which the said plaintiff avers he is prepared to prove before our said court. Hereof fail not.

Witness the Hon. H. M. Edwards, President Judge of our said court, at Scranton, the 26th day of January, A. D. 1909.

[Seal]

Willard M. Bunnell,  
Prothonotary.

**10. Tenants in common, minors and landlords, as plaintiffs.**

Section 1, April 13, 1807, 4 Sm. 476, provides:

"The writ of ejectment prescribed in the act to which this is a supplement shall issue in all cases where lands, tenements or hereditaments are claimed, and give remedy as fully and effectually as in ejectments in the form heretofore used; and all parties having an undivided interest in any such lands, tenements and hereditaments, whether as joint tenants, copartners or tenants in common, may join therein and recover according to their interest and title; and minors may sue by their guardians as in other cases; and the defendant may defend upon his own title or the title of third persons; and the landlord may, as heretofore, be admitted as defendant, and in such case, on the trial, shall admit himself in possession."

**11. Sheriff to add names of those in possession.**

Section 2 of the act of 1807, *supra*, provides:

"Where any writ of ejectment shall be issued, and on the service thereof it shall appear to the sheriff that other persons not named in the writ are in possession of the premises or part thereof, such sheriff shall add the name of such person or persons to such writ, and serve the same, and on return thereof, the prothonotary shall enter such additional defendants to the action, and they shall be parties thereto; and in case of any of the defendants not appearing, on motion to the court, and on affidavit of the sheriff or other officer, having served the said writ, stating the manner in which the said service was made, and on the same being deemed by the court a service agreeably to law, judgment may be entered by default for such part as he is possessed of, and a writ of possession may issue upon such judgment, and the action may proceed to trial for the residue against the other defendant or defendants; and the return by the sheriff of having served any such writ on the defendants marked served by him, shall be evidence of such defendant or defendants being in actual possession of the premises or part thereof."

**12. Service of writ — Act 1901.**

Clause tenth of the act of July 9, 1901, P. L. 614, as amended April 23, 1903, P. L. 261, provides:

"The plaintiff in any writ of ejectment, in any writ of summons to recover money upon a ground-rent deed, or to recover any sum charged upon real property by will or deed, in any writ of *scire facias sur mortgage*, or in any writ to charge particular land with the payment of a particular debt running with the land, or some person on his behalf, shall file with his *præcipe* an affidavit, setting forth, to the best of his knowledge, information and belief, who are the real owners of the land charged, or in the action of eject-

ment are claimants thereof, as the case may be; and all such persons shall be made parties to the writ, which shall then be served as follows:

(a) By adding to the writ and serving, as in the case of a summons, all persons other than those named in the writ, who may be found in possession of said land or any part thereof; or if no one be found in possession of said land or any part thereof; or if no one be found in possession thereof, then by posting a true and attested copy of the writ on the most public part of said property; and,

(b) By serving, as in the case of a summons, such of those named in the writ as may be found in the county in which the writ issues; and,

(c) By serving, as in the case of a summons, such of those named in the writ as may be found in any other county of the commonwealth, by the sheriff thereof, who shall be deputized for that purpose by the sheriff of the county in which the writ issues, and

(d) By mailing a true and attested copy of the writ, in a registered letter, to such of those named in the writ as cannot be served within the commonwealth.

But if the plaintiff or some person in his behalf in an affidavit filed shall aver that he does not know, and has not been able to ascertain the owners or the claimants of the property, or their addresses, or the names and addresses of some of them, then service upon the persons in possession of the property, or posting in default thereof, and service as above set forth upon those who can be served, and two returns of *nihil habet* as to the rest of those named in the writ, shall constitute a full service of such writ."

*Provided*, However, that nothing herein contained shall in any wise alter or affect the practice and manner of service upon the original covenantor, provided by the first section of the act approved April 8th, 1840, nor shall anything herein contained in anywise alter or affect the ancient practice of service upon the original mortgagor by two returns of *nihil habet*."

This act, as amended, has been held not to change the manner of personal service fixed by section 2 of the act of June 13, 1836, P. L. 568. Service upon minors in real actions is regulated by the act of 1836.<sup>72</sup> The affidavit is necessary to take judgment on two returns of *nihil*<sup>73</sup> and a sheriff's return will not be permitted to be amended where this is wanting.<sup>74</sup> The sheriff's return should show that the parties served were either served as defendants or as persons he found in possession.<sup>75</sup> The act of April 20, 1905, P. L. 233, validated titles affected by failure to comply with the act of 1901, *supra*.

After defendants were served and pleaded to the general issue they could not object to the filing of the affidavit required above. *nunc pro tunc*.<sup>76</sup> The requirement to make parties defendant is mandatory and the summons will not be bad on demurrer because

<sup>72</sup> Lyons v. Mann, 14 D. R. 104. (See vol. 1, Summons, Actions Real.)

<sup>73</sup> Monges v. Marcus, 14 D. R. 367.

<sup>74</sup> West, Etc., Assn. v. Dunn, 16 D. R. 652.

<sup>75</sup> Kaufhold v. Burke, 5 Lack. Jur. 223.

<sup>76</sup> King v. Grannis, 29 Supr. C. 367; Colture v. Bertholf, 15 D. R. 422.



of misjoinder.<sup>77</sup> Where service is made by mailing by registered letter the return should so specify and not be "*nihil habet*."<sup>78</sup> One of the defendants being a citizen of Pennsylvania and the other of another state the cause cannot be removed to the U. S. Circuit Court on the ground of diverse citizenship, because the Pennsylvania defendant served as required by the act of 1901, files a disclaimer,<sup>79</sup> the question of costs and *mesne* profits being for the state court to determine.<sup>80</sup> An acceptance of service by the owner and party in possession has been held good. The prothonotary must enter the name of the additional party returned served, upon the record.<sup>81</sup>

The sheriff's return must be sworn to in order to be presumptive evidence of possession.<sup>82</sup> It was held to be harmless error where the sheriff's return was read in evidence on the trial<sup>83</sup> if error at all.

### 13. Service on non-resident of county.

Section 1, act of April 18, 1853, P. L. 467, provides:

"Any person wishing to bring ejectment for land claimed adversely to him by any person or corporation not resident or being within the county where such land lies, may bring his action and serve the writ on any person within the county, having charge or superintendence of the land in behalf of or as agent of such party claiming adversely; *Provided*, That before any trial or judgment shall be had in such suit, it shall be made to appear to the satisfaction of the court, that the defendant has had notice in fact of the suit, in time to appear and defend it, and if the defendant be a corporation, this notice may be given to the president or other chief officer of it."

The act of April 13, 1858, P. L. 256, extends the above so as to apply where "claimants and mortgagees may desire to bring actions of ejectment for any unseated or unoccupied lands, whenever the adverse claimant or mortgagor does not reside in the county where such lands are situate and has no known agent or person having the charge or superintendence of said lands, resident within said county." This requires actual notice.<sup>1</sup> Such actual notice cannot be proved where the record does not show service upon defendant's agent or employee in actual charge or superintendence of the land described in the writ.<sup>2</sup>

### 14. Service in action for specific performance.

Section 11, April 14, 1851, P. L. 614, provides:

"Any action of ejectment hereafter to be brought by a vendor to enforce the specific performance of the agreement against the vendee

<sup>77</sup> Jarden v. McMahon, 30 C. C. 544.

<sup>78</sup> Brennen v. Redfern, 11 D. R. 248.

<sup>79</sup> Davies v. Welles, 14 D. R. 209.

<sup>80</sup> Bratton v. Mitchell, 5 Watts, 69; Zeigler v. Fisher, 3 Pa. 365.

<sup>81</sup> Marshall v. Forest Oil Co., 198 Pa. 83.

<sup>82</sup> Stahr v. Brown, 6 Northam. 206.

<sup>83</sup> Wilcox v. Snyder, 22 Supr. C. 451.

<sup>1</sup> Haslett v. Foster, 46 Pa. 471.

<sup>2</sup> Page v. Simpson, 172 Pa. 288. (See this case for the purpose of offering defendant's abstract of title, by the plaintiff.)

or vendees or persons claiming under him or them, for land upon which there is no person residing, the writ may be served on the vendee or vendees, or persons claiming under them, and if such vendee or person claiming as aforesaid cannot be found by the sheriff of the proper county, then and in that case the court, after the return-day of the writ, may, on motion of the plaintiff or his attorney, grant a rule on the defendant (describing the premises) to appear and plead, which rule shall be published, sixty days before the return-day thereof, in one newspaper of the county in which such action is brought, to be inserted at least three times; and if no proper person shall appear to defend against the said action, the court, on proof of such publication, shall, on motion in open court, at the stated term, give judgment by default; but in case the vendee or purchaser or person claiming under him shall appear, the court shall cause the person, or his legal representatives, so claiming under the vendee or purchaser, to be made defendant, and the cause shall be proceeded in and tried with the same effect as if there were an actual occupation of the land and regular service on the defendant."

#### 15. Service in case of unseated lands and pleading.

Section 4, March 29, 1824, 8 Sm. 291, provides:

"Any person wishing to bring an ejectment for land on which no person resides, and which lands have been sold for taxes, may bring his action and serve the writ on the person who purchased the said lands; and if such person cannot be found in the proper county, then the court, after the return-day of the writ, may, on motion of the plaintiff or his attorney, grant a rule on the defendant, describing the premises, to appear and plead, which rule shall be published for sixty days successively, before the return-day thereof, in a weekly or daily newspaper of the proper county; and if no person appears, then the court, on proof of the publication, shall, on motion, in open court, at the stated term, give judgment by default; but when the purchaser appears, or some person claiming under him, the court shall cause the person or his legal representative, so claiming under the purchaser, to be made defendant, and the cause shall be proceeded in and tried on the respective titles of the parties, as fully as if there was an actual occupation of the land."

A plaintiff who sues for vacant land sold for taxes who does not comply with the above act is not entitled to invoke it.<sup>3</sup> The affidavit to the return of service by publication is only necessary in moving for want of an appearance.<sup>4</sup> Judgment by default can only be entered after affidavit of service by the sheriff, and this applies to all the defendants.<sup>5</sup> Where service is made in another county for the recovery of unseated land in constructive possession only the acts of 1807, April 14, 1851, P. L. 612, and April 13, 1858, P. L. 256, need be followed.<sup>6</sup>

<sup>3</sup> *Kreamer v. Voneida*, 213 Pa. 74.

<sup>4</sup> *Wolf v. Moyer*, 21 C. C. 624.

<sup>5</sup> *Tomer v. McFarland*, 13 D. R. 758.

<sup>6</sup> *Kreamer v. Voneida*, 213 Pa. 74.

**16. Provisions of Act of 1851, extended to unseated lands.**

Section 1, June 26, 1895, P. L. 345, provides:

"The provisions of the eleventh section of the act passed the fourteenth day of April, one thousand eight hundred and fifty-one, relative to the service of writs in certain actions of ejectment, shall hereafter extend to all cases where claimants and mortgagees may desire to bring actions of ejectment for any unseated or unoccupied lands within this commonwealth, whenever the adverse claimant or mortgagor does not reside in the county where such lands are situate, and has no known agent or person having the charge or superintendence of said lands resident within said county: *Provided*, That before any trial or ejectment shall be had in such suit it shall be made to appear to the satisfaction of the court that the defendant has had notice in fact of the suit in time to appear and defend it, and if the defendant be a corporation this notice may be given to the president or other chief officers thereof; *Provided*, That this supplement shall not apply to actions of equitable ejectment against vendees to enforce specific performance of agreements for the sale of land."

**17. Tenants to notify landlords.**

Section 8, March 21, 1772, 1 Sm. Laws, page 372, provides:

"Every tenant to whom any (declaration in) ejectment shall be delivered for any lands, tenements or hereditaments, within this province, shall forthwith give notice thereof to his or her landlord or landlords, or his, her or their bailiff, receiver, agent or attorney, under penalty of forfeiting the value of two years' rent of the premises so demised or holden in the possession of such tenant, to the person of whom he or she holds; to be recovered by action of debt to be brought in any of the Courts of Common Pleas within this province, wherein no *essoins*, protection or wager of law, shall be allowed, nor any more than one imparlance."

**18. Landlords to be added as parties defendant.**

Section 9. It shall and may be lawful for the court where such ejectment shall be brought, to suffer the landlord or landlords to make him, her or themselves defendant or defendants, by joining with the tenant or tenants, to whom such declaration in ejectment shall be delivered, in case he or they shall appear, but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed (against the casual ejector), for want of such appearance; but if the landlord or landlords of any part of the lands, tenements or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves (and consent to enter into the like rule, that by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done), then the court, where such ejectment shall be brought, shall and may permit such landlord so to do, and order a stay of execution upon such judgment (against the casual ejector) until they shall make further order therein.

See Act 1905  
P.L. 889.

### 19. Declaration and answer — Issue.

Section 2 of the act of May 8, 1901, P. L. 142, provides a new method of pleading in this action, but without repealing any of the former laws not in conflict with it. It is as follows:

"Section 2. In all actions of ejectment hereafter to be brought, the plaintiff shall file a declaration; which shall consist of a concise statement of his cause of action, with an abstract of the title under which he claims the land in dispute, and in addition to the plea of "not guilty," now required by law, the defendant shall file an answer in the nature of a special plea, in which he shall set forth his grounds of defence, with an abstract of the title by which he claims; and no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed, nor shall any evidence be received on the trial of said action of any matter not appearing in the pleadings, subject to the power of amendment. The several courts of this commonwealth shall have power, by general rule or special order, to fix the time within which the defendant shall file his abstract of title."

The defendant's possession must be averred in the statement.<sup>7</sup> Where plaintiff claims under an alleged trust he must set out all the facts which constitute it.<sup>8</sup> If he claims under a sale by the county commissioners, he must aver their right to make such sale.<sup>9</sup> He will also be held to his description of the land as bounded by certain warrant and survey.<sup>10</sup> Unless the defendant is a mere trespasser, a single conveyance intermediate and not linked to a chain of title out of the commonwealth, is insufficient to maintain the action.<sup>11</sup> But long continued claim of title and acts of ownership, without adverse possession will supply a missing link.<sup>12</sup> The tenant need only show title from his landlord and possession under the lease.<sup>13</sup> One who sues in a certain right cannot claim by an inconsistent title which is an empty one.<sup>14</sup>

• Abandonment of property appropriated to public use is well-pleaded when the statement avers abandonment of intention to use it for public purposes.<sup>15</sup> Judgment by default cannot be taken for want of an appearance under the act of 1901, *supra*, when the plaintiff has not filed his statement before the return day.<sup>16</sup>

### 20. Form of declaration in ejectment.

Mary Thornton } In the Court of Common Pleas of Lackawanna  
v. } County.  
Benjamin Levy. } No. 140.

Sept. T., 1907.

Mary Thornton, the plaintiff, in an action of ejectment in the

<sup>7</sup> Snyder v. Pettebone, 16 D. R. 778.

<sup>8</sup> Barber v. Barber, 8 Lack. Jur. 321.

<sup>9</sup> Snyder v. Pettebone, *supra*.

<sup>10</sup> Updegraff v. Snyder, 36 Supr. C. 30.

<sup>11</sup> Crist v. Boust, 26 Supr. C. 543; P. & L. Dig., vol. 5, col. 7467.

<sup>12</sup> Hastings v. Wagner, 7 W. & S. 215.

<sup>13</sup> Watson v. Hue, 9 D. R. 519.

<sup>14</sup> Hilliard v. Connelly, 21 Supr. C. 271; P. & L. Dig., vol. 5, col. 7559.

<sup>15</sup> Carr v. Phila., 212 Pa. 123.

<sup>16</sup> Lorenz v. Berry, 207 Pa. 296; P. & L. Dig., vol. 5, col. 7688.

Court of Common Pleas of the County of Lackawanna, and State of Pennsylvania, by her heretofore commenced against Benjamin Levy the defendant, by her attorney, George D. Taylor, Esq., hereby declares and states the cause of said action of ejectment to be that the said defendant unjustly, wrongfully and unlawfully uses and occupies and is in possession of a certain parcel of land, to which the said plaintiff is lawfully entitled in fee simple and of which she ought of right to be peaceably possessed; and the said parcel of land is situated and lies in the city of Scranton, County of Lackawanna and State of Pennsylvania, and is bounded and described as follows, to-wit: [Describe fully, as in præcipe and writ]: and the plaintiff to this statement has appended and herewith files an abstract of the title under which she claims the land in dispute in this case, viz.: the one hundred and forty-four (144) square feet of land above described or intended so to be.

And the plaintiff declares and states that the defendant unlawfully and wrongfully holds, uses and occupies, and during a long time has so held, used and occupied the land aforesaid, and unlawfully and wrongfully prevents and during a long time has so prevented the plaintiff from enjoying, using or occupying the same or any part thereof, and therefore she has commenced against him this action of ejectment, for the purpose of recovering from him the possession of the land aforesaid.

Mary Thornton.

By her attorney,

George D. Taylor.

Date, May 16, 1907.

## 21. Form of abstract of title.

[Title of case.]

A brief extract of the title of Mary Thornton, to the land described in the writ of ejectment and the plaintiff's declaration in the above stated case:

1. On the 21st day of January, 1804, Thomas Cooper and John M. Taylor as commissioners, duly appointed for putting in execution the act of the general assembly of the State of Pennsylvania entitled "An act for offering compensation to the Pennsylvania claimants of certain lands within the seventeen townships of the County of Luzerne, and for other purposes therein mentioned," passed the 4th day of April, 1799, and the several supplements thereto, did certify to the surveyor general of the Commonwealth of Pennsylvania that Ebenezer Slocum and Benjamin Slocum, tenants in common, were the owners as "Connecticut claimants" of three hundred and eighty-two acres and forty-one perches of land in the township of Providence, one of the above mentioned seventeen townships, being numbered thirty-seven in that township, etc. [further describing the same, and thence bringing the chain of title down through successive conveyances to the plaintiff].

[Signed] Mary Thornton.

By her attorney,

George D. Taylor.

Certified from the records this

16th day of May, A. D. 1907

W. M. Bunnel, Prothonotary.

It will be noticed the fixing of the time of filing an abstract of title is left to the rules of court. The plaintiff's statement and abstract may be filed after the return day by leave of court.<sup>1</sup> His abstract need only show chain of title, the description of the property being contained in the declaration.<sup>2</sup> Where a rule of court, as in Luzerne County, requires a reference to the record and a concise statement of all matters resting in parol, it must be followed.<sup>3</sup> As to tenants in common, the abstract is fatally defective which does not aver title out of the commonwealth and show how the common grantor obtained title, or that defendants were in possession, or an ouster, or facts tantamount to an ouster, and *non pros.* will be entered, on a rule.<sup>4</sup> A lease offered to rebut the defendant's claim of right by adverse possession need not be set out in the plaintiff's abstract.<sup>5</sup> After verdict and judgment it is too late to object to an omission in the abstract.<sup>6</sup> Judgment for want of an abstract under a rule of court cannot be stricken off, but it may be opened, when counsel had agreed to give defendant more time and then took "snap judgment."<sup>7</sup> To take judgment thus, plaintiff's abstract must make out a *prima facie* title.<sup>8</sup> When plaintiff offers defendant's abstract in evidence showing a common source of title he does so for the sole purpose of showing that defendant recognized such source. This does not relieve defendant from showing how the title came down to him from such source.<sup>9a</sup> If the court allows an amendment of the abstract and the adversary does not plead surprise he will be held to have waived it.<sup>9b</sup>

## 22. Rule in Philadelphia, as to abstracts.

It is provided by section 1 of Rule 17, Philadelphia, that:

"In actions of ejectment each party may enter a rule on the other party to file an abstract of his title to the property in dispute and serve a copy thereof in fifteen days, and at the trial so much of the title shown by the said abstracts as is common to both parties shall be taken as admitted. The abstracts shall be verified by affidavit.

On the failure of the plaintiff to comply with this rule, judgment of *non pros.* may be entered against him, and on the failure of the defendant to comply with this rule, he will not be permitted to offer any evidence."

It has been held that such a rule is enforceable.<sup>9</sup>

## 23. Time to file plea and answer.

Section 2 of Rule 17, Philadelphia, adopted Oct. 4, 1907, provides: "The time within which the defendant in an action of ejectment

<sup>1</sup> Collins v. South, Etc., Co., 15 D. R. 468.

<sup>2</sup> Reading Co. v. Seip, 1 Lehigh Co. 15.

<sup>3</sup> Fuller v. Wilkes-Barre, Etc., R. Co., 12 Luz. L. R. 175.

<sup>4</sup> Hunter v. Rubright, 17 D. R. 188.

<sup>5</sup> Duffy v. Duffy, 20 Supr. C. 25.

<sup>6</sup> Jenkins v. McMichael, 21 Supr. C. 161; 17 Supr. C. 476.

<sup>7</sup> Davidson v. Miller, 204 Pa. 223.

<sup>8</sup> Wirt v. Birtles, 12 Luz. L. R. 45.

<sup>9a</sup> Page v. Simpson, 172 Pa. 288.

<sup>9b</sup> Sweeny v. Horn, 190 Pa. 237.

<sup>9</sup> Lehman v. Howley, 95 Pa. 295; Scott v. Ames, 4 Penny. 475.

shall file a plea and answer setting out an abstract of title as required by the act of assembly of May 8, 1901, P. L. 142, shall be thirty days from the service of a copy of the plaintiff's statement and abstract of title upon him or his attorney of record."

#### 24. Rule as to statement and abstract in Allegheny.

Rule 90, Allegheny County, provides:

"Section 1. In all actions of ejectment hereafter brought it shall be the duty of the plaintiff, either by himself, his agent or attorney, to file in the office of the prothonotary of this court, on or before the first day of the term to which the writ is returnable, a statement containing a description of the land together with the number of acres and the proportion thereof which he claims, and an abstract of the title on which he relies for his recovery whether the same be in writing or otherwise; and where the same is a matter of record, a reference thereto. And the defendant shall plead "not guilty," and enter his defense if any he hath, for the whole or any part thereof, before the next term; and at the time of entering his plea he shall, by himself, his agent or attorney, file a statement containing an abstract of the title or facts on which he relies for his defense, whether the same be in writing or otherwise; and where the same is matter of record, a reference thereto, together with a specification of so much of the plaintiff's title as he denies, and so much thereof as is not denied shall be deemed admitted; and in answer thereto, it shall be the duty of the plaintiff, his agent or attorney, within twenty days after written notice of the filing of such statement by the defendant to file a specification traversing so much of the defendant's title as he denies, and so much thereof as is not denied shall be deemed admitted; the case may then be ordered on the issue docket under the rule; and at the trial the evidence shall be confined to the facts respectively denied by the parties."

Section 2. On failure of the plaintiff to file an abstract and statement as required by the first section of this rule, judgment of *non pros.* shall be entered by the prothonotary on præcipe of defendant's attorney, or the like judgment may be entered on motion in open court.

The failure of the defendant to file the abstract and statement required by this rule shall be deemed a confession of the truth of the facts set forth by the plaintiff and that he has no defense thereto. And thereupon, on motion in open court, the plaintiff shall be entitled to such judgment as may be warranted by the facts set out in the abstract and statement filed by plaintiff."

#### 25. Form of defendant's plea and answer.

William L. Thomas	} In the Court of Common Pleas of Lackawanna County.	
v.		
Michael McDonough.		No. 247.

#### DEFENDANT'S ANSWER.

The defendant in the above case enters a plea of "not guilty," together with the following answer in the nature of a special plea in which is set forth his ground of defense, with an abstract of title

in which the defendant claims the land for which this action of ejectment is brought:

**26. Defendant's abstract of title.**

[Here follows description of the land and claim of title.]

The defendant denies that he unjustly, wrongfully and unlawfully uses and occupies and is in possession of the piece or parcel of land claimed by the plaintiff in this action to-wit: [describing it as in the plaintiff's statement by quantity].

Michael McDonough.

Sworn to, etc.

W. M. Bunnell,

Prothonotary.

Marked filed May 13, 1909.

P. E. Kilcullen, Deft.'s Attorney.

Where the defendant's abstract shows a complete chain of title and the plaintiff's has a missing link, plaintiff cannot recover<sup>10</sup> and when his answer combines an abstract of title with it, a bill of particulars will be refused, because the plaintiff may rule the defendant to file a more specific answer.<sup>11</sup> If there are missing links in a chain, an averment of possession for twenty-one years and upwards, with the payment of all taxes assessed during that time may supply them.<sup>12</sup> A prior outstanding title is a complete defense<sup>13</sup> and defendant may fortify his possession by buying outstanding titles.<sup>14</sup> An amendment of defendant's abstract may be permitted where it omits matters material to the defense.<sup>14a</sup> But if he claims title on 21 years continuous adverse possession and does not mention it in his abstract he cannot offer evidence of it.<sup>14b</sup>

One who holds the complete equitable title must set it up, when in possession, against the action, or he cannot proceed in the Orphans' Court for specific performance.<sup>15</sup> A decree in equity amounting to *res judicata* is a bar to ejectment,<sup>16</sup> but it should be set up in the answer;<sup>17</sup> though it has been held that estoppel may be shown by parol under the plea of "not guilty" which is now a part of the answer.<sup>18</sup> In determining what was adjudicated in the former suit, the court will strip it of all extraneous matter to get at the kernel of the case.<sup>20</sup> But a writ regular on its face will not be quashed because defendant claims *res judicata*.<sup>21</sup> Where the defendants

<sup>10</sup> Crowe v. Morton, 13 Luz. L. R. 305.

<sup>11</sup> Phelan v. B. & O. R. Co., 14 D. R. 634.

<sup>12</sup> Atherton v. Kingston Twp. Trustees, 14 Luz. L. R. 130.

<sup>13</sup> McCormick v. Shelly, 201 Pa. 184; Kreamer v. Voneida, 213 Pa. 74;

<sup>24</sup> Supr. C. 347.

<sup>14</sup> Richardson v. Morris, 26 Supr. C. 192; P. & L. Dig., vol. 5, col. 7519.

<sup>14a</sup> Meade v. Clark, 159 Pa. 159.

<sup>14b</sup> Scott v. Ames, 4 Penny. 475.

<sup>15</sup> Dutton's Est., 208 Pa. 350.

<sup>16</sup> Bruner v. Finley, 217 Pa. 127.

<sup>17</sup> Klick v. Gernert, 220 Pa. 503.

<sup>18</sup> Phillips v. Crist, 33 Supr. C. 445.

<sup>20</sup> Jackson v. Thomson, 215 Pa. 209.

<sup>21</sup> Bruner v. Finley, 211 Pa. 74, explaining Rosenberg v. Mencke, 208 Pa. 331; P. & L. Dig., vol. 5, col. 7617.



plead to issue and file no disclaimer, they admit possession.<sup>22</sup> The defendant's voluntary appearance and pleading puts him in court; but it is still incumbent on the plaintiff to show title and that the defendant was in possession either actual or constructive.<sup>23</sup>

There is no authority to enter judgment for want of a sufficiently specific answer.<sup>24</sup> Nor can judgment be entered for want of an appearance where plaintiff has not filed his statement on or before the return day.<sup>25</sup> Where both abstracts trace title to the common-wealth defendant may prove by surveys that the land is not included in plaintiff's written title.<sup>26</sup>

#### 27. Plaintiff's title, character of.

In ejectment the plaintiff must recover on the strength of his own title and not the weakness of his adversary's.<sup>1</sup> Possession by the defendant gives him a right as against every man who cannot show a good title, unless defendant has by fraud induced the plaintiff to purchase a bad title.<sup>2</sup> Naked possession is sufficient to protect the party as against a trespasser or mere intruder<sup>3</sup> or one who can show no better title than he who has the possession.<sup>4</sup> But a mere possession must also be accompanied with evidence of acts indicating title or purpose to secure title such as improvements and cultivation of the soil.<sup>5</sup>

Since this action is founded on the present right of possession by the plaintiff it will not lie for one who was evicted wrongfully, unless such person can show a present title,<sup>6</sup> or a present right of possession, as a vendee under articles of sale.<sup>7</sup> The title of the plaintiff must be sufficient when he issues his writ; a subsequent acquirement of title is no aid.<sup>8</sup> But as to an intruder, he may fortify his right to possession by a deed from the equitable owner, after suit brought.<sup>9</sup> Where the sheriff has sold the land pending the action and the purchase money has not been paid nor the deed acknowledged, the title of the owner remains at the trial and his right to recover is not affected by the sale.<sup>10</sup> In order to interpose the title of the landlord against a sheriff's sale of the land as the property of the one

<sup>22</sup> Hoig v. Clark, 22 C. C. 552.

<sup>23</sup> Kreamer v. Voneida, 213 Pa. 74.

<sup>24</sup> McCloskey v. O'Hanlan, 35 Supr. C. 95; McCanna v. Johnston, 19 Pa. 434; McIntire v. Wing, 113 Pa. 67.

<sup>25</sup> Lorenz v. Berry, 207 Pa. 296.

<sup>26</sup> Ireland v. Bagaley, 118 Pa. 148.

<sup>1</sup> Walker v. Coulter, Addison, 390; Covert v. Irwin, 3 S. & R. 283; Kennedy v. Sheer, 3 Watts, 95; Miller v. Holman, 1 Grant, 245.

<sup>2</sup> Lane v. Reynard, 2 S. & R. 65.

<sup>3</sup> Lair v. Hunsicker, 28 Pa. 115.

<sup>4</sup> Woods v. Lane, 2 S. & R. 53; Foster v. McDivet, 9 Watts, 341; Hoey v. Furman, 1 Pa. 295; Shumway v. Phillips, 22 Pa. 151; Turner v. Reynolds, 23 Pa. 199; Kline v. Johnston, 24 Pa. 72.

<sup>5</sup> Burke v. Hammond, 76 Pa. 172.

<sup>6</sup> Heffner v. Betz, 32 Pa. 376.

<sup>7</sup> D'Arras v. Keyser, 26 Pa. 249.

<sup>8</sup> McCullogh v. Cowher, 5 W. & S. 427; Alden v. Grove, 18 Pa. 377; Schrack v. Zubler, 34 Pa. 38.

<sup>9</sup> Rockland, Etc., Co. v. McCalmont, 72 Pa. 221.

<sup>10</sup> Storch v. Carr, 28 Pa. 135.

in possession, a tenancy must be proved on the trial.<sup>11</sup> In an ejectment by one who has the legal title it is not necessary, first to tender the defendant the sum due on his equitable claim; whereas, when brought by the owner of the equitable title he must first tender the sum due and keep his tender good to the verdict.<sup>12</sup> But as against a trustee *ex maleficio* no tender is needed.<sup>13</sup>

It was also held that the heirs of a *feme covert* might recover against her vendee on an agreement improperly acknowledged, without first refunding the purchase money.<sup>14</sup>

### 28. Plea to be entered for defendant, when.

Section 1, December 5, 1860, P. L. (1861) 844, provides:

In actions of ejectment, where the defendant or defendants shall have neglected or refused to appear and plead on or before the term next after that to which the original process was made returnable, or having appeared and then withdrawn said appearance, if said process shall have been duly served, the court may direct a plea to be entered for the defendant or defendants, and the case shall proceed to trial and judgment as in other cases: *Provided*, That the writ shall have been so served on the party actually claiming title.

It is not for the plaintiff to enter the plea, but for the court, or to provide by rule how it shall be done.<sup>15a</sup>

### 29. Rule in Allegheny county.

Rule 89, Allegheny County, provides:

"Actions of ejectment where there is an appearance for defendant, may be ordered for trial whether defendant have entered a plea or not; the plaintiff or the prothonotary may enter the plea of 'not guilty' for the defendant at any time."

### 30. Pleas.

Formerly the plea in ejectment was "not guilty" and "*liberum tenementum*." But now there is but the one plea "not guilty"—the general issue. However, under the act of 1901, the defendant is required to set forth in his answer any special matter of which he desires to give evidence in support of his right of possession. So where a rule of court requires the evidence to be confined to the issue in the pleadings, the defendant having failed, cannot shift to a different ground.<sup>15</sup> Under the plea of "not guilty" estoppel may be shown by parol evidence,<sup>16</sup> but objection cannot, be made that plaintiffs are tenants in common.<sup>17</sup> *Res judicata* may also be shown under this plea.<sup>18</sup>

<sup>11</sup> Curry v. Raymond, 28 Pa. 144.

<sup>12</sup> Gore v. Kinney, 10 Watts, 139; Magaw v. Lothrop, 4 W. & S. 316.

<sup>13</sup> Hall v. Vanness, 49 Pa. 457.

<sup>14</sup> Kirk v. Clark, 59 Pa. 479.

<sup>15a</sup> Collins v. Lynch, 10 Kulp, 377.

<sup>15</sup> Wescott v. Crawford, 210 Pa. 256.

<sup>16</sup> Phillips v. Crist, 33 Supr. C. 445.

<sup>17</sup> Hoyersadt v. Felts, 7 Lack. Jur. 5; P. & L. Dig., vol. 5, col. 7517.

<sup>18</sup> Bruner v. Finley, 211 Pa. 74.

### 31. Evidence.

As a general rule evidence will be confined to the issues raised by the pleadings and nothing is admissible which does not fairly come within their scope. A deed made by a common grantor is admissible, regardless of whether he made another conveyance which would negative its effect.<sup>19</sup> When the parties claim under different warrants and surveys with patents, a deed from a patentee as trustee is admissible.<sup>20</sup> The record of a prior ejectment is admissible in rebuttal to show an admission of chain of title in it.<sup>21</sup>

Parol evidence to annul a deed from defendant to plaintiff, absolute on its face, must be clear and convincing, in order to submit it to a jury.<sup>22</sup> In case of an alleged parol gift, plaintiff must prove possession; mere neighborhood gossip is insufficient evidence.<sup>23</sup> But if the evidence be sufficient to raise a question as to an adverse and exclusive possession for twenty-one years, it is for the jury.<sup>24</sup> In case of conflicting titles derived from sales of unseated lands for taxes, the burden of proof is on him who alleges that the later sale is void.<sup>25</sup> A defendant claiming under an Orphans' Court sale to his grantor cannot give evidence of a resulting trust in favor of the creditor who procured the sale.<sup>26</sup>

In case the Supreme Court reverses and sends back the cause for new trial and an account in equitable ejectment the defendant cannot attack the evidence on which the decree rests, as false and fraudulent.<sup>27</sup> The assessment and payment of taxes are not evidence of title but of claim of possession, and are admissible on this ground alone.<sup>28</sup> Prior to act of 1901, two verdicts being requisite to settle the question of title, the plaintiff in his second action could claim for his improvements under tax title, although he did not claim in the first action.<sup>29</sup>

The record of a suit in trespass to try title is admissible although there was no plea of "*liberum tenementum*," the plea of "not guilty" under the act of 1837, having put every question in issue.<sup>30</sup> Where the defense is an adverse lease the plaintiff may rebut it with the presumption of a grant in extinguishment of the lease.<sup>31</sup> A conflict of evidence as to a division line is for the jury;<sup>32</sup> so

<sup>19</sup> Davis v. Robinson, 32 Supr. C. 90; P. & L. Dig., vol. 5, col. 7482.

<sup>20</sup> Henry v. Hower, 11 Northam. 279; P. & L. Dig., vol. 5, col. 7519.

<sup>21</sup> Houseman v. Intl. Nav. Co., 214 Pa. 552.

<sup>22</sup> Monticelli v. Rosenthal, 193 Pa. 545; P. & L. Dig., vol. 5, col. 7543.

<sup>23</sup> Wood v. Praul, 217 Pa. 293; P. & L. Dig., vol. 5, col. 7460.

<sup>24</sup> Davis v. Robinson, 32 Supr. C. 90; 34 Supr. C. 371.

<sup>25</sup> Floyd v. Kulp Lumber Co., 222 Pa. 257.

<sup>26</sup> Smith v. Wildman, 194 Pa. 294; 178 Pa. 245; P. & L. Dig., vol. 5, col. 7500.

<sup>27</sup> Fellows v. Loomis, 204 Pa. 225.

<sup>28</sup> Green v. Schrack, 16 Supr. C. 26; 17 Supr. C. 6; Quin v. Brady, 8 W. & S. 139; P. & L. Dig., vol. 5, col. 7482.

<sup>29</sup> Neeld v. Cunningham, 216 Pa. 523; act April 12, 1842, P. L. 262; P. & L. Dig., vol. 5, col. 7593.

<sup>30</sup> Camp v. Zimmerman, 2 Lehigh Co. 286, P. & L. Dig., vol. 5, col. 7615, as to former actions.

<sup>31</sup> Townsend v. Boyd, 217 Pa. 386.

<sup>32</sup> Daley v. Wingert, 210 Pa. 169; Richardson v. Morris, 26 Supr. C.

also testimony by experts.<sup>33</sup> Proceedings in partition in the Common Pleas as between tenants in common are admissible to show that the defendant was duly served and did not come in and defend. He cannot in ejectment by the purchaser from the master in partition set up ouster and twenty-one years' adverse possession.<sup>33a</sup>

The record of a former judgment by default is "persuasive evidence," but it is not error for the court to charge the jury that it is not conclusive.<sup>34</sup> The sheriff's return to a *hab. fa. pos.* showing that he put defendant in possession is evidence of possession, and in the absence of proof of ouster is conclusive on that point.<sup>35</sup> A recital in a treasurer's deed, of a fact, is evidence against a grantor and all claiming under him but not prior to him.<sup>35a</sup> When both parties claim from the same grantor title need not be traced to the commonwealth.<sup>35b</sup>

By section 6 of the act of April 27, 1855, P. L. 369, title will be presumed to be out of the commonwealth, after thirty years, as between private litigants and twenty-one years adverse possession quiets a defeasible title.

Where the evidence shows that the land sold for taxes as seated under act of April 29, 1844, was in fact unseated the purchaser took no title<sup>35c</sup> and could not maintain ejectment on a color of title obtained by cutting some trees upon it.<sup>35d</sup>

### 32. Disclaimer.

When the defendant does not intend to take defense as to the whole or any part of the land described in the writ, it is his duty to file with his plea a disclaimer which is a statement that he does not claim such land describing it, if in part. If he pleads the general issue he will be held to defend the right as to the whole premises.<sup>36</sup> Disclaimer is not a plea, but it is a specification of what part of the land sued for defendant claims no right to hold; and the effect is that if the plaintiff recovers no more than what defendant has disclaimed, he will be liable for the costs.<sup>37</sup>

A disclaimer of one defendant should be admitted of record and a verdict taken against him.<sup>1</sup> A defendant who has secured a general verdict on disproof of possession as to part of the land, should

192; *Reilly v. Crown Petroleum Co.*, 212 Pa. 325; P. & L. Dig., vol. 5, col. 7698.

<sup>33</sup> *Perkiomen R. Co. v. Kremer*, 218 Pa. 641; P. & L. Dig., vol. 5, col. 7698.

<sup>33a</sup> *Lamon v. Rodgers*, 42 Supr. C. 437, citing *Weaver v. Lutz*, 103 Pa. 593; *Cummisky v. Cummisky*, 109 Pa. 1; *Stewart v. Madden*, 153 Pa. 445; *Gallitzin, Etc., Assn. v. Steigers*, 28 Supr. C. 336.

<sup>34</sup> *Gibson v. Rowland*, 35 Supr. C. 158; P. & L. Dig., vol. 5, col. 7639.

<sup>35</sup> *Haupt v. Haupt*, 157 Pa. 469.

<sup>35a</sup> *Penrose v. Griffith*, 4 Binny, 231.

<sup>35b</sup> *McGrew v. Harmon*, 164 Pa. 115; *Hamsher v. Kline*, 57 Pa. 397; *Trexler v. Africa*, 42 Supr. C. 542; 27 Supr. C. 385; 33 Supr. C. 395.

<sup>35c</sup> *Hathaway v. Elsbree*, 54 Pa. 498; *Preswick v. McGrew*, 107 Pa. 43.

<sup>35d</sup> *Holloway v. Jones*, 143 Pa. 564.

<sup>36</sup> *Hill v. Hill*, 43 Pa. 521; *Ulsh v. Strode*, 13 Pa. 433.

<sup>37</sup> *Kirkland v. Thompson*, 51 Pa. 216.

<sup>1</sup> *Wood v. Praul*, 217 Pa. 293; P. & L. Dig., vol. 5, col. 7690.

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file his disclaimer before judgment, but judgment will not be reversed because he has failed to do so. Should he later claim all the land the court can stay *fi. fa.* for costs until a disclaimer is duly filed.<sup>2</sup> Where one of two defendants files a disclaimer as to all, plaintiff is entitled to demand judgment from the other, or a plea of the general issue before a jury is sworn.<sup>3</sup>

Costs on disclaimer follow judgment. If the plaintiff accepts the disclaimer he must pay the costs.<sup>3a</sup>

### 33. Rule of court — Survey by artist — Diagrams.

Rule 88, Allegheny County, provides:

"In all ejectments wherein the question of boundary or interfering surveys may arise, either party may apply to the court for an order for a survey by an artist; and where such order is made, the artist at the time fixed upon (of which notice shall be given to the opposite party), shall survey and ascertain such boundaries<sup>4</sup> and interference and furnish a diagram of both the claims, describing their boundaries, interference and any other circumstances material to a proper investigation of the subject. Each party shall furnish two copies of such diagram for use of the court and jury."

### 34. Nonsuit for one or more plaintiffs.

Section 1, March 31, 1823, 8 Sm. 141, provides:

"In all actions of ejectment now pending, or hereafter to be commenced in the courts of this commonwealth, by more than one plaintiff, if, on the trial of the cause, any of the said plaintiffs shall fail to establish his, her or their right to recover, judgment of nonsuit may be entered against the plaintiff or plaintiffs so failing, and a verdict and judgment may be rendered in favor of the other plaintiff or plaintiffs, for the interest in the premises, which they may be respectively entitled to recover in any such action."

Where a verdict was given against two, and set aside as to one a *nol. pros.* was entered as to him and judgment entered against the other.<sup>4a</sup>

### 35. Verdict — Conclusive.

Section 1, May 8, 1901, P. L. 142, provides:

"Where one verdict shall in any writ of ejectment between the same parties be given for the plaintiff or defendant, and judgment be entered thereon, no new ejectment shall be brought; but such verdict and judgment thereon shall be final and conclusive and bar the right."

The act of April 23, 1907, P. L. 293, amending the above, as well as the act of 1901, was prospective only.<sup>5</sup>

It was provided by act of April 6, 1869, P. L. 16, that where an action of ejectment and also one of trespass *quare clausum fregit*

<sup>2</sup> *Lehigh Val. Coal Co. v. Beaver Lumber Co.*, 203 Pa. 544.

<sup>3</sup> *Lieber v. Lieber*, 17 Montg. Co. 34.

<sup>3a</sup> *Mabie v. Fuellhart*, 23 C. C. 241.

<sup>4</sup> *Medara v. DuBois*, 187 Pa. 431.

<sup>4a</sup> *Blight v. Ewing*, 1 Pitts. 275; P. & L. Dig., vol. 5, col. 7811.

<sup>5</sup> *Neeld v. Cunningham*, 216 Pa. 523; *Lynch v. Lynch*, 221 Pa. 423.

were brought successively, two judgments successively for the same party were conclusive.

The verdict if for the plaintiff is for the land described in the writ, and if for the defendant, for him generally. A verdict "for plaintiff—binding instructions" is informal but not ground in itself for reversal.<sup>6</sup> After verdict, it is too late for defendant to object to the description as not sufficiently definite.<sup>7</sup> But if the verdict describes the land in an impossible manner, it will be reversed and with a *venire de novo*.<sup>8</sup> The defendant cannot complain when the jury has found for the plaintiff for only part of the land, where the evidence would have sustained a verdict for the whole of it.<sup>9</sup> Where one of four heirs receives a verdict for the entire tract, no exception being taken, it will not be set aside.<sup>10</sup> But a verdict for part of an undivided tract would be questionable.<sup>11</sup> A verdict for plaintiff, with compensation to defendant for improvements, without specifying the amount is uncertain. If made certain, judgment could not be entered on the verdict.<sup>12</sup> The verdict in a possessory action must be certain as to the land recovered,<sup>13</sup> in order that judgment may be entered and a writ of *habere facias possessionem* issue for it,<sup>14</sup> and that it may be identified by monuments or boundaries of a permanent nature.<sup>15</sup> A vague description in the writ and a general verdict make a record too uncertain.<sup>16</sup> Where it is a split verdict the land must be described definitely which is found for the plaintiff.<sup>17</sup>

"The sufficiency of the verdict is to be judged of by the face of the record; it is good, if it finds the whole matter in issue."<sup>18</sup> The act of March 14, 1872, P. L. 25, was passed to remedy defects of form in verdicts. It provides:

"No verdict shall be set aside by reason of the want of a declaration or plea, or from defectiveness or indefiniteness in the form of said verdict, but the court in which such verdict shall have been rendered, shall have power at any time to direct the filing of a declaration, the entering of a plea and the filing of such description or amended description, if in an action of ejectment, as in the judgment of the court shall make the pleadings and the record conform to what was tried before the jury and found by the verdict."

<sup>6</sup> *Brewer v. Lohr*, 35 Supr. C. 461; P. & L. Dig., vol. 5, col. 7715.

<sup>7</sup> *Harris v. Pitts., Etc.*, R. Co., 11 Supr. C. 6; P. & L. Dig., vol. 5, col. 7655.

<sup>8</sup> *Stephens v. Gunzenhauser*, 27 Supr. C. 417.

<sup>9</sup> *Sudeck v. Roell*, 8 York, 5; *Sautee v. Keister*, 6 Binney, 36.

<sup>10</sup> *Hess v. Gourley*, 80 Pa. 195.

<sup>11</sup> *Robertson v. Robertson*, 9 Watts, 32.

<sup>12</sup> *Allen v. Flock*, 2 P. & W. 159. (For a sufficient finding, see *Ackerman v. Fisher*, 57 Pa. 457.)

<sup>13</sup> *Harrisburg v. Crangle*, 3 W. & S. 462; *O'Keson v. Silverthorn*, 7 W. & S. 246; *Tyson v. Passmore*, 7 Pa. 274.

<sup>14</sup> *Green v. Watrous*, 17 S. & R. 393.

<sup>15</sup> *Hagey v. Detweiler*, 35 Pa. 409; *Smith v. Brotherline*, 62 Pa. 461.

<sup>16</sup> *Hunt v. McFarland*, 38 Pa. 69; *Nolan v. Sweeney*, 80 Pa. 77; *Smith v. Jenks*, 10 S. & R. 153.

<sup>17</sup> *Stewart v. Speer*, 5 Watts, 79.

<sup>18</sup> *Sergeant, J.*, in *Tryon v. Carlin*, 5 Watts, 372. (See also *Emig v. Diehl*, 76 Pa. 359; *Ross v. Barker*, 5 Watts, 391.)

The certainty that is required is a reasonable certainty. Rogers, J., in *Green v. Watrous*, said: "By an application of the maxim '*id certum est, quod certum reddi potest*,' we have such certainty as is required for the purposes of substantial justice, nor will it infringe the maxim '*Oportet quod res certa deducatur, in iudicium*.'" <sup>19</sup>

Amendment of a misdescription of the land cannot be made to relate back to the commencement of the action and thus cut out defendant's right under the statute of limitations.<sup>20</sup>

Said act is constitutional and the verdict may be made to conform to the facts,<sup>21</sup> when the meaning is plain.<sup>22</sup>

### 36. Verdict in ejectment on mortgage.

When ejectment is brought on a mortgage against the person in possession a conditional verdict is improper, but may be amended in the Supreme Court.<sup>23</sup> The jury have no right to limit the time of redemption to one year.<sup>24</sup> The owner cannot defeat the right of the purchaser to bring his ejectment, by an amicable ejectment in favor of the mortgagee of other lands.<sup>25</sup>

### 37. Verdict in equitable ejectment.

By virtue of the act of April 21, 1846, P. L. 424, one verdict was made conclusive in all actions brought to enforce purchase money payment, wherein time became the matter of consideration by the jury, or in cases of confession of judgment. The time thus fixed became the limit of payment and on failure, the verdict became absolute.<sup>26</sup> By it, all equitable interests carved out of the title are cut off.<sup>27</sup> But the act was held not to apply to an ejectment by a mortgagor against a mortgagee.<sup>28</sup> (See Equity and Specific Performance.)

### 38. Judgment.

Prior to the act of 1901 judgment did not change the relation between plaintiff and defendant so far as possession was concerned.<sup>29</sup> Where judgment was confessed to secure the payment of purchase money and not reclamation, except incidentally, the judgment will be opened and restitution ordered on payment of the sum due and the costs.<sup>30</sup> So also, where a judgment is entered on a warrant in a contract where the defendant shows failure of title and an equitable

<sup>19</sup> *Green v. Watrous*, 17 S. & R. 393.

<sup>20</sup> *Leeds v. Lockwood*, 84 Pa. 70.

<sup>21</sup> *Parks v. Boynton*, 98 Pa. 370.

<sup>22</sup> *Wells v. Van Dyke*, 109 Pa. 330.

<sup>23</sup> *Bower v. Fenn*, 90 Pa. 359.

<sup>24</sup> *Bagley v. Wallace*, 16 S. & R. 245.

<sup>25</sup> *Feigenspan v. Driesigacker*, 195 Pa. 17.

<sup>26</sup> *Arnold v. Fitzgerald*, 76 Pa. 385; *Gordonier v. Billings*, 77 Pa. 498; *Brown v. Nickle*, 6 Pa. 390; *Paull v. Oliphant*, 41 Pa. 364, modifying former cases cited.

<sup>27</sup> *Maxson's Ap.*, 75 Pa. 176.

<sup>28</sup> *Brown v. Nickle*, *supra*.

<sup>29</sup> *Duffy v. Duffy*, 20 Supr. C. 25. (See T. & H. Pr., section 1883.)

<sup>30</sup> *Jones v. Scott*, 209 Pa. 177; P. & L. Dig., vol. 5, col. 7746.

defense;<sup>31</sup> but not where he does not offer to pay, but claims for improvements.<sup>31a</sup>

The judgment follows the verdict, but an error of the clerk in entering it, occasioning a variance, is amendable, even after appeal, on payment of costs.<sup>32</sup> After verdict and judgment every possible indentment will be made in favor of the judgment.<sup>33</sup> The judgment in ejectment is for land and not for money except the costs. Therefore a judgment of revival upon a *sci. fa.* to revive is not an award of execution, but a judgment of recovery.<sup>34</sup> In case service is made on the tenant and he omits to notify the landlord and judgment is entered by default it will be opened to let the landlord defend.<sup>35</sup>

### 39. Action to be indexed as notice.

Section 2 of the act of April 22, 1856, P. L. 532, provides:

"No purchaser or mortgagee shall be affected with notice of the pendency of any ejectment or action to recover real estate, or to compel a conveyance thereof, unless such action shall be indexed against the defendant, and any *terre-tenant* made a party thereto, in a book to be kept by the prothonotary, and called the ejectment-index, for which the plaintiff shall furnish the necessary information."

### 40. Costs.

By statutes of Gloucester and 4th James I, ch. 3, the costs follow suit as in other actions. In order to avoid payment of costs the defendant, if a trustee or otherwise, should disclaim.<sup>36</sup> If the plaintiff accepts the disclaimer he is liable for the costs; if he does not, they follow judgment.<sup>37</sup> and if he recovers, he is entitled to full costs;<sup>38</sup> though the verdict be conditional.<sup>39</sup>

If defendant disclaims as to all but a part and the plaintiff recovers only that to which the disclaimer applied the defendant is entitled to his costs after disclaimer filed.<sup>40</sup> When a defendant disclaims and keeps up his disclaimer and the jury find that he was not in possession he is entitled to full costs.<sup>41</sup> If defendant does not disclaim or surrender, plaintiff will be entitled to his costs although he does not recover all the land embraced in his writ.<sup>42</sup>

It was decided that the services of a surveyor appointed by the court cannot be taxed as costs against the party who loses.<sup>43</sup> See

<sup>31</sup> *Buchanan v. Banks*, 192 Pa. 516.

<sup>31a</sup> *McCollum v. Shook*, 228 Pa. 28.

<sup>32</sup> *Riddle v. Findlay*, 6 S. & R. 227.

<sup>33</sup> *Morres v. Barry*, 2 Strange, 1180, Eng.

<sup>34</sup> *Foster v. Fox*, 4 W. & S. 92 (Ch. J. Gibson).

<sup>35</sup> *Wharton v. Botham*, 3 W. & S. 158. But not on the application of one in possession for other persons.

<sup>36</sup> *Caldwell v. Lowden*, 3 Brewster, 63.

<sup>37</sup> *Mabie v. Fuellhart*, 23 C. C. 241.

<sup>38</sup> *Gill v. Gill*, 37 Pa. 312.

<sup>39</sup> *Bradley v. O'Donnell*, 40 Pa. 479.

<sup>40</sup> *Lane v. Harrold*, 66 Pa. 319; *Kirkland v. Thompson*, 51 Pa. 216.

<sup>41</sup> *Tripner v. Abrahams*, 47 Pa. 220.

<sup>42</sup> *Kirkpatrick v. Vanhorn*, 32 Pa. 131.

<sup>43</sup> *Caldwell v. Miller*, 46 Pa. 233.



rule of court in Allegheny County, *supra*, as to such surveys to be furnished by the parties. By act of April 10, 1867, P. L. 1115, the costs in Erie County are regulated in accordance with the act of April 27, 1864, P. L. —, in cases of partition. An attachment will issue for costs against one not a party to the record.<sup>44</sup> But now all persons in interest must be made parties to the record.

#### 41. Rule to bring ejectment.

A system of equity practice in the Common Pleas has been adopted by the various forms of the rule to bring an action of ejectment, in order to quiet title to lands possessed by one, but against which there may be actual or possible adverse claimants. This rule is a virtual summons to such claimants to bring their action of ejectment within the statutory time or be barred. Each form will be considered in its order.

#### 42. Rule to bring ejectment within ninety days.

Section 1 of the act of June 24, 1885, P. L. 152, amending the act of June 11, 1879, provides:

"In all cases where real estate has been or shall hereafter be sold by the sheriff, treasurer or commissioners of any county of this commonwealth, and any person or persons other than the defendant or defendants as whose property the same may have been sold, shall claim that the title to the said premises sold is vested in him, her or them, and shall be in possession of the said premises, by occupancy, lease, coverture or otherwise, and the said party or parties in possession of the said premises, the title to which is or may be in controversy, shall be desirous of settling the same, it shall be lawful for such party or parties claiming title to said premises, to present his, her or their petition to the Court of Common Pleas of the county wherever such premises are situated, or to a law judge thereof in vacation, setting forth that the petitioner or petitioners claim title to the premises in controversy; whereupon a rule shall be granted upon the purchaser or purchasers at such sheriff's, treasurer's or commissioner's sale, or any person holding such sheriff's, treasurer's, or commissioner's title under such purchaser or purchasers, to bring his, her or their action of ejectment, within ninety days from the time the rule shall be made absolute, or show cause why the same cannot be so brought; which rule may be made returnable to any term or return-day of such court, and be served and returned as writs of summons are served and returned and shall be entered of record in the appearance docket of said court, and duly indexed therein, and also in the ejectment index of said court: *Provided*, That

When the purchaser or purchasers, or parties holding under them, shall reside without the county wherein the premises sold are situate, and their residence can be ascertained by the party or parties petitioning for said rule, such rule may be served by the sheriff or any constable within the county wherein the said purchaser or purchasers, or those holding the said title under them, may reside; and when the residence of the said purchaser or purchasers, or those holding

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<sup>44</sup> Taylor v. Hickman, 1 T. & H. Pr., section 954.

said title under them, shall reside without the commonwealth, or his or their residence cannot be ascertained by the petitioner or petitioners (affidavit of which fact of non-residence shall be duly filed of record), then said rule shall be served, by publication of the substance of said rule in a weekly newspaper published within the county wherein the said premises are situate, for four weeks prior to the return-day of said rule, which service so made by publication shall have the same effect as if personally served and so returned by the sheriff."

In order to sustain his petition he must show that he is in actual possession and not a mere agent or attorney.<sup>1</sup>

### 43. Judgment in default of appearance.

Section 2 of the same act is as follows:

"Whenever the purchaser or purchasers at such sheriff's, treasurer's or commissioner's sale, or the holder or holders of such sheriff's, treasurer's or commissioner's title under such purchaser or purchasers shall have been served, shall fail to appear and show cause why such action cannot be brought within the time limited in the first section of this act, it shall be the duty of the court to enter judgment against the parties served, which judgment shall be final and conclusive between the parties, their heirs and assigns; and after the lapse of said period, no action of ejectment for the recovery thereof shall be brought by the said purchaser or purchasers at such sheriff's, treasurer's or commissioner's sale, or any person or persons claiming or holding such sheriff's, treasurer's or commissioner's title under such purchaser or purchasers."

If the rule is discharged it does not bar an action of ejectment.<sup>2</sup> When the rule is made absolute, an appeal does not lie to such order.<sup>3</sup> Mere temporary possession does not give a right to this rule as to treasurer's sale of unseated land.<sup>4</sup>

This act being statutory it must be strictly pursued.<sup>5</sup> The costs of an unsuccessful rule will fall on the petitioner.<sup>6</sup> The act requires the rule to be "served and returned as writs of summons are served and returned," therefore service must be made ten days before the return day.<sup>7</sup> An answer may be filed *nunc pro tunc*, before judgment, for inadvertence of counsel, if it discloses a good defense.<sup>8</sup> Having brought ejectment in response to the rule the plaintiff cannot suffer a nonsuit, if the defendant objects.<sup>9</sup>

<sup>1</sup> Farmers', Etc., Mfg. Co. v. Goldstine, 4 C. C. 428; Finch's Petn., 2 C. C. 322; Hoffman v. Blakesley, 4 C. C. 427.

<sup>2</sup> Dewees v. Letchford, 10 W. N. C. 61; Herron v. Fetterman, 14 W. N. C. 480; Light v. Zeller, 2 C. C. 367.

<sup>3</sup> Davenport v. Jones, 126 Pa. 271; Gabler v. Black, 210 Pa. 541; P. & L. Dig., vol. 5, cols. 7792-4.

<sup>4</sup> Great, Etc., Co. v. Nutting, 8 D. R. 523.

<sup>5</sup> Summa v. Rettig, 16 C. C. 511.

<sup>6</sup> Nickey v. York B. & L. Assn., 8 D. R. 438.

<sup>7</sup> Creveling v. Marshall, 5 Kulp, 203.

<sup>8</sup> Birkel v. Rhoad, 16 D. R. 956.

<sup>9</sup> Pratt v. Darlington, 17 D. R. 20.

**44. Rule to bring ejectment within six months.**

Section 1 of the act of April 16, 1903, P. L. 212, amending section 1 of the act of March 8, 1889, P. L. 10, provides:

Whenever any person, not being in possession thereof, shall claim or have an apparent interest in or title to real estate, it shall be lawful for any person in possession thereof, claiming title to the same, to make application to the Court of Common Pleas of the proper county, whereupon a rule shall be granted upon said person not in possession, to bring his or her action of ejectment within six months from the service of such rule upon him or her, or show cause why the same cannot be brought, which rule may be made returnable to any term or return day of such court, and be served and returned as writs of summons are by law served and returned: *Provided, however,* When parties claiming or having an apparent interest in land, but not in possession thereof, reside without the county where the land lies and within the commonwealth, the sheriff of the county in which such rule shall be granted shall have power to serve the same; and when parties claiming or having an apparent interest reside outside of the state, it shall be lawful for any person to serve notice of said application on such parties; said rule shall be entered of record and indexed as actions of ejectment are now indexed in the courts of the commonwealth."

It was said that this rule takes the place of an injunction;<sup>10</sup> but the act does not apply where unseated lands are sold for taxes, that being regulated by act of March 29, 1824, P. L. 167.<sup>11</sup> Where there is a substantial dispute as to the fact of possession this remedy does not apply. The rule to bring ejectment is only invoked where there is no such dispute, but the question is one of the right to possession. The better practice is to apply to have an issue framed under the act of June 10, 1893, P. L. 415, when the fact of possession is in dispute.<sup>12</sup> Under the act of 1903 a mere squatter cannot claim the benefit of this rule.<sup>13</sup> But one in possession with some claim of right may have it regardless of how he got it.<sup>14</sup> But where the one made respondent could not bring the action, on the face of the record, it would be useless to grant the rule, as where the wife, after divorce asks for the rule against her husband they being tenants by entireties.<sup>15</sup>

This is a proper rule to determine respondent's interest under an agreement to sell him coal in place.<sup>16</sup> A plaintiff ruled to bring ejectment cannot discontinue without cause but may suffer a voluntary nonsuit.<sup>17</sup> The court may extend the time to bring the action,

<sup>10</sup> Hogue v. Matlack, 8 C. C. 657.

<sup>11</sup> Dull v. Ahls, 3 D. R. 368.

<sup>12</sup> Fearl v. Johnstown, 216 Pa. 205; Lyle v. Kemp, 31 C. C. 663; P. & L. Dig., vol. 5, col. 7792.

<sup>13</sup> Welsh's Petn., 13 D. R. 498.

<sup>14</sup> Welsh v. Clough, 216 Pa. 276, reversing 13 D. R. 498, *supra*.

<sup>15</sup> Alles v. Lyon, 216 Pa. 604.

<sup>16</sup> Miller v. Fretts, 25 C. C. 669.

<sup>17</sup> Knabb v. Connor, 23 C. C. 237. (But see Pratt v. Darlington, 17 D. R. 20; Hay v. Fidelity, Etc., Co., 13 York, 53.)

where proof of service is not filed until after the six months have expired.<sup>18</sup>

**45. Rule to be made absolute, when.**

Section 2 of the act of March 8, 1889, P. L. 10, provides:

"Whenever a person claiming an interest in, or title to, such real estate, shall have been served and shall fail to appear and show cause why such action cannot be brought within six months after such service, it shall be the duty of the court to enter judgment against the person served, and make the rule absolute, which judgment shall be final and conclusive between the parties, their heirs and assigns; and thereafter no action of ejectment for the recovery thereof shall be brought by such person claiming an interest in or title to such real estate or any person claiming by, from or under such person: *Provided*, That if the party served shall fail to appear and show cause, within the period of six months, as aforesaid, he or she shall not in any event be liable for the costs."

The respondent should show cause with sufficient detail to enable the court to determine whether the title under which he claims is such as can be enforced in ejectment in the lifetime of the petitioner, in case of life tenancy.<sup>19</sup> Where the respondent denies the possession of the petitioner and there are no depositions the case stands in equipoise and the rule must be discharged.<sup>20</sup> An answer is not sufficient which avers that respondent "has not, does not and will not claim possession or the right of possession during the life of the petitioner. 'It must state the facts specifically and leave nothing to inference.'<sup>21</sup> If respondent does not bring his action within six months he will be barred and his writ be quashed.<sup>22</sup>

**46. Form of petition.**

Sarah Kennedy's Petition for rule on Elizabeth McCalmont to bring Ejectment.	}	In the Court of Common Pleas of McKean County. No. 299, October Term, 1900.
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To the Honorable Judge of said Court:

The petition of Sarah Kennedy represents:

That she is the owner and in possession of that certain tract of land situate in the city of Bradford, county of McKean, state of Pennsylvania, bounded and described as follows: [Give description and title.] That one Elizabeth McCalmont claims an interest in and title to the said described real estate, but is not in possession of the same, wherefore your petitioner, being desirous of quieting the title thereto, respectfully requests that a rule be granted upon the said Elizabeth McCalmont to bring her action of ejectment within six months from the date of service of said rule, or show cause why the same cannot be so brought.

Sarah Kennedy.

[Affidavit to the truth of same.]

R. B. Stone, James George.	}	Attorneys for Petitioner.
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<sup>18</sup> Healey v. Healey, 9 Lack. Jur. 60 (extended 30 days).

<sup>19</sup> Kennedy's Petn., 19 Supr. C. 482. (See form.)

<sup>20</sup> Huntzinger v. Helfenstein, 10 C. C. 576.

<sup>21</sup> Kennedy's Petn., *supra*.

<sup>22</sup> Utley v. Cobb, 42 Supr. C. 484.

**47. The answer.**

The answer should be full and explicit and leave nothing to inference. In the case above,<sup>23</sup> the answer admitted petitioner's right to possession as life tenant and denied intention and power to interfere with it, but did not clearly affirmatively aver the nature of respondent's claim, and the order discharging the rule was reversed and respondent ordered to bring her action of ejectment within six months.

**48. Rule where possession is disputed or denied.**

Section 2 of the act of June 10, 1893, P. L. 415, provides:

"When any person or persons, natural or artificial, shall be in possession of any lands or tenements in this commonwealth, claiming to hold or own possession of the same by any right or title whatsoever, which right or title, or right of possession shall be disputed or denied by any person or persons as aforesaid, it shall be lawful for any such person to apply by bill or petition to the Court of Common Pleas of the county where such land is situate, setting forth the facts of such claim of title and right of possession and the denial thereof by the person or persons therein named, and thereupon the said court shall grant a rule upon such person or persons, so denying such right, title or right of possession, to appear at a time to be therein named and show cause why an issue shall not be framed in said court, between the parties, to settle and determine their respective rights and title in and to said land. Twenty days' notice of such rule shall be given."

**49. Court to frame an issue.**

Section 2, continued:

"And if, upon the hearing of such rule, it shall appear to the court that the facts set forth in such petition are true, it shall be the duty of the court thereupon to frame an issue of such forms as the court shall deem proper between the respective parties, to settle and determine the right and title of the respective parties to said land, and the verdict of the jury in such issue shall have the same force and effect upon the right and title and right of possession of the respective parties in and to said land as a verdict in ejectment upon an equitable title."

Where the petition sufficiently avers the petitioner's claim of title and right of possession and the respondent's denial thereof, and the parol testimony shows that the petitioner and those under whom he claimed title had exclusive possession of the land for many years, the court should grant the issue prayed for.<sup>24</sup>

On a petition to quiet title to coal land, where the respondents answer that they have a valid contract to purchase the land and insist on their right to hold this cloud on the title they are properly made plaintiffs in the issue framed by the court.<sup>25</sup> One in possession under a contract that the land shall be devised to him may have this remedy against the claimant under the will of him with whom

<sup>23</sup> Kennedy's Petition, 19 Supr. C. 482.

<sup>24</sup> Titus v. Bindley, 210 Pa. 121.

<sup>25</sup> Stamey v. Barkley, 211 Pa. 313.

he so contracted. It assimilates to equitable ejectment but it does not follow that the scope and purpose of the act shall be narrowed by the principles and rules which govern ejectments.<sup>26</sup>

The proceeding under this act is by petition setting forth the facts of claim, right of possession and denial thereof; and if the court is satisfied that the facts set forth are true, it shall award an issue, and the verdict thereon shall have the force and effect of a verdict in ejectment on an equitable title.<sup>27</sup> Regardless of the apparent unconstitutionality of the first section, the second section is constitutional.<sup>28</sup> This act does not give a new right but a new remedy and is cumulative with the others, and the court has control over form and substance, so it may fit the requirements of the issue to the circumstances of the case. The defendant, on coming in to answer the rule may disclaim, or he may deny default on his part and ask for a conditional verdict as if in ejectment, or he may set up a default by the plaintiff and elect to recover damages under a plea of set-off, as in an action for breach of contract.<sup>29</sup> This act furnishes a remedy for a dispute as to default concerning an option, but if the question has been determined on a bill in equity it is *res judicata*.<sup>30</sup> It is not exclusive of a bill to declare a resulting trust.<sup>31</sup> Where a citizen builds a stone wall on a strip of ground claimed by the city this act furnishes a ready remedy, by rule to quiet the title and have a jury decide the issue of fact.<sup>32</sup> The possession of the petitioner must be actual and not constructive possession as is the case of unseated lands sold for taxes.<sup>33</sup>

Where both parties claim possession the remedy is not under the act of 1889, but the act of 1893, and the petitioner who brought his application under the former act, may amend and bring it within the terms and practice under the latter.<sup>34</sup> In case the real estate consists of undeveloped coal whereof neither has taken manual seizure, the only possession is that which the legal title gives, and this being in dispute, an issue may be awarded to fit the case under the above act.<sup>35</sup> This act was not passed for "a case of scrambling possession, nor where there is a manifest manœuvring for position."<sup>36</sup>

#### 50. Service upon non-residents.

Section 2, continuing:

"In case the person or persons denying such right, title or right of possession in such lands or any of them are not residents within the jurisdiction of the court, such court may make an order for service of said rule and a copy of said bill or petition upon such

<sup>26</sup> Smith v. Hibbs, 213 Pa. 202.

<sup>27</sup> Canal Co. v. Genet, 169 Pa. 343.

<sup>28</sup> McGarry v. McGarry, 9 Supr. C. 71; Corr v. Phila., 31 C. C. 171.

<sup>29</sup> Ullom v. Hughes, 204 Pa. 305.

<sup>30</sup> Vankirk v. Patterson, 204 Pa. 317.

<sup>31</sup> Hutchinson v. Dennis, 217 Pa. 290.

<sup>32</sup> Pearl v. Johnstown, 216 Pa. 205.

<sup>33</sup> Hilborn v. Wilson, 17 C. C. 346.

<sup>34</sup> Manufacturers', Etc., Co. v. Rentz, 29 C. C. 78.

<sup>35</sup> Britton v. Posey, 29 C. C. 668.

<sup>36</sup> Loveland v. Howe, 2 Lack. L. N. 34.

persons at their residence or place of business outside of the county or state where the land lies, in the same manner as service is made of a summons in a personal action, giving at least twenty days' notice of such hearing."

This section called for construction and it was held that personal service upon a non-resident elsewhere, beyond the county, than at his place of residence or business was invalid, though cured by filing an answer.<sup>37</sup>

**51. Issue when respondent fails to appear — Judgment — Disclaimer — appeal.**

Section 2, continuing:

"If any person or persons shall neglect or refuse to appear at such return day, after twenty days' service of such rule and copy of petition, or having appeared shall refuse to join in such issue, the court may proceed to determine the rule and award and proceed with the issue in like manner as if such persons had appeared therein and any judgment obtained in such issue shall as fully and finally conclude and determine the rights and title of such defaulting party as if such persons had appeared and joined in such issue: *Provided*, That if, upon the return of such rule, any of the persons served shall disclaim, by writing filed, any right, title or interest in said land, all further proceedings as to such persons shall cease and such disclaimer shall forever bar such persons from ever setting up or claiming any such right or title in any court.

The decree of the court in refusing the rule or issue in any such case and the judgment in such issue shall be subject to appeal by either party to the Supreme Court, in like manner as appeals are allowed to judgments and decrees of the said Court of Common Pleas."

**52. Rule to bring ejectment, on parties out of possession for 21 years.**

Section 1 of the act of April 18, 1905, P. L. 202, provides:

"That whenever any person or persons claiming or having an apparent interest in or title to, real estate, but not having been in possession thereof for a period of twenty-one years next prior to the date of the application hereinafter referred to, are unknown, or being known, their residence cannot be ascertained, it shall be lawful for any person or persons in possession of said land, and claiming title to the same, to make an application to the Court of Common Pleas of the county in which the land is situated, setting forth the facts that the party or parties claiming, or having an apparent interest in or title to said real estate, have not been in possession thereof for a period of twenty-one years next preceding the date of said application, and are unknown, or, being known, their residence cannot be ascertained, which application shall be supported by the affidavit of the party or parties in possession of said land, praying that a rule be granted on said party or parties claiming, or having

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<sup>37</sup> *Stamey v. Barkley*, 211 Pa. 313, following *Lehigh Val. Ins. Co. v. Fuller*, 81 Pa. 398.

an apparent interest in or title to said real estate, but not in possession thereof, as aforesaid, to bring his, her or their action of ejectment for said land, within six months from the service of said rule upon him, her or them, and further praying for authority from the court to make such service by publication. Whereupon the court, after investigation and testimony taken, upon due proof of the allegations set forth in the petition having been made to the satisfaction of the court, may grant a rule upon said party, or parties claiming or having an apparent interest in or title to real estate, but not having been in possession thereof for a period of twenty-one years next preceding the date of said application, to bring his or their action of ejectment, within six months from the date of the service of such rule upon him, her or them, or show cause why the same cannot be so brought, which rule may be made returnable to any term or return day of such court; and, if such rule shall be granted, shall order and decree that the service of said rule may be made, . . . by publication in one or more newspapers of the county in which the land is situate, once a week for six weeks, and, in the discretion of the court, in one or more newspapers, for a like time, published at or near the place where said party or parties . . . appears to have last resided; said advertisement to contain the names of the parties claiming . . . together with the names of the parties in possession and making application, with condensed statement of the contents of the petition and a description of the real estate."

**53. Trustees for those unknown or under disabilities.**

**Section 2:**

"Whenever any person or persons claiming [as aforesaid], shall have been served by publication in the manner prescribed in the preceding section, are unknown or are minors, under the age of twenty-one years, or are lunatics, or are suffering under any other legal disability, and shall fail to appear within six months after the date of such service, it shall be the duty of the court to appoint a trustee for such unknown parties, or minors, or lunatics, or parties suffering under other legal disability, upon whom the rule to bring ejectment, as aforesaid, shall be served; and it shall be the duty of such trustee to investigate the matters set forth in said petition, and to appear and make answer thereto within sixty days of the date of the service of such rule upon him, if, upon such investigation, such trustee should decide that an appearance and answer are required to properly protect the interest of the parties unknown, or minors, or lunatics or parties suffering under any legal disability as aforesaid."

**54. When rule to be made absolute and judgment entered.**

**Section 3 provides:**

"Whenever any person or persons claimant [as aforesaid], shall have been served by publication in the manner prescribed in the preceding sections, and shall fail to appear and show cause why such action of ejectment cannot be brought, within six months after such service; and, in case of unknown parties, or lunatics, or persons suffering under other legal disability, within sixty days after service of such rule upon the trustee for such unknown parties, minors, lunatics



or persons suffering under other legal disability, as aforesaid, it shall be the duty of the court to make the rule absolute and enter judgment against the person or persons so served, which judgment shall be final and conclusive between the parties, their heirs and assigns; and thereafter no action of ejectment for the recovery of said real estate shall be brought by such person or persons claiming, or having an apparent interest in or title to, said real estate, but not having been in possession thereof, as aforesaid, or any person claiming by, from or under such person or persons: *Provided*, That if the party or parties served shall fail to appear and show cause, within the period of six months, as aforesaid, he, she or they shall not in any event, be liable for costs; which costs, in the discretion of the court, may include a reasonable compensation for any trustee appointed by virtue of this act."

#### 55. Habere facias possessionem.

If the plaintiff obtains judgment in ejectment which becomes final because the defendant has not appealed, he may take possession without process, if he can do so peaceably.<sup>1</sup> He can have a *fi. fa.* for costs as in other cases or he may take out a writ of *habere facias possessionem*,<sup>2</sup> with a clause of *fi. fa.* for costs, which is the usual practice.

#### 56. Form of habere facias possessionem.

— County, ss:

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

Whereas, ———, lately, that is to say, to No. ———, of ——— Term, 19—, in our County Court of Common Pleas of said County, before our Judges thereof, by the consideration of the same Court, recovered against ———, late of your County, yeoman, a certain tract of land situate in the ———, in the said County, bounded and described as follows: [describe same as in the verdict or writ].

Therefore we command you, that justly and without delay, the aforesaid ———, his possession of and in the tenements aforesaid, with the appurtenances, you cause to have, &c. (a) (b)

NOTE.—<sup>a</sup> IF CLAUSE OF FIERI FACIAS FOR COSTS BE WISHED, SAY AFTER THE WORD "HAVE, &c.:" ELSE REFER ABOVE TO THIS CLAUSE AND ERASE BALANCE. And we also command you, that of the goods and chattels, lands and tenements of the said Def't in your bailiwick, you cause to be levied all costs in this behalf expended and endorsed on this writ, which to the said Pl'ff in our same Court were adjudged for his damages, which he sustained by occasion of the said trespass and ejectment:—And have you these moneys before our said Judges, at the day and place aforesaid, to render to the said Pl'ff for damages, whereof the said Def't is convict, and this writ.

<sup>b</sup> IF CLAUSE OF CAPIAS AD SATISFACIENDUM FOR COSTS, SAY AFTER THE WORD "HAVE, &c.:" And we also command you, that you take the said Def't, and him safely keep, &c. [see forms of Capias Satisfaciendum], to satisfy Pl'ff, &c., which to the said Def't in our said Court were adjudged for his damages, which he sustained by the occasion of the said trespass and ejectment, whereof the said Pl'ff is convict, &c.

<sup>1</sup> Bauders v. Fletcher, 11 S. & R. 420.

<sup>2</sup> That you cause (plaintiff) to have possession.

And how you shall have executed this writ, make known to our Judges at —, at our County Court of Common Pleas, there to be held for the County of —, the — Monday of —, A. D. 18—.

Witness the Honorable —, President of our said Court, the — day of —, A. D. 18—.

Prothonotary.

— —,

*Return.*

To the Honorable the Judges, &c.:

By virtue of this writ, on the — day of —, 18—, caused the within named —, to have possession of the premises within described with the appurtenances, and — —.

So answers — —, Sheriff.

**57. Execution of *hab. fa. pos.***

As stated the writ should conform to the verdict and not cover more or other land than that which the jury found for plaintiff and therefore, the sheriff should be instructed by the plaintiff or his attorney. To be more precise the præcipe for the writ should give the names of the parties, the number and term of the case and demand a *hab. fa. pos.* for the land [describing it] with clause of *fi. fa.* for costs, or without, as the case may be. If more land be delivered than the judgment covers, the court will compel restitution on application for a writ for that purpose.<sup>3</sup> Plaintiff may be given legal seisin of an undivided interest, but cannot oust the defendant from his possession when he has title to the remaining interest.<sup>4</sup> And a *bona fide* purchaser from one having the legal title cannot be ejected by such writ, under a judgment by the *cestui que trust* against the legal owner, of which trust the purchaser had no notice.<sup>5</sup> After possession delivered it is too late to move to vacate the writ.<sup>6</sup> Nor can it be set aside by the appellate court.<sup>7</sup> When the Common Pleas strikes off a snap judgment under which possession was given by *hab. fa. pos.* a writ of restitution will also be awarded;<sup>8</sup> so also where possession was obtained wrongfully on a conditional judgment;<sup>9</sup> and where a tenant was wrongfully ejected, who was not made a party or who held by a distinct right.<sup>10</sup> The court will stay the writ where the plaintiff is in equity bound to make title to part of the premises.<sup>11</sup> And where there is a conditional verdict, it will only be allowed to issue on application to the court showing that the right has ripened<sup>12</sup> and then also the

<sup>3</sup> *Norris v. Hamilton*, 7 Watts, 91.

<sup>4</sup> *Chambers v. Reinhold*, 33 Supr. C. 266.

<sup>5</sup> *Fellows v. Loomis*, 15 D. R. 247.

<sup>6</sup> *Smith v. Harley*, 1 W. N. C. 132.

<sup>7</sup> *Brolasky v. Anderson*, 23 Leg. Int. 237.

<sup>8</sup> *Buchanan v. Banks*, 192 Pa. 516; 203 Pa. 599; *Hoffman v. Hafner*, 211 Pa. 10; P. & L. Dig., vol. 5, col. 7783. (For form, See "Execution.")

<sup>9</sup> *Wall v. Stone*, 3 Lack. L. N. 314; *Walsh v. Sykes*, 1 Lack. L. R. 429.

<sup>10</sup> *Young v. Algeo*, 3 Watts, 223.

<sup>11</sup> *Mathers v. Akewright*, 2 Binney, 93.

<sup>12</sup> *Shaw v. Bayard*, 4 Pa. 257.

plaintiff may have *fi. fa.* for costs.<sup>13</sup> If the plaintiff move prematurely when nothing is due, he may be postponed in his right until the last installment falls due.<sup>14</sup> But if issued immediately after the judgment has become absolute it is regular.<sup>15</sup>

If the recovery be of an undivided part the sheriff will deliver seisin jointly with the defendant and if he be ousted by the defendant he may have an alias.<sup>16</sup> The sheriff must set the defendant out, notwithstanding his wife comes up with a claim of title in herself, which was not made on the trial.<sup>17</sup> But if he find a person in possession by title paramount, he cannot eject such person although he went into possession pending the action.<sup>18</sup> Nor can he dispossess one of property not covered by the writ.<sup>19</sup> Such person may re-enter peaceably. It will affect a person only who is in possession under the defendant.<sup>20</sup> Where the equitable owners are in possession and the grantee of the legal title has recovered, *hab. fa. pos.* will not issue until the payments due them are made.<sup>21</sup> But one who acquired title subsequent to the judgment cannot set it up against the writ. He must surrender in obedience thereto and sue on his title.<sup>22</sup>

#### 58. Estrepement and mesne profits.

Pending an action of ejectment the plaintiff is entitled to a writ of estrepement to stay waste. This writ is issued by the prothonotary, of course, on affidavit sworn to before a judge. Since this practice will be fully gone into in the next chapter, mention only will be made here of the fact.

The same may be noted concerning mesne profits which were formerly recovered in ejectment but since the act of 1876, *infra*, must be sued for in trespass. See "Trespass."

#### 59. Alias and pluries writs of possession.

Section 1, act of Feb. 1, 1834, P. L. 26, provides:

"Whereas inconvenience frequently occurs to plaintiffs in ejectment from the re-entry of the defendants, or persons claiming under them, on the lands recovered after the execution and return of the writ of *habere facias possessionem*; and the plaintiffs are obliged to resort to a new ejectment, and it is proper to render recoveries in ejectment more effectual; therefore, it shall be the duty of the court in which a judgment in ejectment shall be recovered, on the application of the plaintiff, his agent or attorney, and on cause shown, to award alias and *pluries* writs of *habere facias possessionem*, from time to time, notwithstanding any or all pre-

<sup>13</sup> Bradley v. O'Donnell, 40 Pa. 479.

<sup>14</sup> Boyd v. McNaughton, 51 Pa. 225.

<sup>15</sup> Allen v. Woods, 24 Pa. 76.

<sup>16</sup> Ash v. McGill, 6 Wharton, 301.

<sup>17</sup> Johnson v. Fullerton, 44 Pa. 466.

<sup>18</sup> Raw v. Stevenson, 24 Pitts. L. J. 145.

<sup>19</sup> Comth. v. Gerstle, 4 Walker, 200.

<sup>20</sup> Frigard v. Griffith, 2 Pitts. L. J. 78; P. & L. Dig., vol. 5, cols. 7755-61.

<sup>21</sup> Howard v. Murray, 203 Pa. 464.

<sup>22</sup> Noyes v. Brooks, 10 Supr. C. 250.

ceding writs may have been returned executed; and the additional costs shall be taxed and collected in the usual manner: *Provided*, That such application shall be made within three years after the return-day of the preceding writ."

An alias or *pluries* writ, under this act, should not be issued without previous notice to the party against whom it is directed.<sup>23</sup> The practice is to present a petition averring a re-entry, and take a rule or serve notice of the application. If an answer is filed depositions may be taken and read on the argument of the rule. Upon making the rule absolute a *præcipe* demanding the issuance of an alias *hab. fa. pos.* may be filed with the prothonotary on which he will issue the writ.<sup>24</sup>

#### 60. Title by nonsuit, not conferred.

If the plaintiff become nonsuit title will not ripen in the defendant short of twenty-one years.<sup>1</sup> A delay of fourteen years does not entitle the original defendant to a nonsuit.<sup>2</sup> A rule to take off a nonsuit entered twenty-one years past, for non-appearance at the trial, will be discharged, where plaintiff had made no move for twenty-six years.<sup>3</sup> A *non pros.* is properly entered where plaintiff's title rests on a deed he does not produce and whose existence he fails to prove.<sup>4</sup>

Where one defendant dies after joint plea a nonsuit may be entered without substitution.<sup>5</sup> A nonsuit as to one or more plaintiffs without prejudice to the rights of the others is authorized by the act of March 31, 1823, P. L. 229.<sup>6</sup> Where the plaintiff amends, under section 6, act of April 22, 1856, by adding another tract, it is error to nonsuit him as to both tracts, his right being barred only as to one.<sup>7</sup> In suit to recover an oil lease it is error to nonsuit the plaintiff on the answer and abstract of defendant averring abandonment. It would be a premature determination of the issue.<sup>8</sup>

<sup>23</sup> *White v. Robinson*, 3 Penny. 222.

<sup>24</sup> *City of Phila. v. Hood*, 3 Supr. C. 373.

<sup>1</sup> *Phila. v. Cleary*, 10 D. R. 752; P. & L. Dig., vol. 5, col. 7811.

<sup>2</sup> *Hillside, Etc., Co. v. Heermans*, 191 Pa. 116.

<sup>3</sup> *Brobst v. Big, Etc., Co.*, 25 C. C. 135; *Neel v. McElhenny*, 45 Pitts. L. J. 153.

<sup>4</sup> *Anders v. Central R. Co.*, 19 Supr. C. 564.

<sup>5</sup> *Nickle v. M'Farland*, 7 Watts, 406.

<sup>6</sup> *O'Keson v. Silverthorn*, 7 W. & S. 246; *Foust v. N. C. R. Co.*, 5 York, 34; *Mobley v. Bruner*, 59 Pa. 481.

<sup>7</sup> *Miller v. Bealer*, 100 Pa. 583.

<sup>8</sup> *Bartley v. Phillips*, 165 Pa. 325.

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## CHAPTER XLII.

### ESTREPEMENT.

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#### 1. Writ of estrepement in ejectment.

When an ejectment has commenced the plaintiff is entitled to his writ of estrepement to prevent or stay waste which the prothonotary will issue on præcipe filed for that purpose.

Section 2 of the act of 1803, 4 Sm. L. 89, is as follows:

"That when any ejectment suit shall be depending in the \* \* \* Court of Common Pleas, it shall and may be lawful for the prothonotary \* \* \* of the court in which such ejectment is or shall be depending, upon affidavit of the plaintiff or other person knowing the fact, filed in his office, that the tenant or defendant in such ejectment has committed or is committing waste and destruction of or in the premises to issue a writ of estrepement to prevent the same, of course, without motion to the court and in vacation, which affidavit shall be sworn before one of the judges of the \* \* \* Court of Common Pleas and shall be considered regular though the judge before whom it shall be taken, may not

be a judge of the court in which such ejectment shall or may be depending."

What constitutes waste at the common law and under the English statutes as well as those of Pennsylvania, is discussed in the chapter on "Waste," *infra*.

## 2. Form of præcipe and affidavit.

Ethel Grey	}	In the Court of Common Pleas of Cameron	— Term, 19—.
v.		County.	
Thomas Day.		No. —.	

Ejectment.

Issue writ of estrepement against the defendant to prevent waste and destruction of the premises for which the ejectment in above case is pending.

F. D. Leet,  
Plaintiff's Attorney.  
July 19, 1910.

To ———, Esq.,  
Prothonotary.

Cameron County, ss:

Ethel Grey the plaintiff above named being duly sworn says that Thomas Day the defendant in the above entitled action of ejectment has committed and is committing waste and destruction of and in the premises for which the said action is pending, by cutting down and destroying the timber on said premises [or as the case is].  
Ethel Grey.

Sworn to, etc.

## 3. Practice on issuing writ.

Accompanying the præcipe and affidavit the plaintiff is required to file a bond with security approved by a judge of the court, as in case of an injunction, to indemnify the defendant against loss and damages occasioned by the writ. The ordinary bond of indemnity, with the condition required by the acts, *infra*, will suffice.

## 4. Security.

The act of April 11, 1862, P. L. 430, provided that security shall be given as required in case of injunctions under section 1, of the act of May 6, 1844, P. L. 564, which requires a bond by the party applying for the same, "with sufficient sureties to be approved by said judge or court, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction."

But the act of April 2, 1863, P. L. 250, repealed the act of 1862, so far as relates to actions of ejectment to compel specific performance.

## 5. Summary power of courts.

By section 2 of the act of May 4, 1852, P. L. 584, applying the second section of the act of March 29, 1822, P. L. 86, to all cases where the writ of estrepement is issued, it is provided that such courts

"Shall in all cases of estrepement have power to hear the parties

in a summary manner, and dissolve said writ or make such further order therein as may seem just and right."

The act of Feb'y 18, 1873, P. L. 35, gave the judges power to dissolve writs of estrepement in vacation after notice to the opposite party.

The defendant may come in, and move to dissolve the writ, on giving security, and the court has full power to hear the parties on the merits and make such orders "as may seem just and right." In pursuance of which it may order the defendant, life-tenant, to repair the waste already done.<sup>1</sup> An amendment is allowable at the hearing, *nunc pro tunc*.<sup>2</sup>

#### 6. Estrepement by landlord, purchaser at sheriff's sale or lien creditor.

Section 1 of the act of March 29, 1822, P. L. 86, provides:

"It shall and may be lawful for any owner or owners of any lands or tenements leased or let for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant or tenants to leave the same, according to the provisions of the act of assembly in such case made and provided; or for any purchaser or purchasers at sheriff's or coroner's sale of lands or tenements, after he or they have been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment creditor or creditors, after the lands bound by such judgment or mortgages shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*, to apply to the Court of Common Pleas \* \* \*, of the proper county while in session, or to any judge thereof in vacation, by petition and affidavit made by him, her or them, or some other credible person, setting forth such of the facts before mentioned as may be necessary to bring him, her or them within the provisions of this act and that the tenant or person in possession has committed waste to the freehold (or allows it to be done by others) or threatens to do the same, and that such owner, mortgagee or plaintiff, or some other person for him or them, verily apprehends in consequence of such threat that such waste will be committed unless the same be restrained by law, it shall and may be lawful for such court or judge, as the case may be, in their discretion to order the prothonotary of such court to issue a writ of estrepement to stay waste, which said writ shall have the same effect to all intents and purposes, as if the same had been issued after action of ejectment, brought in cases where such action is the proper remedy."

It is not necessary that a notice to quit should have been served on the lessee, before the writ is applied for.<sup>3</sup>

<sup>1</sup> *Humphreys v. Humphreys*, 6 Lack. Jur. 216; 14 D. R. 546.

<sup>2</sup> *Union Tanning Co.*, 22 C. C. 647.

<sup>3</sup> *Jones v. Whitehead*, 1 Parsons, 304; *Heil v. Strong*, 44 Pa. 264.

**7. Petition for writ of estrepement by landlord.**

Andrew K. Bosard } In the Court of Common Pleas of Tioga County.  
 v.  
 Morgan Sweley. } No. —. — Term, 19—.

To the Hon. David Cameron, Judge of said court, your petitioner respectfully represents that on the — day of —, 19—, he leased to one Morgan Sweley a certain tract of land by him owned, situate in —, said county, described as follows:

[Description] for the term of — years, commencing on the — day of —, A.D. 19—, reserving to himself the rent mentioned in his said lease, which demise continues [or is ended and said tenant still continues in possession, although duly notified to remove] and that the said Morgan Sweley, being in possession as aforesaid has committed and is still committing [or threatens to commit] waste to the freehold by cutting down timber thereon growing [or whatever the waste consists of]; and thereupon he prays your honorable court to order the prothonotary to issue a writ of estrepement against said Morgan Sweley, to stay all waste of said premises, and he will ever pray, etc.

Andrew K. Bosard.

Tioga County, ss:

Andrew K. Bosard being duly sworn, says that the facts stated in the foregoing petition are just and true as he verily believes and that the said Morgan Sweley has committed [or, as the case is] waste to the said described premises.

Andrew K. Bosard.

Sworn to, etc.

Charles Tubbs, Attorney for Petitioner.

**8. Affidavit when waste is threatened.**

The above may be varied thus:

That in consequence of the threat of said Morgan Sweley, he verily believes that the waste mentioned in said petition will be committed to his irreparable injury, unless restrained by law.

Signed — —.

Sworn to, etc.

**9. Order of court.**

[Same title as above.]

Now — —, 19—, on the petition of said Andrew K. Bosard and it appearing to the court that the facts warrant it, the prothonotary is ordered to issue a writ of estrepement as prayed for, against the said Morgan Sweley, as provided in such case by act of assembly, bond in the sum of \$300.

Per cur.

David Cameron, P. J.

**10. Form of writ against tenant.**

Tioga County, ss:

The Commonwealth of Pennsylvania:

To the sheriff of said county, and to Morgan Sweley, greeting:

Whereas by the law of the land no waste or strip ought to be



committed in any lands or tenements or by any tenant during his possession of premises demised to him and whereas the said Andrew K. Bosard, on the — day —, A.D. 19—, [here set forth the demise as in the petition] and the said Morgan Sweley is in possession of the premises: and now on the part of the said Andrew K. Bosard we have received complaint that the said Morgan Sweley, and his servants and others employed by him, very great waste and strip in the lands and wood standing and growing thereon daily do commit [set out the particular waste and strip complained of] and do not desist, to the grievous hurt and damage of the said Andrew K. Bosard, contrary to the law of the land and to the form of the statutes in such case made and provided: We being willing that the said laws and statutes be inviolably preserved do hereby command you, the said sheriff, that you strictly prohibit the said Morgan Sweley and his servants and others employed by him, to commit or do any waste or strip in the land or woods aforesaid, contrary to the law and statutes aforesaid, and restrain the said Morgan Sweley, his servants and others employed by him, that they commit no waste as aforesaid; and we further command you, Morgan Sweley, that you do not yourself nor cause any person to do any waste or strip of lands or woods aforesaid, as you shall answer at your peril, to the contrary, and at the peril of them by whom you shall so cause any waste or strip to be done as aforesaid.

Witness the Hon. David Cameron, President Judge, at Wellsboro, in the county of Tioga aforesaid, this — day of —, 19—.

[Seal]

—, Prothonotary.

#### 11. Tenant's right to be heard.

Section 2 of the act of 1822, *supra*, provides:

"That it shall and may be lawful for the tenant or other person in possession to apply to the court from which the said writ may have been issued, at any time after the issuing thereof, whenever such court may be in session, and the said court shall hear the parties in a summary manner, and may dissolve the said writ or make such further order therein as to them may seem just and right."

The court is given summary power and the exercise of its discretion is not reviewable, whether it dissolves or continues the writ.<sup>4</sup>

#### 12. Form of petition of purchaser at sheriff's sale for writ.

Erb Spencer	}	In the Court of Common Pleas of Susquehanna
v.		
David Holka.		County.
		No. —.
		— Term, 19—.

To the Honorable —, Judge of said court:

The petition of Erb Spencer respectfully represents that by virtue of a writ of *venditioni exponas* [or *fi. fa.* if sold on such writ] issued out of said court, a certain messuage or tract of land situate [description]. Was exposed to sale by the sheriff of said county on the — day —, 19—, as the property of David Holka, and your petitioner become the purchaser thereof at said sale and entitled to have the possession in due course of law; that said David Holka

<sup>4</sup> Smith v. Chappell, 25 Supr. C. 81.

still remains in possession and has committed waste and still is committing waste by cutting down the timber there standing and growing [or, as the particular waste is].

Therefore he prays your honorable court to order the prothonotary to issue a writ of estrepement to stay waste to said premises; and he will ever pray, etc.

Erb Spencer.

Susquehanna County, ss:  
[Affidavit as above.]

### 13. Form of petition of mortgagee to stay waste.

Eunice Houk } In the Court of Common Pleas of Sullivan County.  
v. } No. ——. — Term, 19—.  
Stan Hope. }

To the Hon. Charles E. Terry, President Judge of said court:

Your petitioner Eunice Houk respectfully represents that Stan Hope on the — day of —, A. D. 19—, executed and delivered to your petitioner a mortgage on a message and tract of land situate in [describe same] to secure to the petitioner payment of the sum of — dollars, with interest, in one year from the date thereof, which mortgage is entered in Mortgage Book F, page 365, in the office of the Recorder of said county, and still remains unsatisfied and said tract of land bound thereby; that said premises are now subject to be sold under a *levari facias* on said mortgage [or as the case may be] that the said Stan Hope has committed waste and is still committing waste upon said premises by tearing down the fences, etc. [or as the case may be] and therefore your petitioner prays, etc. [Same as in petitions, *supra*.]

Eunice Houk.

The same form, with slight variation will apply where the lands have been condemned by an inquisition, for petition by a judgment creditor.

### 14. Form of petition of remainderman.

[Same title as above.]

Your petitioner respectfully represents:

That Peter Seiler is tenant for life of a certain message and tract of land situate in [description], and that your petitioner is interested in the estate in remainder therein, being the owner in fee of said remainder; that the said Peter Seiler is in possession of said premises and has committed and is committing waste to the freehold, by [state of what the waste consists]. The petitioner further shows that he served a legal notice upon said Peter Seiler, copy of which and proof of service being hereto annexed, on the — day of —, 19—, more than five days since, demanding that he desist from his commission of said waste to the premises.

And therefore he prays that your honorable court order the prothonotary to issue, etc.

Signed, James Auman.

[Affidavit to the truth appended.]

### 15. Form of notice to life tenant.

To Peter Seiler:

You are hereby notified to desist from the commission of waste

by cutting down timber trees [or, as the case may be] on a certain messuage, etc. [describing same] of which you are now in possession of as tenant for life, and the undersigned is owner of the remainder in fee.

James Auman.

July 19, 1910.

Clinton County, ss:

John Carus, constable of Logan Township, said county, being sworn, says that he served the foregoing upon Peter Seiler personally by making known to him the contents and by handing him a true copy thereof.

John Carus.

Sworn to, etc.

A similar form, with adaptation of the condition and premises will answer for a creditor of a decedent who seeks to have the writ issued. The tenant, in such case may petition to have the writ dissolved in like manner as a tenant, *supra*, and give bond similarly.

With slight variations a writ may be sought by one who has had a writ of foreign attachment served as to lands.

#### 16. Quarrying and mining, etc., as waste.

Section 3 of the act of March 27, 1833, P. L. 99, provides:

"That quarrying and mining, and all such other acts as will do lasting injury to the premises, shall be considered as waste under the provisions of the second section of the act \* \* \* of April 2, 1803: *Provided*, That no writ of estrepement shall be issued to prevent waste or injury by the working of quarries or mines, which were opened previous to the institution of the suit for recovering possession thereof, until the term next succeeding that to which the writ of ejectment was returnable, or until the plaintiff shall have filed, in the office of the prothonotary of the proper court, an affidavit that the title, or right of possession to the premises, or some part thereof is vested in him and until the attorney for the claimant shall have certified his opinion that the title or right of possession is vested in the plaintiff as aforesaid. And *provided further*, That the court in which the action is pending shall have authority to dissolve the writ of estrepement, on the defendant giving security to indemnify the plaintiff against any damage or loss by the further working of the quarries or mines, or on such other terms and conditions as the court may consider equitable and just."

Whether the cutting of timber by the tenant for life was waste, in early times was decided by the custom of farmers.<sup>5</sup>

The working of mine by life tenant may not be the ground for a writ of estrepement by the remainder-man when a court of equity will require an account.<sup>6</sup> A life tenant under a devise of the "right and title" is not liable<sup>7</sup> unless he sells the coal; an equita-

<sup>5</sup> McCullough v. Irvine's Exs., 13 Pa. 438.

<sup>6</sup> Irwin v. Covode, 24 Pa. 162.

<sup>7</sup> Neel v. Neel, 19 Pa. 323.

ble tenant for life, is liable to the trustee of the legal title;<sup>8</sup> also an administratrix who removes a tenement of the estate for her own profit.<sup>9</sup> If the life tenant's use of timber is wanton the writ will lie.<sup>10</sup>

**17. Form of affidavit in case of quarries.**

James Jack }  
v. } In the Court of Common Pleas of Montour County.  
Ernest Mack. } No. —. — Term, 19—.

Ejectment.

Montour County, ss:

James Jack, the plaintiff, being duly sworn, says that Ernest Mack, the defendant in the above stated action of ejectment, has committed and is committing waste of the premises mentioned in this suit, by working quarries in the same which had been opened previous to this action; that the term next succeeding that to which the writ was made returnable has commenced; and that the title and right of possession to said premises is vested in him the said James Jack, as he verily believes.

Sworn to, etc.

James Jack.

**18. Certificate of attorney.**

I, Charles V. Amerman, attorney for the plaintiff in the above case, do certify my opinion that the title and right of possession to the premises for which the above stated action has been instituted, is vested in the plaintiff.

Charles V. Amerman,  
Attorney for plaintiff.

July 19, 1910.

**19. Defendant's counter-affidavit.**

James Jack }  
v. } In the Court of Common Pleas of Montour County.  
Ernest Mack. } No. —. — Term, 19—.

Estrepement *sur* ejectment.

Ernest Mack, the defendant, being sworn, says that the title and right of possession to the premises mentioned in the above writ of estrepement *sur* ejectment are vested in him and not in the said plaintiff, as he verily believes, and that the quarries worked by him in the same were opened previously to the institution of the suit to No. —, — Term, —, 19—, in the same court for the recovery of possession of the premises.

Ernest Mack.

Sworn to, etc.

**20. Recognizance of defendant to dissolve writ of estrepe-  
ment.**

[Same title.]

Montour County, ss:

We, Ernest Mack, defendant, and John Frazier and Louis

<sup>8</sup> Woodman v. Good, 6 W. & S. 169.

<sup>9</sup> Montier's Est., 7 Phila. 491.

<sup>10</sup> Williard v. Williard, 56 Pa. 119.

Geringer, all of said county of Montour, acknowledge ourselves to be indebted to James Jack, the plaintiff above named, in the sum of — dollars, to be levied off our goods and chattels, lands and tenements, respectively; and to be void upon condition that the said Ernest Mack will indemnify the said James Jack, plaintiff, against any damage and loss by the further working of the quarries mentioned in said writ of estrepement [or on such terms as the court may order].

Signed, } ———  
                  } ———  
                  } ———

Taken and acknowledged  
in open court this — day of —, A. D. 19—.

### 21. In what cases the writ will issue.

It has been held that the writ will issue in all cases of waste at the common law, where an injunction would issue, if the case is covered by a statute; such a case is plowing the sod to sow the ground with corn by a tenant;<sup>11</sup> removing the manure from the farm;<sup>12</sup> severing fixtures from a mill.<sup>13</sup> Pending the action of ejectment the writ will issue, *pendente placito*, under the statute of Gloucester, 6th Edward I, ch. 13, which is in force in Pennsylvania.<sup>14</sup>

The writ thus issued is in the nature of an injunction<sup>15</sup> to stay waste being committed or threatened. For waste already done and completed the common law action of waste in the form of trespass lies, which see, *infra*. The cases in which the writ may issue are covered by the acts of assembly which are given in this chapter.<sup>16</sup>

### 22. Rights under the writ.

The writ is purely preventive and does not ordinarily authorize arrest of the defendant.<sup>17</sup> But a discharge from arrest, under *habeas corpus*, does not affect the binding power of the writ.<sup>18</sup> After service, the plaintiff has a right to inspect the premises, to see whether the waste continues and the court may order defendant to permit it.<sup>19</sup> The writ is as specific as a writ of ejectment and applies only to the land described; so a defendant cannot recover on the bond for damages sustained by reason of his ceasing operations on another tract.<sup>20</sup> The writ protects all parties interested in the particular land though sued out by but one of them.<sup>21</sup>

<sup>11</sup> Jones v. Whitehead, 1 Parsons, 304.

<sup>12</sup> Barrington v. Justice, 2 Clark, 501; Walm v. O'Conner, 1 Phila. 353; Lewis v. Jones, 17 Pa. 262.

<sup>13</sup> Powell v. Smith, 2 Watts, 126; Harlan v. Harlan, 15 Pa. 507. In such case replevin will not lie.

<sup>14</sup> Brown v. O'Brien, 3 Clark, 93.

<sup>15</sup> Hough v. Kulp, 24 C. C. 563.

<sup>16</sup> Jones v. Whitehead, 1 Parsons, 304.

<sup>17</sup> Comth. v. White, 9 Lanc. Bar, 41; Eberly v. Rupp, 90 Pa. 259.

<sup>18</sup> Comth. v. White, 9 Lanc. Bar, 41.

<sup>19</sup> Lutz v. Winkler, 4 W. N. C. 442.

<sup>20</sup> Kulp v. Bowen, 122 Pa. 78.

<sup>21</sup> Duff's Ap., 21 W. N. C. 491.

### 23. Motion to dissolve.

Where a writ has issued to stay what is not waste such as tenant cutting his crops, the proper motion by the defendant is to dissolve it.<sup>22</sup> But a writ will not be dissolved where the tenant proposes to make changes which would endanger the building;<sup>23</sup> or where manure, fencing, etc., were about to be removed.<sup>24</sup> It will be dissolved as to those who answer that they were only employees;<sup>25</sup> also when defendant answers fully all the particular acts averred in the petition.<sup>26</sup> Upon a rule to dissolve and depositions the plaintiff may give additional bond and have the rule discharged.<sup>27</sup> It was held that under section 3 of the act of May 4, 1869, P. L. 1251, relating to waste of timber, the power to dissolve on condition was inherent in the equitable powers of the court independently of that section. The court dissolved the writ as to timber already cut, on defendant's giving bond.<sup>28</sup> So it may dissolve the writ with or without requiring security; and the bond may be to the plaintiff instead of the commonwealth.<sup>29</sup> A bond with but one surety was held insufficient<sup>30</sup> prior to act of June 26, 1895, P. L. 343, authorizing a surety company to become surety in all cases.

### 24. Estrepeement during appeals.

Section 1 of the act of April 20, 1869, P. L. 76, provides:

"That on all real actions in dower, partition, waste and ejectment to stay waste committed by the defendant or defendants, in favor of the plaintiff or plaintiffs and against the defendant or defendants therein, and a writ or writs of error are sued out by the defendant or defendants, whereby execution is delayed on the judgment pending such writs of error, the plaintiffs shall, notwithstanding the writ of error and the removal of the record from the court in which the judgment was rendered, have a writ of estrepeement to stay waste committed by the defendant or defendants, or his or their agents or tenants by the cutting of timber, extracting coal, stone, gravel, sand, oil, peat, slate, plumbago, clay, iron and other ores and minerals."

### 25. Issuance and dissolution.

"Section 2. The plaintiff or plaintiffs shall, after filing an affidavit, stating the waste complained of, and a bond for the estimated amount of said waste, with good and sufficient sureties, justified before a judge of the county court, in the clerk's office of the court in which the action was commenced, have a writ or writs of estrepeement issued by the clerk or prothonotary of said court, as of course, without motion and in vacation, to stay and prevent

<sup>22</sup> Snyder v. Depew, 1 Lack. L. R. 477.

<sup>23</sup> Smith v. Chappell, 25 Supr. C. 81.

<sup>24</sup> Gourley v. Lukens, 4 Montg. Co. 15.

<sup>25</sup> Union Tanning Co. v. Shug, 22 C. C. 647.

<sup>26</sup> Burke v. Weiss, 1 Kulp, 310.

<sup>27</sup> Hough v. Kulp, 24 C. C. 563.

<sup>28</sup> Hensal v. Wright, 10 C. C. 416.

<sup>29</sup> Byrne v. Boyle, 37 Pa. 260.

<sup>30</sup> Agnew v. Sutton, 16 C. C. 77.

such waste, to be executed by the sheriff as writs in such cases are now executed; and the court from which such writ issues shall have authority to dissolve said writ upon the defendant or defendants' giving security, by a bond, to be filed in said court, in the same amount given by the plaintiff, with good and sufficient sureties to be approved by said court or a judge thereof in vacation, to indemnify the plaintiff or plaintiffs against any damage or loss from the actions or waste or removal of the aforesaid products from the land by the defendant or defendants, his or their agents and tenants, in case the judgment shall be affirmed by the Supreme Court on the writ of error, or the same be *non-prossed* or abandoned."

#### 26. Tenants in common of timber lands.

Section 1 of the act of May 3, 1869, P. L. 1251, provides:

"It shall be unlawful for any owner or owners of any undivided interest in timber land, within this commonwealth, to cut or to remove or to cause to be cut or removed, from the said land any timber trees, without first obtaining the written consent of all co-tenants in said premises."

The penalty of treble damages provided by the act of March 29, 1824, 8 Sm. L. 283, is not extended to the parties covered by this act.<sup>31</sup>

#### 27. Sales of timber cut not to pass title.

Section 2 of the act, *supra*, provides:

"That no sale of any timber cut or removed from such undivided lands, before or without such consent, shall pass any title thereto; and the parties injured shall have every remedy in law and equity for the recovery of the said timber trees, and of all square timber, boards, lumber, ties, shingles and other articles whatsoever manufactured therefrom; and also for the recovery of damages for the cutting or removing of the same, which they now have against an entire stranger to the title."

If the entry is unlawful, the treble damages follow the trespass.<sup>32</sup> The entry being lawful, the rule of the six carpenters' case<sup>33</sup> seems to apply. In this case having entered a tavern lawfully and consumed wine and bread for which they failed to pay, the action was in debt and not trespass.

#### 28. Estrepelement to issue.

Section 3 of the act, *supra*, provides:

"Upon the violation of the provisions of the first section of this act, it shall be lawful for any of the parties in interest to sue out a writ of estrepelement, to prevent any further cutting thereon, or the removal of any timber then already cut, or both; which

<sup>31</sup> *Wheeler v. Carpenter*, 107 Pa. 271; *Bush v. Gamble*, 127 Pa. 43. (Sand is not a mineral under the act of May 8, 1876, P. L. 142; *Hendler v. Lehigh V. R. Co.*, 209 Pa. 263; *Dexter v. Lathrop*, 26 W. N. C. 504; *Boults v. Mitchell*, 15 Pa. 371.)

<sup>32</sup> *Shiffer v. Brodhead*, 126 Pa. 260.

<sup>33</sup> 8 Coke, 146; 1 Sm. L. Cas. 62.

said writ shall be of force until the interests of the parties shall be set out in severalty, or the writs dissolved by the court, or the action of partition in reference to said land finally ended; and the said writ of estrepement shall be obtained by affidavit, and allowed in the same manner and with like proceedings as to its service and dissolution as are now by law allowed and authorized in cases of estrepement issued pending actions of ejectment for real estate."

Under this act and the equitable powers of the court in estrepement the court may modify the writ so as to permit the defendant to dispose of the timber cut, on giving security.<sup>34</sup>

An affidavit which is deficient may be amended *nunc pro tunc*, and if the bond is not sufficient a new bond may be required, in a case where bark is reserved by contract. What constitutes reasonable notice to take off the bark is a question for a jury.<sup>35</sup> In contracts to cut and remove timber where no time is fixed, the law fixes reasonable time after notice.<sup>36</sup>

#### 29. Estrepement may issue in favor of remainderman.

Section 1 of the act of April 10, 1848, P. L. 472, provides as follows:

"The provisions of an act of assembly, passed the twenty-ninth day of March, 1822, entitled: "An act to prevent waste in certain cases within this commonwealth," be and the same are hereby extended, so as to embrace and be applicable to estates and tenants for life; and upon the application of any person interested in any estate in remainder, his or her agent or attorney, made according to the terms and requirements of said act, a writ of estrepement shall be issued, to prevent waste, as, is directed in other cases therein specified: *Provided*, That at least five days' notice shall be first given to the tenant or tenants in possession, notifying him, her or them not to commit or desist from the commission of any waste, as the case may be: And *provided also*, That no tenant or tenants for life shall be hereby restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession, and that the Court of Common Pleas shall have power to inquire into and determine the nature and extent of said use and enjoyment, upon any motion to dissolve said writ."

The rights of a life tenant are much greater in Pennsylvania than in England and he may work quarries and mines opened on the land before his tenancy began, and cut timber for the clearing of the land.<sup>1</sup> But if his use is wanton the writ will issue.<sup>2</sup> If he is not precluded by restraining words, he may work an opened mine to exhaustion.<sup>3</sup>

<sup>34</sup> Hensal v. Wright, 10 C. C. 416.

<sup>35</sup> Union Tanning Co. v. Shug, 22 C. C. 647.

<sup>36</sup> Boults v. Mitchell, 15 Pa. 364, 371; Patterson v. Graham, 164 Pa. 234; Andrews v. White, 4 Cent. R. 689; Duff v. Bindley, 30 Pitts. L. J. O. S. 408 (U. S. D. C.).

<sup>1</sup> Lynn's Ap., 31 Pa. 44.

<sup>2</sup> Williard v. Williard, 56 Pa. 119.

<sup>3</sup> Westmoreland Coal Co.'s Ap., 85 Pa. 344; Kier v. Peterson, 41 Pa. 357; Irwin v. Covode, 24 Pa. 102; Sayers v. Hoskinson, 110 Pa. 473.



**30. Estrepement may issue in favor of mortgagee.**

Section 1 of the act of April 22, 1850, P. L. 549, supplement to the act of 1822, provides as follows:

"A writ of estrepement to stay waste may be issued agreeably to the provisions of the act to which this is a supplement, in all cases after judgment obtained on a *scire facias* or mortgage, or after proceedings instituted to collect a debt secured by mortgage, upon the proper affidavit being made as required by said act: the court out of which said writs shall issue shall have full power and authority to dissolve, modify or restrict said writs, and to make such orders in the premises as to them seem equitable, and to enforce such orders by attachment if necessary: *Provided*, That no mortgagor shall be hereby restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession; and that the court shall have power to inquire into and determine the nature and extent of such use and enjoyment, upon any motion to dissolve such writ.

**31. Estrepement may issue in favor of creditors of decedent.**

Section 2 of the act of April 22, 1850, P. L. 549, provides as follows:

"From and after the passage of this act it shall and may be lawful for any creditor of any decedent, who has theretofore died seized or possessed of any real estate in this commonwealth, or who may hereafter die so seized or possessed, to apply to the Court of Common Pleas of the proper county, while in session, or to any judge thereof in vacation, by petition and affidavit made by such creditor, or the agent of such creditor, setting forth that such decedent was at the time of his decease indebted to such creditor, and also setting forth the amount and character of such indebtedness, and that the personal estate of such decedent is not sufficient to pay his just debts, and that the tenant or person in possession of such decedent's real estate has committed waste to the freehold, or allows it to be done by others, and that in consequence of such waste the claims of his or her creditors will be endangered, and their collection defeated in whole or in part; and thereupon said court or judge, as the case may be, shall order the prothonotary of said court to issue a writ of estrepement to stay waste, which writ shall have the same effect as if issued after action of ejectment brought in cases where such action is the proper remedy: *Provided*, That the court from which said estrepement issued shall have power to dissolve the same upon receiving from the person or persons in possession of such real estate security to indemnify the creditors of said decedent against any damages or loss which may be occasioned by the commission of waste on said decedent's premises as aforesaid, or on such other terms and conditions as the court may consider equitable and just."

**32. Trees cut down not to be removed after service of writ.**

Section 3 of the act of April 22, 1850, P. L. 549, provides as follows:

"It shall not be lawful for any tenant or other person in possession of any lands within this commonwealth, after the service of a writ of estrepement to prevent waste on the lands of which he or she

is possessed, to remove therefrom any timber trees, although cut down before the issuing of said writ; and all timber removed from said lands after the service of such writ may be replevied by the party on whose behalf it issued, who shall be entitled to recover and hold the same: *Provided*, The removal thereof shall prove to be injurious to him or her, either as owner of the premises or as a creditor of the owner, or otherwise."

**33. Plaintiff in foreign attachment may have estrepement.**

Section 4 of the act of May 8, 1855, P. L. 532, provides as follows:

"After the execution of any writ of foreign attachment upon the lands and tenements of the defendant, or upon lands held by the lien of any judgment or mortgage owned by the defendant, as provided in the third section of this act, it shall be lawful for any court, if in session, or any judge in vacation, upon petition and affidavit in the usual form, of the plaintiff, or some one in his behalf, to award and allow a writ of estrepement, to stay waste upon all such lands and tenements as in other cases."

**34. Estrepement may issue in proceedings on mortgage of leasehold.**

Section 1, act of June 2, 1871, P. L. 290, supplement to act of 1822, provides as follows:

"A writ of estrepement to stay waste may be issued, agreeably to the provisions of the act to which this is a further supplement, in all cases after judgment obtained on *scire facias* on mortgage, or after proceedings instituted to collect a debt secured by mortgage upon any leasehold estate or estates, for a term of years, upon the proper affidavit being made as required by said act; the court out of which said writs shall issue shall have power and authority to dissolve, modify or restrict said writs, to require security, and to make such order in the premises as to them shall seem equitable and just, and to enforce such orders by attachment if necessary."

**35. Estrepement to prevent waste on land sold for taxes.**

Section 1 of the act of June 13, 1883, P. L. 89, provides as follows:

"Hereafter when any unseated lands shall be sold for arrearages of taxes, by the county treasurer of any county in this commonwealth, as is now or may be provided by law, it shall be lawful for the purchaser or purchasers of said unseated lands to apply to any Court of Common Pleas of the county in which said unseated lands are situated, during the session of the said courts, or to any judge of such courts in vacation, and on presentation of petition and affidavit made by him, her or them, or some other creditable person, setting forth that the owner or owners, or some other person or persons, acting under the owner or owners thereof, have committed waste to the said lands, and that such purchaser or purchasers, or some other person for him, her or them, verily apprehends in consequence of such threat that such waste will be committed, unless the same be restrained by law, it shall be lawful and the duty of such court or judge, in its or his discretion, to order the prothonotary of said court to issue a writ of estrepement to stay waste upon such lands, which said writ shall have the same effect, to all intents

and purposes, and shall be governed by the same rules of law, as writs of estrepement in other cases now have: *Provided*, That any such writ may be dissolved, at any time during the period established by law for the redemption of such lands by the owner or owners thereof, upon the payment to the county treasurer of the proper county the full redemption money, and the payment to the prothonotary of said court of all costs of such writ of estrepement: *Provided further*, That upon the dissolution of such writ of estrepement, by redemption of the land, the *pro rata* amount of the twenty-five per centum, which would have accrued at the time such redemption be made, shall only be required to be paid."

**36. County commissioners may sue out estrepement to prevent waste on land held for taxes.**

Section 1 of the act of May 4, 1889, P. L. 83, provides as follows:

"Whenever taxes are returned to the commissioners of any county under the provisions of the first section of the act entitled 'An act to make taxes assessed upon real estate a first lien, and to provide for the collection of such taxes and a remedy for false returns,' approved the second day of June, 1881, the commissioners shall have the right to sue out a writ of estrepement, to prevent the cutting of any timber trees upon the lands on which the said taxes were assessed, or the removal of any timber then already cut, or bark peeled, from same, or any lumber or other article manufactured from said timber, which said writ shall be of force until the taxes so assessed and returned shall have been paid. The said writ of estrepement shall be obtained by affidavit and allowed in the same manner, and with like proceedings as to its service and dissolution, and with like effect as are now by law allowed and authorized in cases of estrepement issued, pending actions of ejectment for real estate."

**37. Suit by owner of contingent interest.**

Section 1 of the act of June 8, 1891, P. L. 208, provides as follows:

"From and after the passage of this act, it shall be lawful for any person or persons having a contingent interest in any real estate in this commonwealth, and not being in possession of the same, to commence and prosecute any suit or suits at law or in equity to prevent the commission of waste to such real estate, or to recover damages for waste committed or injury done to such real estate, in the same manner and form as they might or could do was such interest vested and the person or persons having such interest in actual possession of the same: *Provided*, That before any suit at law or equity is commenced, the said person or persons having such contingent interest shall apply to the Court of Common Pleas of the county where such land or part of the same is situated, for the appointment of some suitable person to take and receive any and all moneys that may be so received in any suit or suits, which person shall, after recovery of judgment and before any money or property passes, give such bond with such sureties as may be approved by said court, and shall hold any and all such moneys received as aforesaid, subject to the orders of said court. Such receiver shall receive such compensation for his services as the court may allow."

**38. Estrepelement for waste in petroleum, pending ejectment.**

Section 1 of the act of June 5, 1883, P. L. 79, provides as follows:

"Whenever petroleum shall be produced from land in controversy in any action of ejectment hereafter commenced, the court in which said action is pending, or a law judge thereof at chambers, upon the application of the plaintiff or plaintiffs therein, may direct a writ of estrepelement to issue against the defendant or defendants, and all parties claiming or acting under them, to prevent the further production of petroleum from the said land."

**39. Affidavit — Bond.**

Section 2 of the act, *supra*, provides:

"Before an order directing the issuing of a writ of estrepelement shall be made, under the first section of this act, the plaintiff or plaintiffs, or some one in his or their behalf, shall present, along with the application for said writ, an affidavit setting forth the facts upon which the application is based, and also a bond with sufficient sureties to be approved by said court or judge, conditioned to indemnify the defendant or defendants for all damages, that may be sustained by reason of said writ of estrepelement."

**40. Dissolution of writ.**

Section 3 of the act, *supra*, provides:

"Upon the application of any party interested the said writ of estrepelement may be dissolved, by the said court or law judge, upon such terms and conditions as may be deemed proper in the discretion of said court or law judge."

**41. Receiver for open and producing well.**

Section 4 of the act, *supra*, provides:

"In case there shall be upon the land in controversy, an open well or wells, producing petroleum at the time when said writ of estrepelement shall be applied for, or at any time subsequent thereto, the court or law judge thereof at chambers, may, unless the defendant or defendants shall give bond with sufficient sureties, and in a sum to the satisfaction of the court or law judge, conditioned to indemnify the plaintiff or plaintiffs, in addition to awarding said writ, on the application of any party interested, appoint a proper person to take charge of the said well or wells and of the petroleum produced therefrom, pending said action of ejectment, to have like power and authority, upon like conditions and accountability as receivers under the equity practice of this commonwealth."

Where a receiver is appointed under this section the defendant is entitled to compensation for the cost of putting down the well, out of the funds derived by the receiver from sale of the oil. He would be entitled to retain the cost of drilling the well and causing it to be productive, where he proceeded in good faith and in the belief that he had a good title to the land or a valid leasehold.\*

\* Phillips v. Coast, 130 Pa. 572; Kille v. Ege, 82 Pa. 102; Ege v. Kille, 84 Pa. 333.

## CHAPTER XLIII.

### REPLEVIN.

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34. Action against plaintiff.

#### 1. Nature of action.

In Pennsylvania the action of replevin is not a proceeding *in rem*, altogether, but likewise against the defendant personally with a summons to him to appear and defend.<sup>1</sup> But since the act of April 19, 1901, P. L. 88, "regulating the practice in cases where the writ of replevin is issued," it is placed nearly in the same class with assumpsit, section six eliminating the elaborate pleadings which were formerly used.

#### 2. Rules of practice.

Section 12 of the act gives the Courts of Common Pleas power to make general rules governing the proceedings under this act, not inconsistent with it, and reference will be had to such rules, for they have the force of law. This principle we derive from England. Said Tindal, Ch. J.:<sup>2</sup> "Courts of law have already within themselves the inherent power and right to regulate their own practice." Unwritten rules of practice remain in force, so far as they are not inconsistent with the rules promulgated.<sup>3</sup> Said

<sup>1</sup> Weaver v. Lawrence, 1 Dallas, 157; Shearick v. Huber, 6 Binney, 3; Woods v. Nixon, Addison, 134; Stoughton v. Rappolo, 3 S. & R. 562; Bower v. Tallman, 5 W. & S. 556.

<sup>2</sup> Scales v. Cheese, 12 M. & W. 687.

<sup>3</sup> Begg v. Forbes, 13 C. B. 614.

Thompson, Ch. J.: "In the exercise of judicial power, there are many things inherent in the courts and exercisable by them, without having been conferred by statute, but which necessarily result from their own rules and uniform practice."<sup>4</sup> It has also been laid down as a principle that the court of first instance is the best authority in expounding its own rules and will not be reversed in such exposition, unless it is manifestly erroneous and injurious.<sup>5</sup>

### 3. Right of action.

In order to maintain this action the plaintiff must have the right to immediate possession and if he has, it matters not that he never had possession himself.<sup>6</sup> He must recover on the strength of his own and not on the weakness of his adversary's title.<sup>7</sup> Where a good title to a piano was shown to be in defendant's wife, the plaintiff was defeated.<sup>8</sup> The plaintiff's title being undisputed and no question of estoppel raised at the trial, it cannot be heard in the appellate court.<sup>9</sup>

The mere fact that one leaves an article in the home of her father when she marries and goes away, is not to be taken as an abandonment of her property right, and if the executor sells it, she may still have her action.<sup>10</sup>

Where the plaintiff sells for cash and delivers the goods and the defendant procrastinates from day to day, a verdict in replevin will be sustained;<sup>11</sup> if the rights of third parties are not involved, who acted on the evidence of possession.<sup>12</sup> As the action only lies for personal property, the question as to whether the articles were attached to the freehold may be submitted to the jury.<sup>13</sup>

Where a decedent has left in his safe certificates of stock sealed in an envelope with a power of attorney transferring them to one, and a statement on the envelope that they were to be delivered at his death, replevin will lie against the executor by such an one, where it is shown they were delivered in his lifetime but returned for safe-keeping.<sup>14</sup>

A plaintiff may have his writ of replevin for goods in this state, notwithstanding he has a suit pending for conversion in another

<sup>4</sup> Comth. v. Mayloy, 57 Pa. 291.

<sup>5</sup> Daily v. Green, 15 Pa. 118; Bair v. Hubartt, 130 Pa. 96; Co. v. Latimer, 165 Pa. 617; Mendenhall v. Mendenhall, 12 Supr. C. 290; Haines v. Young, 13 Supr. C. 303; Kunkle's Est., 21 Supr. C. 200; Webster v. Co., 201 Pa. 278. (See Bierly, on Procedure by Petition and Rule.)

<sup>6</sup> Harlan v. Harlan, 15 Pa. 507; Ferguson v. Lauterstein, 160 Pa. 427; Heilman v. McKinstry, 18 Supr. C. 70.

<sup>7</sup> Reinheimer v. Hemingway, 35 Pa. 432; Swope v. Crawford, 16 Supr. C. 474.

<sup>8</sup> Johnson v. Groff, 22 Supr. C. 85.

<sup>9</sup> Martin v. Stong, 35 Supr. C. 635.

<sup>10</sup> Guillon v. Campbell, 35 Supr. C. 639.

<sup>11</sup> Frech v. Lewis, 32 Supr. C. 279.

<sup>12</sup> Bowen v. Burk, 13 Pa. 146; Backenstoss v. Speicher, 31 Pa. 324.

<sup>13</sup> Glasgow v. Hill, 29 Supr. C. 222.

<sup>14</sup> Reber v. Schroeder, 221 Pa. 152.

state, when he has discontinued his suit there so far as the articles replevied here are concerned.<sup>15</sup>

Where there is a contract of bailment and the bailee makes default the bailor may bring replevin for the goods.<sup>16</sup>

An outgoing tenant given privilege by the landlord and the incoming tenant to store goods in the cellar and allowed a key may maintain replevin against one who without notice buys the goods from an employee of the tenant.<sup>17</sup>

Replevin will lie for a deposit in a bank after insolvency, if it is unmingled with other funds and can be identified.<sup>18</sup>

An unregistered foreign corporation may maintain replevin for its property seized for rent in the hands of a commission merchant.<sup>19</sup>

Where a purchaser buys goods and leaves them in possession of the vendor a subsequent *bona fide* purchaser without notice, will take good title with the delivery.<sup>20</sup>

A creditor cannot replevy goods sold and transferred by his debtor in violation of the act of March 28, 1905, P. L. 62.<sup>21</sup>

A livery stable keeper has a lien for keeping a horse, and if possession is gained by paying with a worthless check he may replevy.<sup>22</sup>

Replevin or trespass is the remedy for recovery of cattle held under the estray law of April 13, 1807, 4 Sm. L. 472 (P. L. 366), unless the detainer of the cattle has given notice and filed a description with the town clerk as required by section 2 of said act. The new fence law has not repealed the stray laws.<sup>23</sup>

#### 4. Parties — Adding party in possession.

Replevin, being the proper form of action to recover goods in possession of another regardless of the manner in which that possession was obtained, the claimant may follow the property through several transfers of possession and replevy it in whatsoever hands he finds it. The action survives to the legal representative of either party, who can be brought in on a *scire facias* and substituted, where the original party dies. If a married woman is in possession of the goods, she should be made a co-defendant and if she is not she may intervene on an averment of title.<sup>24</sup>

Section 2 of the act of 1901, provides that if any other person than the defendant named in the writ be found in possession of the goods and chattels he shall be duly served with the writ, and his name added as a party defendant to the cause. The writ shall command the sheriff to serve the party in possession as well as the defendant named.

<sup>15</sup> *Levy v. Solomon*, 207 Pa. 478.

<sup>16</sup> *Cincinnati, Etc., Co. v. Strang*, 215 Pa. 475.

<sup>17</sup> *McQuale v. N. A. S. Co.*, 208 Pa. 504.

<sup>18</sup> *Corn, Etc., Bank v. Solicitors', Etc., Co.*, 188 Pa. 330.

<sup>19</sup> *Berry, Etc., Co. v. Pile*, 17 D. R. 246.

<sup>20</sup> *Beatty v. Ledy*, 17 D. R. 765.

<sup>21</sup> *Reymer v. Phillips*, 16 D. R. 270.

<sup>22</sup> *Fox v. Magaw*, 12 D. R. 53.

<sup>23</sup> *Murphy v. Dressler*, 14 D. R. 129.

<sup>24</sup> *Lewall v. Lewall*, 158 Pa. 626.

### 5. Pre-requisite — Bond.

Section 1 of the act of April 19, 1901, P. L. 88, provides that before any writ of replevin shall issue out of any court of this commonwealth, the person appearing for said writ shall execute and file with the prothonotary of the said court a bond to the commonwealth of Pennsylvania, for the use of the parties interested, with security in double the value of the goods sought to be replevied, conditioned that if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels and all legal costs, fees and damages which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin.

### 6. Fixing bail — Affidavit with præcipe — Power of court.

Under section 8 of the same act, as amended March 19, 1903, P. L. 39, the prothonotary shall, in the first instance, fix the amount of bail, and approve or reject the security offered; his action in either regard shall be subject to revision by the court, or, in vacation time, a judge thereof at chambers. In order to determine the amount of bail, the plaintiff shall make an affidavit of the value of the goods and chattels (filed with his præcipe), which value shall be the cost to the defendant of replacing them should the issue be decided in his favor. The court or, in vacation time a judge thereof, at chambers, may, upon motion, increase the amount of bail required; may require new bail, if for any reason the old bail has become insufficient, and may enter a *non pros.* against the party in default, if he has the goods and chattels, and its orders be not complied with, or may permit the substitution of bail for that already given and enter an *exoneratur* on the bail bond. This section probably was intended to cover not only the fixing of the original bond of plaintiff, but also the counter-bond given by the defendant to the sheriff, known as the "claim property bond," to entitle him to retain possession of the goods and chattels.

Unless the counter-bond is filed within seventy-two hours, it is too late.<sup>25</sup> The affidavit and bond are prerequisites and cannot be filed *nunc pro tunc*.<sup>26</sup> Before an alias can issue a new bond must be given.<sup>27</sup> Exceptions to the bond must be first heard by the prothonotary before an appeal to court.<sup>28</sup> Where the prothonotary has approved a bond in which a married woman is surety, it is not absolutely void and a judgment by default will not be stricken off, nor will the plaintiff be ruled to perfect the bond, if there is no prayer to have the judgment opened. Judgment will not be opened because of the errors of preceding counsel.<sup>29</sup>

When the sheriff took the forthcoming bond he was liable for its sufficiency.<sup>30</sup>

<sup>25</sup> Lunneman v. Lunneman, 11 D. R. 759.

<sup>26</sup> Ammerman v. Stone, 11 D. R. 726.

<sup>27</sup> Natl., Etc., Co. v. Wilmore, 11 D. R. 651.

<sup>28</sup> Hogg v. Washington Oil Co., 17 D. R. 118.

<sup>29</sup> Rehm v. Askew, 13 D. R. 353.

<sup>30</sup> Hill v. Mervine, No. 1, 13 D. R. 580; Watterson v. Fuellhart, 169 Pa. 612.



## 7. Form of præcipe.

Enos H. Kreider, Jacob D. Rider and Jefferson G. Usner, trading as Lancaster Automobile Co., v. Fremont Shirk.	}	In the Court of Common Pleas of Berks County, Pa. No. —, — Term, 190—.
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To Eldridge Zimmerman, Esq., Prothonotary:

Issue writ of replevin to replevy the following goods and chattels, to-wit: One (1) single cylinder Oldsmobile runabout automobile, of the value of three hundred and seventy-five dollars, and summon the said defendant and whomsoever in whose possession it may be found to answer the plaintiffs wherefore he took the same and unjustly detains against pledges, etc.

Harvey F. Heinly,  
Plaintiffs' attorney

January 10, 1907.

## 8. Form of affidavit of value.

Berks County, ss.

I, Jacob D. Rider, one of the plaintiffs, being duly sworn, according to law, doth depose and say that the value of the goods as set forth in the foregoing præcipe, is three hundred and seventy-five dollars and — cents.

Jacob D. Rider.

Sworn and subscribed before me this 10th day of January, 1907.

[Seal.]

Eldridge Zimmerman, Prothy.

## 9. Form of bond.

Enos H. Kreider, Jacob D. Rider and Jefferson G. Usner, trading as Lancaster Automobile Co., v. Fremont Shirk.	}	In the Court of Common Pleas of Berks County, Pa. Of February Term, 1907. No. 9, Replevin Bond.
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*Know all men by these presents*, That we, — the — above named, and — all of the county of Berks, are held and firmly bound unto the commonwealth of Pennsylvania for the use of — in the sum of — dollars, lawful money of the United States, to be paid to the said commonwealth of Pennsylvania for the use of — or — certain attorney, or assigns; to which payment, well and truly to be made and done, we do bind ourselves, and each of us, for and in the whole, our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated the — day of — A. D. 190—.

*Whereas*, The plaintiff above named — sued out of the Court of Common Pleas of the said county of Berks, a certain writ of replevin to No. — of — Term, 190—, against — the defendant above named, commanding the said sheriff that the goods and chattels in said writ mentioned, he should cause to be replevied and delivered to the said plaintiff.

*Now the condition of this obligation is such*, That if the above bounden — fail to maintain — title to the goods and chattels claimed — shall pay to the party thereunto entitled the value of said goods and chattels and all legal costs, fees and damages which

the defendant or other persons, to whom such goods or chattels, so replevied belong, may sustain by reason of the issuance of such writ of replevin. That then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in the presence of

— — —,	}	— — —	[Seal.]
— — —,		— — —	[Seal.]
— — —,		— — —	[Seal.]

### JUSTIFICATION OF SURETY.

State of Pennsylvania, Berks County, ss.

— — —, surety within named, being duly sworn according to law, doth depose and say, that he is the owner of the real estate situate within the county of Berks, state aforesaid, which is worth at least — — — dollars, over and above all encumbrances.

Sworn and subscribed before me this — — — day of — — —, A. D. 190—.

— — —, Prothonotary.

### 10. Form of writ of replevin.

Commonwealth of Pennsylvania, Berks County, ss.

[Seal.]

To the Sheriff of said county, Greeting:

*Whereas*, — — — and — — — have executed and filed the required bond, with sureties, in the sum of seven hundred and fifty dollars, conditioned that if — — — shall fail to maintain — — — title to the goods and chattels hereafter recited — — — shall pay to the party entitled thereto the value thereof, together with legal costs, fees and damages which the defendant or other person to whom such goods and chattels belong may sustain by reason of this writ:

*Now we command you*, That to the said — — — you deliver the following goods and chattels [name them], of the value of three hundred and seventy-five dollars, which to be replevied and delivered you cause and that you summon and put by safe pledges the said — — — or any other person in whose possession the goods and chattels may be found, so that — — — be and appear before our judges at Reading, at our County Court of Common Pleas there to be held for the county of Berks, on the second Monday of — — — 190—, to answer the said — — — of a plea wherefore — — — took the goods and chattels aforesaid, and the same unjustly detains against sureties and pledges, etc. And have then and there this writ.

Witness the Honorable James N. Ermentrout, President Judge of our said court at Reading, this 10th day of January, A. D. 1907.

Eldridge Zimmerman, Prothonotary.

### 11. Alias and pluries writs.

Alias and pluries writs of replevin may be issued if the goods and chattels be not taken or all the defendants named be not served, and the cause may proceed against defendants in fact served, though the goods and chattels be not found. (Section 9, act of 1901, *supra*.) But a new bond must be given.<sup>31</sup>

<sup>31</sup> Natl., Etc., Co. v. Wilmore, 11 D. R. 651.

Amendments as to parties, if only formal, may be made *ex parte*, after the filing of the counter bond;<sup>32</sup> but not without rule and notice, where it goes to the substance.<sup>33</sup>

#### 12. Service of writ.

The mode of service is set forth in section 9 of the act of 1901, P. L. 614, which is given under title "Summons," and in par. 3, *supra*. But these do not sufficiently explain the practice and it is necessary to go more into detail. Armed with this writ the sheriff may enter defendant's house and search for the goods specified, and is justified though he find them not, seeing he does nothing in excess. English authorities go as far as to justify the sheriff in breaking an outer door, where entrance is refused, after notice of his intention, his authority and a proper demand.<sup>1</sup> Nowhere else than in England is there more respect for the truism that "Every man's house is his castle."

It is the duty of the plaintiff to point out the goods to the sheriff, and the sheriff must make an actual delivery where no counter-bond is given by the one in possession, unless consent be given to a symbolic delivery.<sup>2</sup>

#### 13. Counter-bond and intervention.

Section 3 of the act of 1901, *supra*, as amended by the act of April 14, 1905, P. L. 163, provides for a counter-bond, claim property bond and intervention. Before that the act was defective. It now reads as follows:

"The court, or in vacation time, a judge thereof at chambers may grant leave to any person, upon an affidavit filed that the goods and chattels so replevied belong to him, to intervene as party defendant in such suit; and the defendant or party so intervening may file a counter-bond within seventy-two hours after such goods or chattels have been replevied, during which time the said goods and chattels shall remain in the possession of the sheriff, and which time may be extended by the court or, in vacation time, a judge thereof at chambers upon cause shown. Such counter-bond shall be given to the commonwealth of Pennsylvania, for the use of the parties interested, in the same amount as the original bond and with like conditions. Where several parties claim the right to give a counter-bond and have possession of said goods and chattels, the party who is in actual or constructive possession of the goods and chattels at the time the writ of replevin was served, shall, upon entering the proper counter-bond, be entitled to have said goods and chattels."

Where a corporation has brought the action against two defendants and a third party intervenes, first claiming title to all the property replevied, but subsequently relinquishing his claim except to a small portion which is conceded and the only plea of the defendants is that the plaintiff is not a corporation, it is not error for the court to direct the jury to be sworn as to the plaintiff and

<sup>32</sup> *Shenk v. Kurtz*, 25 *Lanc. L. R.* 191; *Hays v. Rinker*, 18 *D. R.* 539.

<sup>33</sup> *Comrey v. E. U. Twp.*, 202 *Pa.* 442.

<sup>1</sup> *Jones v. Herron*, 12 *C. C.* 183.

<sup>2</sup> See *Bierly on Landlord and Tenant*—"Replevin."

the intervenor alone, and to instruct them that no question of title is at issue and their only duty is to find the value of the goods replevied. The plea of defendants was a plea in bar and the issue was solely between the plaintiff and intervenor, and the defendants had no standing on appeal.<sup>3</sup>

The intervention clause does not apply where a tenant replevies goods distrained for rent which is admitted to be due all the goods on the premises being liable.<sup>4</sup> This act applies to landlord's distraint,<sup>5</sup> and it may be brought after the sale for an irregular and tortious distress.<sup>6</sup>

#### 14. Claim property bond — Impounding — Fixing of security.

The act of 1905, *supra*, to meet the case of a claim property bond and poundage, patches up the act of 1901, in a proviso, to-wit:

*Provided*, That in any action of replevin, hereafter to be brought, where the defendant or person intervening in such action, claiming title to the property replevied, shall enter a claim property bond therefor, if the plaintiff, within seventy-two hours after notice from the sheriff, of the entry of such claim property bond, by affidavit filed in such action, aver that by reason of the nature of such property, or any special circumstances connected with his alleged ownership thereof, the actual pecuniary value of such property will not compensate him for the loss thereof, the court, or, in vacation time, any judge thereof at chambers, shall order such property to be impounded in the custody of the sheriff, or such other person as the court, or, in vacation time, any judge thereof at chambers, may designate, to abide the final determination of the action: *Provided*, The plaintiff shall exhibit an estimate of the probable necessary charges and expenses of the storage, care or keep of such property pending the final determination of such action, and shall pay, or secure the payment of such charges and expenses as the court, or, in vacation time, any judge thereof at chambers shall approve. The amount of such security shall be fixed by the court, or, in vacation time, by any judge thereof at chambers, and said security shall be approved in the same manner as now provided for the approval of the security entered by the plaintiff on the issuing of the writ of replevin. The bond shall be to the commonwealth and shall be for the use of any party interested in the payment of the storage, care or keep of the impounded property.

"Upon the final determination of such action, the property so impounded shall be delivered to the party who shall have successfully maintained his title thereto, and the charges and expenses of the storage, care or keep of such property shall be assessed as costs of suit, and shall be recoverable from the unsuccessful party in the same manner as damages and costs are now recoverable in action of replevin."

<sup>3</sup> U. S. Circle Swing Co. v. Reynolds, 224 Pa. 577.

<sup>4</sup> Samson v. Levy, 12 D. R. 600.

<sup>5</sup> Beckel v. Leinbach, 15 D. R. 688.

<sup>6</sup> Hays v. Rinker, 18 D. R. 539.

15. Return — Form.

The sheriff must make particular return of his execution of the writ. In case the defendant claims property and gives a counter-bond the return should show this specially as well as the mode of service. If the property is found in possession of another than the defendant and no counter-bond is given the following is a proper return as made in the case of Enos H. Kreider, *et al.*, v. Fremont Shirk. No. 9, February Term, 1907, C. C. P. Berks Co., *supra*:

And now, to-wit, January 10, 1907, D. B. Hill being found in possession of the property within described, whereupon he is hereby added as a party defendant to the within writ.

Jacob H. Sassaman,  
Sheriff.

January 10, 1907, replevied as within commanded, and at the same time served the within writ upon D. B. Hill, who was made a party defendant to the within writ, being found in the possession of the automobile replevied, as within enumerated, by handing a true and attested copy thereof to him personally, and making known to him the contents thereof. *Nihil habet* as to Fremont Shirk, the defendant within named.

March 10, 1907, no counter-replevin bond being filed within the time allowed by law by any of the defendants as aforesaid, whereupon the property replevied as aforesaid, delivered to plaintiffs.

So answers,  
Jacob H. Sassaman,  
Sheriff.

Sassaman .....	\$3 40
Mileage .....	1 80
	<hr/>
	5 20
D. B. Hill, storage .....	5 00
	<hr/>
Total.....	\$10 20

Paid by plaintiff March 30, 1907.

The sheriff's return may not be contradicted in the affidavit of defense. If it is false the remedy is in an action against the sheriff.<sup>7</sup>

16. Quashing of writ against public officers.

The act of April 3, 1779, 1 Sm. L. 470, declares all writs of replevin void which are issued against officers acting under legal authority of the state and when the court quashes a writ it may impose treble damages, and also award an attachment against the prothonotary for issuing it, if knowingly done. But this act does not apply to a borough policeman who seizes a vehicle for license fees, when it does not appear that there was any legal process or authority by law or ordinance to do so.<sup>8</sup>

<sup>7</sup> Ricard v. Major, 34 Supr. C. 107.  
<sup>8</sup> Cunningham v. Wilmerding Boro', 38 Supr. C. 20.

**17. Declaration — Rule to file — non-pros.**

"Section 4 (act 1901): The plaintiff in such action shall file a declaration, verified by oath, which shall consist of a concise statement of his demand, setting forth the facts upon which his title to the goods and chattels is based. The defendant or party intervening may enter a rule upon plaintiff to file such declaration within fifteen days, and the plaintiff failing so to do, a judgment of *non pros.* shall be entered, which judgment shall operate to forfeit said bond."

**18. Præcipe for rule to declare.**

Following is a form of præcipe for a rule to declare:

Enos H. Kreider	}	Court of C. P. Berks Co. No. 9. Feb'y T., 1907.
<i>et al.</i>		
v.		
Fremont Shirk.		

Please enter rule on above named plaintiffs to declare within fifteen days after service of notice of said rule or judgment *sec. reg.*

H. P. Keiser,  
Attorney for Defendant,

Service of rule accepted.

Harvey F. Heinly,  
Attorney for Plaintiffs.

**19. Form of declaration.**

Following is a form of declaration:

Enos H. Kreider	}	Court of C. P. Berks Co. No. 9. Feb'y T., 1907.
<i>et al.</i>		
v.		
Fremont Shirk.		

The plaintiffs above named complain of the defendant Fremont Shirk and say that the title, right of property and right of possession in a certain one cylinder Oldsmobile runabout automobile was and still is in the plaintiffs, they having acquired title thereto by an exchange with a customer in the winter of 1904-5 in the city of Lancaster, county of Lancaster, state of Pennsylvania. That in the spring of 1906 defendant obtained possession of the above mentioned automobile, being so as aforesaid the property of the plaintiffs and being the property replevied in this action, without the consent or authority of the plaintiffs herein, and without any right to said possession either as owner, bailee or otherwise, and in spite of repeated demands by the plaintiffs upon him to deliver possession thereof to them, the said defendant refused to deliver possession thereof and unjustly detained the said automobile, all of which facts the plaintiffs aver to be true, and bring this suit to recover said automobile, or the value thereof, which is three hundred and seventy-five dollars, and damages for its unjust detention by the defendant.

Harvey F. Heinly,  
Attorney for Plaintiffs.

Berks County, ss:

[Affidavit to truth of above.]

## 20. Plaintiff's declaration — Sufficiency of.

A statement is sufficient which avers that plaintiff is assignee of bailment lease for the chattels, that default was made in payment of rent reserved, that bailee became bankrupt, and in violation of the lease wrongfully delivered them to defendant, that demand was made for them and refused. There is no market overt in Pennsylvania by which a purchaser of a chattel can give title to it when the seller was a mere bailee.<sup>9</sup>

The plaintiff in his statement in a distress case need not anticipate the defense. All he needs to do is to set out clearly his title and the fact of wrongful dispossession.<sup>10</sup> Unless the declaration sufficiently discloses the facts upon which the plaintiff's claim of title rests, a judgment for want of an affidavit of defense will be stricken off.<sup>11</sup> In order to hold the defendant to his duty to file an affidavit of defense a copy of the plaintiff's declaration must be served personally on him or his attorney.<sup>12</sup>

A rule of court authorizing judgment of *non pros.* if no declaration is filed within a year, has been held not to apply to replevin under the act of 1901. The defendant must first rule the plaintiff to file a declaration in fifteen days or *non pros.*<sup>13</sup>

## 21. Affidavit of defense — Judgment in default, etc. — Forfeiture of bond — Insufficient affidavit — Writ of *retorno habendo* — Writ of inquiry — "Common appearance."

Section 5 of the act of 1901, provides:

"The defendant or party intervening shall, within fifteen days after the filing of such declaration, file an affidavit of defense thereto, setting up the facts denying plaintiff's title and showing his own title to said goods and chattels; and in event of his failure so to do, upon proof that a copy of said declaration was served upon him or his attorney, judgment may be entered for the plaintiff and against the defendant, or party intervening, which judgment shall operate to forfeit any counter-bond given by him. The court may enter judgment, with like effect, for want of a sufficient affidavit of defense, or for such goods and chattels as may be admitted to be the property of the plaintiff, in the affidavit of defense; or may enter judgment, with like effect, for such goods and chattels as to which the court may adjudge the affidavit of defense insufficient. And in the event of judgment being rendered in favor of the plaintiff for a portion of such goods and chattels replevied, he may proceed to recover such goods and chattels by writ of *retorno habendo*, or the value thereof after assessment of damages on a writ of inquiry of damages issued, and the case shall be proceeded in, for the recovery of the balance.

<sup>9</sup> *Heisley v. Economy, Etc., Co.*, 33 Supr. C. 218; *Miller Piano Co. v. Parker*, 155 Pa. 208; *Lamb v. Leader*, 6 Supr. C. 50; *Ricard v. Major*, 34 Supr. C. 107.

<sup>10</sup> *Drumgoole v. Lyle*, 30 Supr. C. 463. (The act of 1901 applies to such a case. *Crawford v. Fulmer*, 31 C. C. 219.)

<sup>11</sup> *Forsyth v. Stumbaugh*, 13 D. R. 339.

<sup>12</sup> *Smith v. Smith*, 17 D. R. 380.

<sup>13</sup> *Ott v. Miller*, 16 D. R. 140.

If the defendant has been duly summoned and does not appear at the return day of the writ, the plaintiff, having filed his declaration, may file a common appearance for the defendant, and proceed in the cause as in other cases."

## 22. Affidavit of defense — Requisites.

The affidavit required by the defendant, setting up his title, must state frankly and fairly the facts which support the claim advanced and not mere inferences or legal conclusions. It will be insufficient if absolute ownership be claimed and a mere qualified title is inferable, such as a pledge or bailment or a chattel mortgage without delivery.<sup>14</sup> It need not set out a chain of title, but should show how he obtained ownership to exclude plaintiff's title.<sup>15</sup> Although filed after the fifteen days it will stop judgment by default.<sup>16</sup>

Where an affidavit of defense avers an assignment of the leasehold and notice of same to tenant, but a copy of the assignment is not attached — it is insufficient.<sup>17</sup>

An affidavit of a constable who sells a leased piano for rent, is insufficient which does not set forth strict compliance with the law, especially where the lessor of the piano had given notice to the landlord under the act of May 13, 1876, P. L. 171.<sup>18</sup>

Upon a stock certificate of 2,500 shares an affidavit of defense is sufficient which avers that at a time after the corporation defendant had received the certificate from plaintiff the latter sold to the two individual defendants certain shares of stock of the same company and that it was agreed by all parties that the defendant corporation should hold the certificate and have it divided into smaller certificates, so as to give the individual defendants 500 shares which were due them and which they had paid for, and that this division of the certificate had been prevented by the action of the plaintiff in notifying the company issuing the shares not to make the transfer.<sup>19</sup>

Where the defendant admits title from the plaintiff, as under a bailment lease, he must set up how the plaintiff lost his title and how it was vested in him.<sup>20</sup> One claiming to be the surviving partner of a decedent can defend on that ground against replevin by the executor.<sup>21</sup>

An affidavit of defense has been permitted to be amended on a motion for a new trial so as to comply with the verdict.<sup>22</sup>

## 23. Judgment by default.

A judgment for plaintiff for want of a sufficient affidavit of de-

<sup>14</sup> Miller v. Jackson, 34 Supr. C. 31.

<sup>15</sup> Lehman v. Gill, 12 D. R. 89; Fox v. Magaw, 12 D. R. 53; Hill v. Mervine, No. 2, 13 D. R. 582.

<sup>16</sup> Miller v. Jackson, 16 D. R. 122.

<sup>17</sup> Strafford v. Walter, 24 Supr. C. 498.

<sup>18</sup> Ramsdell v. Seyfert, 27 Supr. C. 133.

<sup>19</sup> Sulzner v. Cappeau, Etc., Co., 223 Pa. 87.

<sup>20</sup> Am. Soda, Etc., Co. v. Egbert, 14 D. R. 426.

<sup>21</sup> Benar v. Lippus, 18 D. R. 241.

<sup>22</sup> Houghton, Miffin & Co. v. DuBell, 15 D. R. 833.



fense operates to forfeit any counter-bond given by the defendant. If, then, the plaintiff, instead of taking out his writ of *retorno habendo*, wishes to recover damages he must proceed by writ of inquiry to have them assessed or by *scire facias* on the judgment. He cannot assess them as of the amount of the bond without proving his damages.<sup>23</sup> Judgment by default may be taken before the return day after notice of declaration filed.<sup>24</sup>

When judgment by default is once entered the court has no power to open it or strike it off.<sup>25</sup> The form of it is a general judgment for the plaintiff.<sup>26</sup>

#### 24. Set-off.

The general rule is that set-off cannot avail in replevin.<sup>27</sup> Nor is it allowable as to a tort in replevin for rent.<sup>28</sup> But where by a settlement in a suit on a replevin bond the landlord confesses judgment, he may ordinarily set off against it, his judgment confessed by the tenant on the lease.<sup>29</sup> As between landlord and tenant it cannot be claimed except for damages arising from breaches of the lease itself, which does not include a covenant to sell the land.<sup>30</sup> But there may arise an equitable set-off to justify the court in staying an execution until a pending action is decided.<sup>31</sup>

#### 25. How issues are made up — Lien.

Section 6 (1901): "The declaration and affidavit of defense, as originally filed, or as amended by leave of court, shall constitute the issues under which, without other pleadings, the question of the title to, or right of possession of the goods and chattels as between all the parties shall be determined by a jury. If any party be found to have only a lien upon said goods and chattels, a conditional verdict may be entered, which the court shall enforce in accordance with equitable principles."

The above eliminates the old form of pleadings, as to avowry and cognizance, etc. Whoever may be interested in such pleas is referred to *Lutz v. Brown*, 26 C. C. 47; or *Bierly on Landlord and Tenant*. Nothing outside the declaration and affidavit will be considered.<sup>32</sup>

A judgment in trover for the same goods and between the same parties may be pleaded in bar to an action of replevin.<sup>33</sup>

<sup>23</sup> *Painter v. Snyder*, 22 Supr. C. 603; *Lewis v. Bonnert*, 12 C. C. 366.

<sup>24</sup> *Griesmer v. Hill*, 36 Supr. C. 336; 225 Pa. 545.

<sup>25</sup> *Chestnut v. Reese*, 16 D. R. 511.

<sup>26</sup> *Patch Mfg Co. v. Killinger*, 12 D. R. 6.

<sup>27</sup> *Natl., Etc., Co. v. Cochran*, 22 Supr. C. 582; *Eureka Knitting Co. v. Snyder*, 36 Supr. C. 336.

<sup>28</sup> *Phillips v. Monges*, 4 Wharton, 226; *Heck v. Shener*, 4 S. & R. 249; *Gogel v. Jacoby*, 5 S. & R. 117; *Groetzinger v. Latimer*, 146 Pa. 628; *Clark v. McLanahan*, 39 Supr. C. 30; *Patch Mfg Co. v. Killinger*, 12 D. R. 6.

<sup>29</sup> *Fahey v. Howley*, 22 Supr. C. 472.

<sup>30</sup> *Harrison v. Brink*, 18 D. R. 22.

<sup>31</sup> *Kline v. Blaine*, 18 D. R. 852.

<sup>32</sup> *Williams v. Williams*, 18 D. R. 988.

<sup>33</sup> *Singer Co. v. Yaduskie*, 26 C. C. 208.

## 26. Title in one out of possession — Retorno habendo and fi. fa.

Section 7 (act of 1901): If the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party and he may, at his option, issue a writ in the nature of a writ of *retorno habendo*, requiring the delivery thereof to him, with an added clause of *fieri facias* as to the damages awarded and costs; and upon failure so to recover them, or, in the first instance, he may issue execution for the value thereof and the damages awarded and costs; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs, in the same manner that recovery is had upon other official bonds.

## 27. Damages — Measure of.

The damages are to be estimated as by the value of the chattel when the plaintiff was entitled to possession by seizure under his writ.<sup>34</sup> Where it is brought on a lease for a piano, the damages should be estimated from the date of demand for a return.<sup>35</sup>

In case where the property is a boat and defendant gives bond and retains it, the jury may deduct from the market value of the boat when the writ issued, the amount and value of subsisting liens against it which had not then been abandoned, or subsequently waived, abandoned or lost by the act of the plaintiff or by litigation. The record in bankruptcy proceedings as to value, etc., is not evidence against the claimant as he was not a party there.<sup>36</sup>

A referee who tries the issue in replevin may hear expert testimony as to value of machinery.<sup>37</sup>

Where defendant retains the property the measure of damages is ordinarily the value of the property and damages for the detention which is usually interest from the time of taking; but where the taking or detention or both are accompanied by circumstances of aggravation, vexation and hardship exemplary damages are allowable.<sup>38</sup>

Where exemplary damages are improperly allowed by the jury the appellate court may, if desired by the appellee, reduce the amount to compensatory damages and in that form affirm the finding below.<sup>39</sup>

The verdict should apply to all the articles which the plaintiff proves are his and which are unlawfully detained.<sup>40</sup>

## 28. Writ of retorno habendo.

At the common law and prior to the act of 1901, where the de-

<sup>34</sup> Johnson v. Groff, 22 Supr. C. 85.

<sup>35</sup> Ludwig Piano Co. v. Browne, 33 Supr. C. 81.

<sup>36</sup> Woods v. Klein, 223 Pa. 256.

<sup>37</sup> Sykes v. Thornton, 223 Pa. 589.

<sup>38</sup> Cox v. Burdett, 23 Supr. C. 346; McDonald v. Scaife, 11 Pa. 381; Dennis v. Barber, 6 S. & R. 420; Herdic v. Young, 55 Pa. 176.

<sup>39</sup> Cox v. Burdett, 23 Supr. C. 346.

<sup>40</sup> Vansciver v. Churchill, 16 D. R. 362.

fendant gave a claim property bond and retained the goods the right of the plaintiff was transformed into a chose in action and the verdict of the jury was properly in damages for the value of the goods as well as for the detention thereof.<sup>43</sup> The defendant was the only party who could have a writ *de retorno habendo*.<sup>44</sup> But the act of 1901 has expressly given the plaintiff a right to this writ in section 5.<sup>45</sup>

Where the judgment is for damages which must be assessed, the assessment is by writ of inquiry. For practice and forms on writ of inquiry, see Bierly on Juries and Jury Trials.

### 29. Form of writ of retorno habendo.

Berks County, ss:

The Commonwealth of Pennsylvania to the sheriff of the said county, greeting: Whereas Henry Meyer lately in our Court of Common Pleas in and for said county, was summoned to answer Hanna Husselton of a plea wherefore he took one organ of the value of two hundred dollars, lawful money of the United States, of the goods and chattels of her the said Hanna Husselton and the same unjustly detained against sureties and pledges, etc., as she alleged, and the said Hanna Husselton afterwards made default in our said court, before our judges thereof. Wherefore it is considered in our same court, before our said judges that she and her pledges for prosecuting should be amerced and that the said Henry Meyer might depart the court without day and should have a return of the organ aforesaid. Therefore, we command you, that without delay, you return the said organ to the said Henry Meyer and you shall not deliver the said organ at the complaint of the said Hanna Husselton without our writ, which shall expressly mention the said judgment. And in what manner you shall execute this writ, make known to our judges at Reading, at our Court of Common Pleas there to be held for the County of Berks, on the — day of —, 19—.

And have you then and there this writ.

Witness our Hon. — —, Judge of said court, etc.

[Seal]

Attest:

— —, Prothonotary.

### 30. Costs.

Where a verdict is rendered against one defendant but for two others, the latter have no claim for costs against the plaintiff.<sup>46</sup>

### 31. Replevin bond — Suit on.

The conditions of a replevin bond are distinct and independent of each other. One is that the plaintiff shall prosecute his writ with effect; the other is that he shall and will make return of the

<sup>43</sup> *Etter v. Edwards*, 4 Watts, 63; *Moore v. Shenk*, 3 Pa. 13; *Fisher v. Woolery*, 25 Pa. 197.

<sup>44</sup> *Schofield v. Ferrers*, 46 Pa. 438; *Rockey v. Burkhalter*, 68 Pa. 221.

<sup>45</sup> *Reber v. Schroeder*, 221 Pa. 152. (See section 7 also.)

<sup>46</sup> *Ramsdell v. Owens*, 1 D. R. 198; *Maus v. Maus*, 10 Watts, 87; *Steele v. Lineberger*, 72 Pa. 239.

goods if return of the same shall be adjudged. The penalty for the breach of either is forfeiture of the bond. The measure of damages is the actual cash paid for the goods bought by the defendant and actual value of goods bought by others, where the plaintiff fails in his suit.<sup>47</sup>

An attorney has no authority to release the surety on a claim property bond.<sup>41</sup>

### 32. Limitation of action on bond.

Section 10 (1901): No action shall be brought upon any bond given in accordance with the provisions of this act unless commenced within five years after the final determination of the suit in which the bond was given.

### 33. Judgment on appeal bond.

On an appeal bond in replevin the exemption of the act of April 9, 1849, P. L. 533, is not allowed.<sup>42</sup>

### 34. Action against plaintiff.

An action may be brought against the plaintiff for accepting goods from the sheriff, which he well knew belonged to claimant and not the defendant in the writ, and for wrongfully converting the proceeds to his own use.<sup>43</sup>

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<sup>47</sup> *Pure Oil Co. v. Terry*, 209 Pa. 403.

<sup>41</sup> *Lowry v. Clark*, 20 Supr. C. 357.

<sup>42</sup> *Ramsdell v. Seybert*, 14 D. R. 247.

<sup>43</sup> *Barley v. Beegle*, 29 Supr. C. 635.

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## CHAPTER XLIV.

### THE WRIT OF SCIRE FACIAS.

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|--|---------------------------------|
| 1. <i>Scire facias</i> defined.              | 5. Pleadings.                   |
| 2. A judicial writ.                          | 6. Trial, verdict and judgment. |
| 3. <i>Præcipe</i> — affidavit — act of 1901. | 7. Appeal.                      |
| 4. The writ.                                 | 8. Execution.                   |

#### 1. *Scire facias* defined.

*Scire facias*<sup>1</sup> is in form a judicial writ based on a record; in practice and pleading it has been termed an action;<sup>2</sup> and it may be an original writ, as (a) for the annulment of letters patent or a charter; (b) upon forfeited recognizances; or it may be incidental or continuing as (a) to bring in necessary parties upon death of parties to the record; or (b) upon assignment or bankruptcy; or upon a judgment, mortgage, mechanic's lien or municipal or tax lien. There is also the form of *quare executionem non*,<sup>3</sup> which in practice now is combined with a *sci. fa.* to revive and continue the lien.

Other forms are *scire facias ad disprobandum debitum* in foreign attachment and *scire facias quare restitutionem non*, after reversal in error or on appeal; also *scire facias* on a *quando acciderint* against an executor, upon a judgment, for assets which came into his hands after the judgment, which fact the writ must set forth; also *sci. fa. ad rehabendum terram*.<sup>4</sup>

#### 2. A judicial writ.

A writ of *scire facias* is not an original writ, but as Lord Coke has said, "a judicial writ, and properly lyeth after the year and day after judgment."<sup>5</sup> This writ he explains: "So as by the writ it appeareth, that the defendant is to be warned to plead any matter in bar of execution; and therefore albeit it be a judicial writ, yet because the defendant may thereupon plead, this *scire facias* is accounted in law to be in the nature of an action."

It took its name from the potent words in the writ itself, to-wit: "*Quod scire facias præfat.* [Zeno Bitner, the defendant.] *Quod sit coram*, etc.] meaning "that you (the sheriff) shall cause the aforesaid defendant to know that he must be before us, etc."

<sup>1</sup> *Scire* — to know; *facias* — that you cause or make.

<sup>2</sup> *Dougherty's Est.*, 9 W. & S. 189; *Smith v. Ramsey*, 6 S. & R. 573; *Allen v. Reesor*, 16 S. & R. 10.

<sup>3</sup> Wherefore plaintiff shall not have his execution; also written "*executionem non*." *Gibson in Dougherty's Est.*, *supra*.

<sup>4</sup> *Schofield v. Harbeson*, 9 Phila. 38.

<sup>5</sup> Coke on Litt., 290b.

There is an instance in Pennsylvania law, where the *scire facias* may be said to be an original writ—as in the charter of the Pennsylvania Railroad Company, wherein it is provided that a writ of *scire facias* may issue out of the Supreme Court in course of law for the forfeiture of its charter.<sup>6</sup>

The courts may by a special order direct a *scire facias* to issue in cases falling within the reason of the law.<sup>7</sup> The writ issues out of the court in which the record is, when in the form *sur* record.<sup>8</sup> Or if upon a mechanics' lien the court in which the lien was filed, but in respect to a municipal claim it was held that it need not issue from the court in which the claim is filed<sup>9</sup> though by analogy with a mortgage it should issue in the county in which the lands lie, that are embraced or affected by it.<sup>10</sup> There is an exception as to the issuance of the *sci. fa.* in the court where the record is, in the case of a recognizance taken in the Orphans' Court for security when lands are taken at the appraisement, the proceeding upon that being in the Court of Common Pleas.<sup>11</sup>

In respect to a recognizance before a justice of the peace if the record is removed by appeal to the Common Pleas the *sci. fa.* is issuable in that court. If the record remains before the magistrate it must be issued from his docket.<sup>12</sup>

### 3. Præcipe — Affidavit — Act of 1901.

The writ issues upon præcipe, as in any action, but if upon a record the præcipe should refer to the record by volume and number and term and date so as to identify it and avoid confusion. And under the service act of 1901, be accompanied with an affidavit.

By the eleventh clause of the act of 1901, P. L. 618, it is provided:

The plaintiff in any writ of *scire facias sur* mechanics' claim, or in any other writ to charge particular land with the payment of a statutory lien, other than those provided for in clause tenth, and excepting also claims for taxes and municipal claims, shall file with his præcipe an affidavit, by himself, his agent or attorney, setting forth that he has caused inquiries to be made, in the neighborhood of the property, of at least three of those residing upon or nearest thereto, whose names and residences are given and the dates of the inquiries stated, and that he believes the persons named by him in such affidavit are the real owners of said property; whereupon all such persons shall be made parties to the writ, which shall be served by the sheriff, by adding to the writ and serving, as in the case of a summons, all persons other than those named in the writ who may be found in possession of said property, or any part thereof, or if no one be found in possession thereof, then by posting

<sup>6</sup> Section 24, act April 13, 1846, P. L. 324.

<sup>7</sup> Dunlop v. Speer, 3 Binney, 169.

<sup>8</sup> Chambers v. Carson, 2 Wharton, 365; section 5, act April 1, 1823, 8 Sm. L. 176.

<sup>9</sup> Schenley v. Comth., 36 Pa. 29.

<sup>10</sup> Troubat & H. Pr., section 1918.

<sup>11</sup> Allen v. Reesor, 16 S. & R. 14.

<sup>12</sup> Troubat & Haley's Pr., section 1918, note.

a true and attested copy of the writ on the most public part of said property; and,

(a.) By serving, as in the case of a summons, such of those named in the writ as may be found in the county in which the writ issues; and,

(b.) By serving, as in case of a summons, such of those named in the writ as may be found in any other county of the commonwealth, by the sheriff thereof, who shall be deputed for that purpose, by the sheriff of the county in which the writ issues; and,

(c.) If all those named in the writ cannot be served, as provided in clauses a. and b. hereof, then by mailing a true and attested copy of the writ, in a registered letter, to such of those named in the writ, whose residences are given as without the commonwealth, and by advertising a brief notice of the contents of said writ, once a week for four successive weeks, in one newspaper of general circulation in the county, and in the legal periodical, if any, designated by the court for that purpose: *Provided*, however, that if all those named in the writ have been personally served, or if return registry receipts for the copies mailed are returned by the sheriff with the writ, the advertisement above provided for may be dispensed with.

Forms will follow with each division.

#### 4. The writ.

The writ is issued in the name of the commonwealth and directed to the sheriff to make known to the ones named in it to appear in court on a day certain and show cause if any they have why the plaintiff should not take the steps he contemplates in the particular premises. The writ should recite the antecedent matter and record with accuracy, or a variance in a material matter may prove fatal on a plea of *nul tiel* record.<sup>13</sup>

The forms will be given, *infra*, with each division. If defective as to form it is amendable. In order that the plaintiff may have judgment on two returns of *nihil* on the *quarto die post*, it was held that the second *sci. fa.* must have issued ten days before the return day the same as a summons.<sup>14</sup> Where service cannot be made on defendant the return is not as ordinarily "*non est inventus*," but *nihil*.<sup>15</sup> If service is made, it is *scire feci*, i. e., he has caused the defendant to know. According to the ancient practice two returns of "*nihil*" are equivalent to *scire feci*, or service.<sup>16</sup>

#### 5. Pleadings.

Upon a *sci. fa.* no declaration is required since the writ itself sets forth the matter which defendant is required to answer or

<sup>13</sup> Walker v. Pennell, 15 S. & R. 68; Eichelberger v. Smyser, 8 Watts, 181; Richter v. Cummings, 60 Pa. 441.

<sup>14</sup> Laws v. McDanel, 1 Clark, 421; Buchanan v. Specht, 1 Phila. 252; sections 31, 36, act of June 13, 1836.

<sup>15</sup> Chambers v. Carson, 2 Wharton, 365.

<sup>16</sup> Compher v. Anawalt, 2 Watts, 490; Warner v. Moore, 3 Luz. L. R. 108.

meet, and he may plead, thereto. A declaration is seldom filed.<sup>17</sup> A demurrer to the writ has the same force as if it were a declaration. Judgment may be taken by default, without it, either for want of an appearance or an affidavit of defense.<sup>18</sup> But a judgment by default cannot be taken in shorter time than the statute or rules of court permit.<sup>19</sup> The defendant may plead in bar or abatement as in other actions.<sup>20</sup> One not a party, but interested in the land affected may come in and be made a party by leave of court to defend his interest.<sup>21</sup>

If the *sci. fa.* be upon a record, however, he may not impeach its verity in this action; he is bound by it, and can set up only defenses which have sprung up since the judgment.<sup>22</sup> The record cannot be thus impugned.<sup>23</sup> At the common law if defendant has a release or other matter in discharge he must plead it to a *scire feci*; and if he does not and execution goes out against him he is estopped from setting it up.<sup>24</sup> But if the judgment be taken on two returns of *nihil* he may have relief by prompt motion and on clear showing.<sup>25</sup> However, if the matter is disputed and there has been delay, he will be put to his *audita querela*, now rule to show cause.<sup>26</sup>

The court should encourage an equitable defense.<sup>27</sup> Where the *sci. fa.* is on a recognizance and the plea is payment the validity of the recognizance is thereby admitted; also that there is one and the defendant has the burden; he must begin and show payment. If he wishes to challenge the instrument he must raise it under the plea of *nul tiel* record, or by demurrer.<sup>28</sup> The English practice of considering a *sci. fa.* abandoned after a year and a day, is not the law in Pennsylvania.<sup>29</sup>

## 6. Trial, verdict and judgment.

The trial on the issue is conducted as in any action at law and costs follow the suit, whether ended by verdict, nonsuit or discontinuance under the statute of 8 and 9, William III, section 3, ch. 11, in force in Pennsylvania.<sup>30</sup> The verdict and judgment follow the issue as made up.

<sup>17</sup> Kean v. Franklin, 5 S. & R. 147; Morris v. Buckley, 11 S. & R. 168.

<sup>18</sup> Umberger v. Zeiring, 8 S. & R. 163.

<sup>19</sup> Ball v. Nicholson, 1 Pearson, 285.

<sup>20</sup> 2 Saunders on Pleading, 72, t.

<sup>21</sup> Heller v. Jones, 4 Binney, 61; Righter v. Rittenhouse, 3 Rawle, 273; Roberts v. Williams, 5 Wharton, 170; Mevey's Ap., 4 Pa. 80; Fraley v. Steinmetz, 22 Pa. 437.

<sup>22</sup> Lewis v. Smith, 2 S. & R. 142; Davidson v. Thornton, 7 Pa. 131.

<sup>23</sup> Carr v. Townsend, 63 Pa. 202.

<sup>24</sup> Wicket v. Creamer, 1 Salkeld (Eng.), 264; Livingston v. Robins, 16 Johnson, 579.

<sup>25</sup> Lord Raymond, 1295;—1 M. & S. 193.

<sup>26</sup> Mitford v. Cordwell, 2 Strange (Eng.), 1198; Wicket v. Creamer, 1 Salkeld, 264.

<sup>27</sup> Hartzell v. Reiss, 1 Binney, 289.

<sup>28</sup> Abbot v. Lyon, 4 W. & S. 38.

<sup>29</sup> Davidson v. Thornton, 7 Pa. 128; Vitry v. Dauci, 3 Rawle, 9.

<sup>30</sup> Roberts' Digest, p. 139; Steele v. Lineberger, 72 Pa. 239.



**7. Appeal.**

An appeal lies as in other actions, but a reversal on the *sci. fa.* has no effect upon the original record, whereas if the reversal is on the original the *sci. fa.* falls necessarily.<sup>81</sup>

**8. Execution.**

The execution depends upon the nature of the award. Where the recognizance is joint and several, the execution may be several although the *sci. fa.* was joint.<sup>82</sup>

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<sup>81</sup> Ranck v. Becker, 12 S. & R. 412.

<sup>82</sup> 2 Bacon's Abr. 725.

## CHAPTER XLV.

### SCIRE FACIAS SUR MECHANICS' LIEN.

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**1. Definition of terms — Structure or other improvements — Owner — Contractor — Sub-contractor — Claimant — Property.**

Section 1 of the act of June 4, 1901, P. L. 431, provides:

"That the words 'structure or other improvements,' as used in this act, mean any building, bridge, wharf, dock, pier, bulk-head, vault, subway, tramway, toll-road, conduit, tunnel, mine, coal breaker, flume, pump, screen, tank, derrick, pipe line, aqueduct, reservoir, viaduct; telegraph, telephone, railway or railroad line; canal, mill race; works for supplying water, heat, light, power, cold air, or any other substance furnished to the public; well for the production of gas, oil or other volatile or mineral substance; or other structure or improvement, of whatsoever kind or character the same may be.

The word "owner" means an owner in fee, a tenant for life or years; or one having any estate or interest in the property described in the claim, who, by contract or agreement, express or implied, in person or by another, contracts for the erection, construction or removal of the structure or other improvement, on any part thereof; for the addition thereto, for the alteration or repair thereof, or for the fitting up or equipping the same, from time to time for the purpose for which it is intended."

The word "contractor" means one who, by contract or agreement, express or implied, with the owner, or the one who acts for the owner, plans or superintends the structure or other improvement, or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials, reasonably necessary for and actually used therein; or any or all of them, whether as an architect, superintendent, builder or material man.

The word "sub-contractor" means one who, by contract or agreement, express or implied, with the contractor or with one who acts for him, superintends the structure or other improvement, or any

part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials reasonably necessary for and actually used therein; or any or all of them, whether as superintendent, builder or material man; excluding, however, architects and those contracting with material men.

The word "claimant" means the person who has filed or may file the claim, as a lien against the property.

The word "property" means the estate in fee; the freehold, leasehold or other estate or interest therein, with the structure or improvement thereon, and the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended; all of which belong to the owner and against which the claim is filed as a lien."

The words "mill" or "mills" are not used *supra* but were under the acts of 1836 and 1856. An ice manufactory has been held to come within the term.<sup>1</sup>

A sewer system has been held to come within the meaning of this section, but a subcontractor who wishes to maintain a lien against a city must comply strictly with the law.<sup>2</sup>

An architect is entitled to a lien for plans, sketches and supervision of the work<sup>2a</sup>

## 2. Property subject to lien.

Part 1 of section 2 of the act, *supra*, provides:

"Every structure or other improvement, and the curtilage appurtenant thereto, shall be subject to a lien for the payment of all debts due to the contractor or subcontractor in the erection and construction or removal thereof, in the addition thereto, and in the alteration and repair thereof, and of the out-houses, sidewalks, yards, fences, walls, or other enclosure belonging to said structure or other improvement; and in the fitting up or equipment of the same for the purpose for which the improvement is made, including paper-hanging, grates, furnaces, heaters, boilers, engines, chandeliers, brackets, gas and electric pipes, wires and fixtures; and for like debts, contracted by such owner in the fitting up or equipment with machinery, gearing, boilers, engines, cars, or other useful appliances, of new or old structures, or other improvements, for business purposes; and for like debts, contracted by such owners for rails, ties, pipes, poles and wires, and the excavation for and laying and re-laying, or stringing and re-stringing, said rails, ties, pipes or wires, or erecting said poles, whether on the property described in the claim or upon other private property or public highways."

A lien may be filed, generally, for anything of a permanent character, furnished, and necessary to equip the building or plant, which will pass with the freehold<sup>3</sup> such as a battery of imbedded boilers masoned in, or furnace chimney and engines attached;<sup>4</sup> a gas engine

<sup>1</sup> Kountz v. Consolidated Ice Co., 28 Supr. C. 266.

<sup>2</sup> Tenth Natl. Bank v. Smith, Etc., Co., 218 Pa. 581.

<sup>2a</sup> Morris v. Christian, 10 Lack. Jur. 65; Cornelius v. Unger, 56 Pitts. L. J. 233.

<sup>3</sup> Dimmick v. Cook, 19 W. N. C. 239; 115 Pa. 573.

<sup>4</sup> Dickey & Shaw's Ap., 19 W. N. C. 79; 115 Pa. 73.

placed under ground and at some distance from the building but used with it;<sup>5</sup> foundation walls, though the building was never completed;<sup>6</sup> brick furnished for the foundations of an ice manufactory;<sup>7</sup> hauling materials for the building.<sup>8</sup> But under previous laws, it was held that no lien could be laid for hauling lumber and wood for erection of an engine house;<sup>9</sup> materials for temporary use by contractor;<sup>10</sup> hauling and use of tools;<sup>11</sup> lime kiln built of brick and stone;<sup>12</sup> excavation for a cellar and erection of cellar walls;<sup>13</sup> a portable laundry piped to a brick chimney.<sup>14</sup> However, the words "other improvements" in the act of 1901 should be general enough to cover almost everything, except groceries, provisions and clothing for the mechanic, unless he can show what relation they have to the plant.

The courts, in restraining the operation of this new, crude and illogical enactment, within reasonable limitations, have held that a claimant cannot have a lien for anything not an integral part of the structure, although appurtenant, unless the lien shows that it is necessary to and usual to the operation or enjoyment of the same;<sup>15</sup> as for example cement for side-walks when not apparent how much went into such footways.<sup>16</sup> If the lien complies in form and substance with the law, it will be presumed that the work was done and materials were furnished on the credit of the building.<sup>17</sup>

But a mere furnishing of work or materials on the credit of a building will not sustain a lien. The claim must be founded on a contract either express or implied with the owner.<sup>18</sup> Averments in the claim as to dates and facts establish nothing as to any other than the owner.<sup>19</sup> But where the owner was the real contractor and the naming of a contractor was a subterfuge, the lien of a subcontractor was sustained.<sup>20</sup> This contingency is provided for in the act of 1901, section 4, *infra*.<sup>21</sup>

### 3. Property not subject to lien.

Part 2 of section 2, *supra*, provides:

"But no lien shall be allowed for labor or materials furnished for purely public purposes; nor against any property held by the committee of a lunatic, the guardian of a minor, or a trustee under

<sup>5</sup> Light Co. v. Gill, 14 C. C. 6.

<sup>6</sup> Thompson v. Porter, 14 C. C. 232.

<sup>7</sup> Kountz v. Con. Ice Co., 28 Supr. C. 266.

<sup>8</sup> Holeman v. Redemptorist Fathers, 4 C. C. 233.

<sup>9</sup> Wilson v. Whitcomb, 12 W. N. C. 123; 100 Pa. 547.

<sup>10</sup> Oppenheimer v. Morrell, 118 Pa. 189.

<sup>11</sup> Hawkey v. City Mission, 21 W. N. C. 575.

<sup>12</sup> Cowdrick v. Morris, 9 C. C. 312.

<sup>13</sup> Florin v. McIntire, 14 C. C. 127.

<sup>14</sup> Women's, Etc., Assn. v. Harrison, 21 W. N. C. 326; 120 Pa. 28.

<sup>15</sup> Miller v. Heath, 22 Supr. C. 313.

<sup>16</sup> Bradley v. Gaghan, 208 Pa. 511.

<sup>17</sup> Rider, Etc., Co. v. Fredericks, 25 Supr. C. 72.

<sup>18</sup> Harlan v. Rand, 27 Pa. 511; Tebay v. Kirkpatrick, 146 Pa. 120.

<sup>19</sup> Safe Deposit Co. v. Columbia Iron & Steel Co., 176 Pa. 536.

<sup>20</sup> McCune v. Hatch, 18 Supr. C. 469.

<sup>21</sup> Sinnott v. Beard, 14 D. R. 619; Cochran v. Simms, 23 Pitts. L. J. 2.

deed, will or appointment by the court, unless by virtue of a contract made under authority of the court, or of the power contained in the deed or will."

A water company incorporated under the act of April 29, 1874, P. L. 73, has been held to be a public corporation whose necessary structures are not lienable.<sup>21a</sup>

An incorporated company for elevation and storage, etc., is a private corporation and not even "quasi-public" as the term is used in a subsequent section.<sup>21b</sup> But an electric power company is a public service corporation and its power house not lienable, section 46 of the act of 1901, being void.<sup>21c</sup>

A lien cannot be filed against property where the land was set apart by a city of the second class for the erection of an educational building by trustees of a private charity.<sup>21d</sup>

#### 4. Liens for alterations and repairs, only allowed after notice to the owner, by sub-contractor.

Part 3 of section 2, *supra*, provides:

"Nor shall any claim for alterations or repairs, or for fitting up or equipping old structures with machinery, gearing, boilers, engines, cars, or other useful appliances, be valid, unless it be for a sum exceeding one hundred dollars; and, in the case of a sub-contractor, unless, also, written notice of an intention to file a claim therefor, if the amount due be not paid, shall have been given to the owners or some one of them, or for him to an adult member of his family, or the family with which he resides, or to his architect, agent, manager, or executive or principal officer, on or before the day the claimant completed his work or furnished the last materials."

The notice required above does not apply to one contracting directly with the owner.<sup>22</sup> However where the owner and builder aliens before completion, and the deed is recorded, subsequent plumbing contracted for by the former owner, is such an improvement as requires notice of intention to file, to be served on the new owner.<sup>23</sup> If a tenant covenants with the landlord to make repairs for a nominal rent, during the first year, a lien was sustainable under the old law.<sup>24</sup>

This act requires written notice and the fact that notice was given must be averred in the claim.<sup>25</sup> If no notice is given before completion the lien will be stricken off.<sup>25a</sup>

The architect was not such an agent as might be served with notice under the act of May 18, 1887, P. L. 118,<sup>26</sup> but the act of

<sup>21a</sup> *Guest v. Water Co.*, 142 Pa. 610.

<sup>21b</sup> *Storage Co. v. Foundry Co.*, 105 Pa. 248.

<sup>21c</sup> *Vulcanite Paving Co. v. Phila. R. T. Co.*, 220 Pa. 603.

<sup>21d</sup> *Taylor Lumber Co. v. Carnegie Inst.*, 225 Pa. 486.

<sup>22</sup> *Sinnott v. Beard*, 14 D. R. 619; *Harbolsheimer v. Totten*, 7 C. C. 665.

<sup>23</sup> *Getz v. Brubaker*, 25 Supr. C. 303.

<sup>24</sup> *Parker v. Hall*, 14 Phila. 619.

<sup>25</sup> *Moss v. Greenburg*, 15 C. C. 192; *Morrison v. Henderson*, 22 W. N. C. 8; *Kramer v. Crump*, 28 W. N. C. 16; *Strawick v. Munhall*, 139 Pa. 163;

*Winton v. Leonard*, 4 Lack. Jur. 338.

<sup>25a</sup> *Hill v. Rush*, 57 Pitts. L. J. 164.

1901 names him, *supra*. The notice must set forth the contract under which subcontractor claims.<sup>26a</sup>

#### 5. Form of notice by sub-contractor.

To Mira Mowrey, owner:

Sir: Please take notice that I intend to file a mechanics' claim for the sum of \$300, against you as owner of the building situate at number 300 Chestnut street, in the city of Harrisburg, Pa., for [labor or] materials furnished Ellis Lewis, contractor, with you — for alterations now being done by me on said building, as subcontractor under contract with said Ellis Lewis, which work is now approaching completion.

Yours respectfully,

Reuben Myers,  
Subcontractor.

Harrisburg, Pa., June 28, 1910.

#### 6. Consent of landlord to tenant for improvements.

Part 4 of section 2 of the act, *supra*, provides:

"Nor shall any claim be valid against the estate of an owner, by reason of any consent given by him to his tenant to improve the leased property, unless it shall appear in writing, signed by such owner, that said improvement was in fact made for his immediate use and benefit."<sup>27</sup>

It must appear affirmatively that the improvements were for the benefit of the lessor and this section makes that evidence written, signed by the lessor.<sup>27a</sup>

#### 7. The curtilage.

Paragraph one of section 3 of the act, *supra*, is as follows:

"The curtilage appurtenant to the structure or other improvement shall be such as is reasonably needed for the general purpose for which such structure or other improvement was made, and belonging to the same owner, including other structures, whether newly erected, or altered, or changed for such purpose, and forming part of a single business or residential plant."

The owner or his creditor may apply to court to have the curtilage determined;<sup>28</sup> but it cannot be defined by an auditor after the sale,<sup>29</sup> unless where the sale is made under a mortgage or a judgment.<sup>30</sup> The proper practice is to apply to court on the *scire facias* to have an auditor appointed to determine and set out the curtilage and make report thereof to the court. Upon such appointment the

<sup>26</sup> Drummond v. Rice, 27 Supr. C. 226.

<sup>26a</sup> McVey v. Kauffman, 223 Pa. 225; Werner v. Lewis, 57 Pitts. L. J. 34.

<sup>27</sup> See Parker v. Hall, 14 Phila. 619, under the old law, *supra*; Boteler v. Espen, 99 Pa. 313; McClintock v. Criswell, 67 Pa. 183.

<sup>27a</sup> McKown v. Harris, 15 D. R. 611.

<sup>28</sup> Harbach v. Kurth, 131 Pa. 177.

<sup>29</sup> Imperial Refining Co.'s Ap., 149 Pa. 139 (Sicardi v. Keystone Oil Co.).

<sup>30</sup> Mowry's Est., 1 D. R. 326. (But see Fox v. Ketterlinus, 10 W. N. C. 506.)

auditor may give notice to all the parties in interest affected by the proceeding and hear them as in other cases, making his report, with notice, so that exceptions may be filed.

The description of the curtilage should be so definite as to furnish the means of identifying the property sought to be subjected to the lien.<sup>31</sup> If there is a large tract of land and a number of buildings, it should be confined to the particular buildings for which the materials were furnished.<sup>32</sup> If a number of manufacturing buildings is liened and one is burned the lien will not be lost, if the remainder are sufficiently described.<sup>33</sup>

If the lien only sets out the dwelling and does not include the stable, materials furnished for the stable cannot be recovered for, although the stable be mentioned in the bill of particulars.<sup>34</sup> It has been held that the whole farm may be included for curtilage to the barn, if necessary to its enjoyment.<sup>35</sup> A steel company's plant as a whole may be included;<sup>36</sup> or paraffine works as a part of an oil company's plant;<sup>37</sup> or a whole group, as brick works.<sup>38</sup>

A description by street and number alone is insufficient;<sup>39</sup> it should be such as would enable one to go to the place and identify the property with its buildings.<sup>40</sup> If erroneous as to the length of the lot and the adjoiners and gives only the width of the lot and the name of the street it is not notice to a subsequent mortgagee.<sup>41</sup> It should be so described that a subsequent encumbrancer may not be misled.<sup>42</sup>

A lien enumerating several structures stating dimensions and averring that they constitute an oil refinery, although not under roof is sufficient.<sup>43</sup> Such a plant is liable for lumber furnished.<sup>44</sup> Not only the curtilage or ground necessary but the buildings must be sufficiently described to show that they are of a permanent and lienable character.<sup>45</sup> If inadequately described no lien attaches.<sup>46</sup> The curtilage is as much land appurtenant belonging to the same owner as is reasonably needed for the general purposes of the structure.<sup>46a</sup>

<sup>31</sup> *Mountain City Market House v. Kearns*, 103 Pa. 403; *Linden Steel Co. v. Refining Co.*, 138 Pa. 10.

<sup>32</sup> *Storage Co. v. Foundry Co.*, 105 Pa. 248.

<sup>33</sup> *Montgomery v. Keystone Fibre Co.*, 1 Supr. C. 261.

<sup>34</sup> *Bevan v. Thackera*, 143 Pa. 182.

<sup>35</sup> *Wisner's Est.*, 2 C. C. 387.

<sup>36</sup> *Safe Deposit Co. v. Iron & Steel Co.*, 176 Pa. 536.

<sup>37</sup> *Imperial Refining Co.'s Ap.*, 149 Pa. 139.

<sup>38</sup> *West Phila. Brick Co. v. Johnson & Co.*, 3 Supr. C. 220.

<sup>39</sup> *Brown v. Myers*, 145 Pa. 17.

<sup>40</sup> *Cowdrick v. Morris*, 9 C. C. 312; *Messersmith's Est.*, 1 Dauphin Co. 223.

<sup>41</sup> *Security, Etc., Union v. Colvin*, 27 Supr. C. 594.

<sup>42</sup> *Gault v. Deming*, 18 Leg. Int. 86.

<sup>43</sup> *Iron Works v. Keystone Oil Co.*, 130 Pa. 211.

<sup>44</sup> *Short v. Miller*, 120 Pa. 470.

<sup>45</sup> *Wheeler v. Pierce*, 167 Pa. 416; *Wethered v. Garrett*, 7 C. C. 529; *Brown v. West*, 7 C. C. 619.

<sup>46</sup> *Hassenfus v. Phila. Packing Co.*, 15 C. C. 650; *McNamee v. Hildeburn*, 9 C. C. 267.

<sup>46a</sup> *Wirsing v. Hotel, Etc., Co.*, 226 Pa. 234.



### 8. Adaptation of old structure — What constitutes a new one.

Paragraph 2 of section 3 of the act, *supra*, provides:

"A substantial addition to a structure or other improvement shall be treated as a new erection or construction thereof; and the addition and the structure or other improvement of which it becomes a part, and the curtilage appurtenant to both, shall be subject to the lien. Every adaptation of an old structure or other improvement to a new or distinct use, which effects a material change in the interior or exterior thereof, shall also be deemed an erection or construction thereof."

This section doubtless, in the last clause, is declared in cognizance of the able opinion of Trunkey, J., in *Long and Furst v. McLanahan & Stone*.<sup>47</sup> Partitions of a hall for offices are not part of the original structure.<sup>48</sup>

The court will determine whether the improvement is a new building or not;<sup>49</sup> and where the bill of particulars shows it was for alterations a lien alleging as for a new building, will be stricken off.<sup>50</sup> The evidence of contractors as experts is not material.<sup>51</sup> Sub-contractors are bound to take notice of the distinction between new structures, and alterations of old ones, where they are required to give notice before completing the work or furnishing. The description in the lien is not conclusive.<sup>52</sup> The finding of an auditor that an addition to a building constituted substantially a new building under section 3 of the act of 1901, when affirmed by the court below will not be reversed.<sup>53</sup>

### 9. Labor or materials furnished, when a part of structure.

Paragraph 3 of section 3, *supra*, provides:

"Any labor or materials furnished in completely fitting up or equipping the structure or other improvement for the purpose for which it was intended, whether on the property subject to the lien or elsewhere, if actually done, or used for the purpose, shall be treated as part of the erection or construction thereof. Materials placed on or near the curtilage appurtenant to the structure or other improvement, or delivered to the owner or contractor for use therein, shall be presumed to have been used therein."

### 10. Ratification, when to be presumed from assent of owner.

Section 4 of the act of 1901, *supra*, provides:

"Any owner, not being a committee, guardian or trustee as afore-

<sup>47</sup> 103 Pa. 537. (See also *Miller v. Hershey*, 59 Pa. 64; *Parrish's Ap.*, 83 Pa. 111; *Seifert's Ap.*, 158 Pa. 57; *DeWald v. Woog*, 158 Pa. 497.)

<sup>48</sup> *Hall v. Blackburn*, 173 Pa. 310.

<sup>49</sup> *Patterson v. Frazier*, 123 Pa. 414, under the act then applicable to Allegheny county; *Porter v. Weightman*, 29 Supr. C. 488.

<sup>50</sup> *Morrison v. Henderson*, 126 Pa. 216.

<sup>51</sup> *Goeringer v. Schappert*, 17 Supr. C. 293; *Caldwell v. Keating*, 18 Supr. C. 297.

<sup>52</sup> *Keim v. McRoberts*, 18 Supr. C. 167; *Kolb v. Refd. Ep. Ch.*, 18 Supr. C. 477; *Hothersall v. Rust*, 18 Supr. C. 495; *East End, Etc., Co. v. Greensburg, Etc., Co.*, 16 D. R. 779.

<sup>53</sup> *Dunbar v. Washington Foundry*, 210 Pa. 58.

said, who shall knowingly suffer or permit any person, acting as if he were the owner, to make a contract for which a claim could be filed, without objecting thereto at the time, shall be treated as ratifying the act of such person acting as if he were the owner, and the claim may be filed against the real owner, with the same effect, if he himself had made the contract. Ratification shall also be presumed, and a like subjection to lien shall follow, if the owner, not being a committee, guardian or trustee, as aforesaid, subsequently learning of such contract or work being done upon his property, shall not within ten days thereafter, repudiate the same, either by notice to the contractor and subcontractors, or by posting such repudiation on the most public part of the structure or other improvement."

The rule is that a lien attaches to the title of him alone by whom the building is erected.<sup>1</sup> But if it appears that the title is held for the benefit of him to whose use the improvement inures, the lien is good.<sup>2</sup> Where a husband purchased a lot on an agreement, procured the erection of a dwelling, paid part, then threw up his hands and his wife thereupon took a new agreement with the vendor, a lien will hold the title thus obtained.<sup>3</sup> So a lien will hold where the contract is with the husband alone but the wife owns the property and she consented thereto by her acts and approval, and the subcontractor who thus furnished the materials may file and maintain his lien, notwithstanding the contractor was paid in full.<sup>4</sup> The interest of the reputed owner, whatever it is, although on a parol contract partly executed, will be bound by a lien.<sup>5</sup>

Where a vendee under articles is the equitable owner, failure of the legal holder of the title to object is not acquiescence under section 4, *supra*.<sup>6a</sup> There must be something in the conduct or acts of the owner which misled the claimant.<sup>6b</sup>

Under section 2 of the act, *supra*, where the property is demised for twenty years, a lien will be stricken off which does not show that the improvement was for the use and benefit of the owner, as, e. g., a steam heating apparatus.<sup>6c</sup>

#### 11. Contract made in bad faith.

"Section 5. A contract made by the owner with one not intended in good faith to be the contractor for the structure or other improvement, shall have no legal effect, except as between the parties thereto, even though written, signed and filed, as hereinafter provided; but such contractor, as to third parties, shall be treated as the agent of the owner."

See sections 15, 16, 17 and 18, *infra*, in regard to contracts. A subterfuge contract will not avail to stop filing of a lien.<sup>6</sup>

<sup>1</sup> Weaver v. Sheeler, 118 Pa. 634.

<sup>2</sup> Second trial of Weaver v. Sheeler, 124 Pa. 473.

<sup>3</sup> Wingert v. Stone, 142 Pa. 258.

<sup>4</sup> Bodey v. Thackara, 143 Pa. 171; Bevan v. Thackara, 143 Pa. 182; Jobe v. Hunter, 165 Pa. 5; Miller v. Fitz, 17 D. R. 933.

<sup>5</sup> Eberly v. Lehman, 13 W. N. C. 395; 100 Pa. 542.

<sup>6a</sup> Neile v. McCuean, 56 Pitts. L. J. 417.

<sup>6b</sup> Panner v. Staub, 18 D. R. 676.

<sup>6c</sup> Harrisburg, Etc., Co. v. Russ, 12 Dauphin Co. 139.

<sup>6</sup> McCune v. Hatch, 18 Supr. C. 469.

**12. Rule to file claim — To be indexed — Retaining payments.**

Section 7 of the act, *supra*, provides:

"After the right to file a claim is complete, any owner or contractor may enter a rule, as of course, in the office of the prothonotary of the Court of Common Pleas of the proper county, requiring any party named to file his claim within fifteen days after notice of such rule, or be forever thereafter debarred from so doing. Such rule shall be entered and indexed in a docket to be known as the Mechanic's Lien Docket. A failure to file a claim within the time specified shall operate to wholly defeat the right so to do. If a claim be filed, it shall be entered as of the court, term and number of the rule. Pending such rule, and until the claim is finally defeated, the owner may, unless approved security be given to indemnify him from loss, retain out of any payments due or to become due to the contractor, a sum sufficient to protect him from loss."

**13. Notice by sub-contractor to owner, of his intention to file a claim.**

By act of March 24, 1909, P. L. 65, section 8 of the act of 1901, *supra*, was amended so as to read as follows:

"Any subcontractor, intending to file a claim, must give to the owner written notice to that effect verified by affidavit, setting forth the name of the party with whom he contracted, the amount alleged to be still due, the nature of the labor or materials furnished, and the date when the last work was done or the last materials furnished. Such notice must be served at least one month before the claim is filed, and within three months after the last of his work was done or materials furnished, if he has six months within which to file his claim,<sup>7</sup> and within forty-five days thereafter, if he has but three months within which to file it,<sup>8</sup> but no such notice need be served if the subcontractor be ruled to file his claim before the expiration of said periods. Service may be made personally on the owner anywhere; or, such notice may be served on an adult member of his family, or of the family with which he resides, if such owner resides within the county where the structure or other improvement is situate. If he resides without the county where such structure or improvement is situate, then such notice may either be served on his architect or on the party in possession of the structure or improvement, or it may be posted on some public part of the structure or other improvement. After such notice, and until the claim is finally defeated, the owner may, unless approved security be given to indemnify him from loss, retain out of any payment due or to become due the contractor, a sum sufficient to protect him from loss."<sup>9a</sup>

This act eliminates from the law the giving of a notice and a sworn statement and requires a written notice sworn to, in which "the contract under which he claims" need not be set forth, but in lieu thereof the name of the person under whom he claims as sub-

<sup>7</sup> Where it is against the owner of the fee and for a new structure.

<sup>8</sup> Where it is a leasehold or less estate or for alterations and repairs.

<sup>9a</sup> Not unconstitutional. *McBride v. Goldstein*, 57 Pitts. L. J. 437.

contractor. From this all the cases on the contract and specifications fall, which relate to this notice.

The service of notice is also changed adding to personal service the alternative of service upon an adult member of the owner's family, etc. It eliminates service upon the "agent."

Even under the act of 1901, a substantial compliance in the notice and sworn statement was held sufficient although the contract was not fully set out.<sup>9</sup>

Such notice cannot be dispensed with. If not given, the lien will be stricken off.<sup>10</sup> It must show "the nature of the labor or materials furnished," and this must be done with sufficient detail to show how the amount claimed is made up.<sup>11</sup> As the notice must be written a verbal notice is insufficient<sup>12</sup> and it must be served at least one month before the claim is filed<sup>13</sup> and in the manner and upon the persons specified by the act.<sup>14</sup> If served on the apparent and record owner and the subcontractor had no notice of the execution of a long lease, the lien was allowed although filed three days after the time allowed for leaseholds.<sup>15</sup> The notice must set forth the amount claimed to be due and how made up.<sup>16</sup>

#### 14. Form of notice with affidavit.

To Sahr Somers, owner of building and appurtenances at No. 33 South Main Street, in the city of Wilkes-Barre, Pa.:

Sir: Please take notice that the undersigned subcontractor has a contract with James Jones, contractor with you, for the erection and construction of a four-story brick building at No. 33 South Main Street in the city of Wilkes-Barre, Pa., which said building was completed on the — day of —, A. D. 19—, and for and upon which, under said contract he furnished [here specify in detail the nature of the labor or materials] in and about the continuous erection and construction of said building the last item of which was furnished on the — day of —, A. D. 19—; that under said contract with your contractor, James Jones, there is still due the undersigned the sum of \$500, for said materials furnished [or labor done] under said contract, with interest thereon from —, 19—, and that I intend to file a mechanic's lien against said building and the appurtenances for the same, at the expiration of one month after the service hereof.

Dated — day of —, 19—.

Wynne James.

Luzerne County, ss.

Before me Wynne James, the person who signed the above notice,

<sup>9</sup> *Este v. Penna. R. Co.*, 27 Supr. C. 521; *Todd v. Gernert*, 56 Pitts. L. J. 330; *Howard v. Allison*, 12 D. R. 117.

<sup>10</sup> *Wolfe v. Penna. R. Co.*, 29 Supr. C. 439; *Kiel v. Rhoads*, 17 D. R. 139; *Willson v. Canevin*, 226 Pa. 362, vol. 4, C. R. A. 1467, P. & L. Dig.; *Tenth Natl. Bank v. Smith, Etc., Co.*, 218 Pa. 581, 584.

<sup>11</sup> *Mock v. Roscoe*, 14 D. R. 774; *Shearer v. Geiselman*, 22 Mont'g Co. 126; *Am. Car, Etc., Co. v. Alexandria, Etc., Co.*, 215 Pa. 520.

<sup>12</sup> *Shively v. Rodell*, 25 Mont'g Co. 80.

<sup>13</sup> *Keeley v. Jones*, 35 Supr. C. 642.

<sup>14</sup> *Lofink v. Scheutte*, 14 D. R. 558.

<sup>15</sup> *Glauser v. Schofield*, 38 Supr. C. 632.

<sup>16</sup> *Hart v. R. Co.*, 41 Supr. C. 224.

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being by me duly sworn, says that the facts set forth in the above notice are just and true to the best of his knowledge and belief.

Sworn to, etc.

Wynne James.

**15. Return of service — Form.**

The within and foregoing notice, was on the — day of —, 19—, duly served upon Sahr Somers, the owner personally by handing a true copy and making known to him the contents; or upon an adult member of his family, viz.: [his wife or other adult]. The within named Sahr Somers, owner, being a non-resident of the county, served the within, etc., by handing a true copy to Jason Ward, his architect, or person in possession of the within designated premises; or, in the absence of owner, agent or anyone in possession, served by posting the same upon the most public part of the structure or improvement, to-wit, on the front door (or as the case may be), on the — day of —, 19—. — —.

Sworn to, etc.

**16. Notice for alterations, etc., and lease-holds.**

The distinction as to time of notice, made by this law between new structures and alterations and repairs; and also owners of the fee and owners of leaseholds must be borne in mind. In the first case, liens may be filed within six months from the date of completion; in the other only three months. In the former the notice must be served at least one month before the claim is filed — which means a calendar month; and in the latter "within forty-five days thereafter."

**17. Service of notice by owner upon contractor — When owner may pay — Notice of defense by contractor.**

"Section 9. An owner served with the notice and sworn statement, aforesaid, may serve a copy thereof upon the party personally liable for the debt therein referred to, with notice that unless such claim is settled within fifteen days thereafter, or he is furnished with a sworn statement setting forth wherein it is intended to be disputed, he may pay the same, and deduct the amount thereof from the contract price or hold the contractor personally liable for any loss. If the contractor approve the claim or fail to serve a sworn statement of defense thereto, the owner may, before the filing of the claim, or at any stage of the proceedings thereon, pay the same and deduct the amount thus paid from the contract price, or hold the contractor liable for any loss.

"Upon payment of his claim the subcontractor shall assign or transfer to the owner, his claim against the contractor and any note or other collateral security he may have received for its payment. If the contractor give notice of a defense thereto it shall be his duty to defend any claim filed, at his own expense, and if he fails, or refuses so to defend or continue defending it, he shall be liable to the owner for all costs, expenses, charges, and the reasonable counsel fees necessary for making such defense, whether successful or not."

**18. Form of notice by owner to contractor.**

To William Watt, Contractor:

Sir: You are hereby notified that George Jones, your subcontractor, in the erection and construction of a certain building and improvement for me under your contract, has served a notice and sworn statement upon me, a copy of which is hereto attached, claiming the right to have a lien for the sum of three hundred dollars with interest from the — day of —, 19—, which he avers was the date on which the last work was done by him, and therefore unless you settle said claim with him within fifteen days from the service of this notice upon you, or unless you furnish me a sworn statement showing wherein his said claim is disputed, I will pay his said claim and deduct the amount thereof from the contract price, or hold you personally for any loss sustained thereby.

Date — — —, —.

John Jacques, owner.

**19. Time of filing claim for alterations, etc.— And against tenancies and leaseholds.**

"Section 10. In the case of tenancies or leasehold estates, of alterations and repairs, and of fitting up or equipping old structures with machinery, gearing, boilers, engines, cars or other useful appliances, the claim must be filed in the Court of Common Pleas of the county or counties in which the structure or other improvement is situate, within three months after the claimant's contract or agreement is completed; and in all other cases within six months thereafter; and when filed, it shall be entered and indexed in the Mechanic's Lien Docket."

This time is fixed by the last material furnished or work done which was necessary to complete the structure.<sup>15</sup> A fence not embraced in the contract will not save the lien.<sup>16</sup>

Where the owner agrees to extend the time for filing the claimant must bring himself clearly within it. "Until" a certain day excludes that day and it must be filed the day before.<sup>17</sup> If lumber has been delivered more than six months after the building was completed and used by the owner elsewhere the material man being ignorant of such diversion, his lien is saved as to that which he had previously furnished for the building.<sup>18</sup>

**20. Time within which sci. fa. must issue, judgment be entered and revival had.**

Section 10, continued:

"Upon it a writ of *scire facias* must issue within two years, unless the owner, by writing filed, before the expiration of that time, waive the necessity for so doing, for a further period, not exceeding three years; and a verdict must be recovered or judgment entered on the *scire facias* within five years after it is issued. Final judgment must be entered on the verdict within five years after its

<sup>15</sup> *Eller v. Cambridge Springs Co.*, 18 Supr. C. 44.

<sup>16</sup> *Miller v. Heath*, 22 Supr. C. 313.

<sup>17</sup> *Miller v. Logan*, 19 York, 77.

<sup>18</sup> *Brubaker's Est.*, 19 York, 29

recovery. After judgment is entered, it must be revived by writ of *scire facias* to revive the judgment or by judgment thereon, within each recurring period of five years. If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the times aforesaid, it shall be wholly lost."

**21. Form of mechanic's lien by contractor against owner or reputed owner.**

Section 11 of the act of June 4, 1901, P. L. 431, was amended by the act of April 17, 1905, P. L. 172, so as to read as follows:

"Section 11. Every person entitled to such lien, shall file a claim, or statement of his demand, in the office of the prothonotary of the Court of Common Pleas of the county in which the building may be situate, which claim shall set forth:

"I. The names of the parties claimant and of the owner, or reputed owner, of the building and also of the contractor, architect or builder.

"II. The amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, or both; and the time when the materials were furnished, or the work done, or both as the case may be.

"III. The locality of the structure or other improvement, with such description thereof as may be necessary for the purpose of identification, and a description of the real estate upon which the same is situate."

It is respectfully submitted that these requirements are wholly inadequate to make out a valid claim meeting the provisions of the act of 1901, which remain in full force, notwithstanding this attempted change of form.

**22. Form for lien on new building by sub-contractor, etc.**

The following form prepared by John Q. Creveling, Esq., of the Luzerne County bar, has been generally accepted and adopted throughout the state as complying with the act of 1901, *supra*,<sup>10</sup> for a new structure:

— — — —	}	In the Court of Common Pleas of — — County. No. — —, M. L. D. — — Term, 19—.
— — — —		
v.		
— — — —,		
owner or reputed		
owner, and		
— — — —,		
contractor.		

— — — —, the above named claimant, files his claim or statement of demand for the price and value of materials furnished [or for work and labor done] for and about the erection and construction of a certain building hereinafter described, against the building and ground thereby covered and so much of the other ground immediately adjacent thereto and belonging to — — — —, as owner or

<sup>10</sup> Published first in Bierly on Taxation and Liens, 1903.

reputed owner, as may be necessary for the ordinary and usual purposes of such building and sets forth his [or their] claim as follows:

I. The name of the claimant is ———.

II. The name of the owner [or reputed owner] is ———.

III. The name of the party with whom the claimant contracted is ———, said party having contracted directly with the owner.

IV. A copy of his contract in writing is hereto attached and made part hereof. [If verbal conditions, set them out here.]

V. The kind and character of labor and materials furnished [or both] are set forth and particularly described in a bill of particulars hereto annexed and made part hereof and the lien is claimed against the fee itself [or a leasehold or tenancy].

VI. The kind and character of labor done [or materials furnished or both] and the price charged for each are set forth in said bill of particulars hereto annexed and made a part hereof.

VII. The amount claimed to be still due and chargeable against the particular property hereinafter described is \$——, with interest thereon from ———, ———, and the manner in which it is made up is shown in said bill of particulars. [If claimant has any note or collateral security, state same here.]

VIII. The property against which the lien is claimed together with a description of the structure or other improvements, as may be necessary for the purpose of identification is as follows:

[Here describe the building, improvement and curtilage fully.]

IX. The claimant furnished his first labor [or materials] for said building and improvement on the ——— day of ———, A. D. 19——, and the last on the ——— day of ———, A. D. ———, and said building and improvement was commenced on the ——— day of ———, A. D. 19——, and completed continuously, on the ——— day of ———, A. D. 19——. The lien hereof is claimed from the ——— day of ———, 19——, for the reason that ——— [state reason].

X. A notice, accompanied with a sworn statement, of intention to file this claim, was served personally on the owner of said building and improvement on the ——— day of ———, A. D. 19——, a copy of which is hereto attached. [Such service was made as follows, if not made personally.]

XI. Said labor was done [or materials were furnished] in the continuous erection and construction of said building [or alteration and repair thereof] and upon its faith and credit.

XII. [In case of lien for alterations, repairs, etc., by a sub-contractor he must further distinctly aver that he gave the owner written notice of his intention to file a lien before the day of completion of work or furnishing the last materials, and should attach a copy of such notice and state how it was served.] ———,

Claimant.

State of Pennsylvania, County of Luzerne, } ss.

———, above named claimant [or his agent], being duly sworn according to law says that all the facts in his foregoing claim set forth are true so far as within his own knowledge, and so far as they are derived from information of others, he has made careful examination and inquiry as to the truth thereof, and therefore believes them to be true.



This affidavit is made by [agent named] for the reason that [absence or illness of claimant, as the case may be.]

Sworn to, etc. — — —

### 23. Bill of particulars.

The bill of particulars should show fully the entire transaction and account, day and date, charges and credits. If it merely states that the work, etc., were performed as "per contract" and the contract is not given, the lien will be defective.<sup>20</sup> If the claim itself refers to the bill of particulars as being a part thereof it will be so considered and may assist the statement as to averments which would otherwise be insufficient.<sup>20a</sup>

The act of April 17, 1905, P. L. 172, has dispensed with the detailed statement of prices attached to a claim of the kind covered by it,<sup>20b</sup> also as to note or collateral.<sup>20c</sup>

### 24. Single claim — Separate apportionment.

"Section 12. If the labor or materials be furnished continuously in the erection and construction of, addition to, or removal of a structure or other improvement, the claimant may file a single claim, though furnished under more than one contract, with the same effect as if furnished continuously under a single contract. A single claim may be filed against more than one structure or other improvement, if they are all intended to form part of one plant. No apportioned claim shall hereafter be allowed, but separate claims, with the amount due determined by apportionment, may be filed as herein set forth."

Upon a joint apportioned claim, depending upon the existence of a street for its validity the question must be determined as of the time when the work began.<sup>21</sup>

This section only applies where the contracts are between the same parties, and all the contracts must be averred in the single claim filed or they cannot be proved.<sup>20b</sup> The Supreme Court, however, has ruled that there cannot be a lien against several dwellings as one "residential plant." A lien must be filed against every separate dwelling, although in a row;<sup>20d</sup> as where two separate houses with separate doors are joined.<sup>20e</sup>

The word "plant" in this section means use in some trade or business.<sup>20f</sup>

<sup>20</sup> *Flach v. Rahauser*, 26 Pitts. L. J. 43. (See P. & L. Dig., vol. 12, col. 20062.)

<sup>20a</sup> *Am. Car, Etc., Co. v. Alexandria Water Co.*, 215 Pa. 520; *Knabb's Ap.*, 10 Pa. 186; *Wilvert v. Sunbury Boro'*, 81 \* Pa. 57.

<sup>20b</sup> *Willson v. Canevin*, 226 Pa. 362.

<sup>20c</sup> *Northern, Etc., Co. v. Brewing Co.*, 6 Schuylkill, 23.

<sup>21</sup> *Fleck v. Collins*, 28 Supr. C. 443; *McDowell v. Riley*, 8 Del. Co. 496.

<sup>20b</sup> *Commercial, Etc., Co. v. Thompson*, 17 D. R. 996.

<sup>20c</sup> *Lockard v. Vahle*, 10 Del. Co. 491.

<sup>20d</sup> *Todd v. Gernert*, 223 Pa. 103.

<sup>20e</sup> *Hiestand v. Keath*, 26 Lanc. L. R. 225, 228.

<sup>20f</sup> *Schively v. Radell*, 227 Pa. 434.

**25. Lien for alterations, etc., to date from filing.**

Part 1 of section 13, act of 1901, provides:

"The lien of every claim for the alteration of or repair to a structure or other improvement, or for fitting up old structures with machinery, gearing, boilers, engines, cars, or other useful appliances, shall take effect as of the date of its filing, and shall be paid out of the proceeds of a judicial sale of the property described therein, in preference to any estate, charge or lien of which the claimant had not actual or constructive notice at that time, except municipal or tax claims and the exemption allowed by law; but such lien shall be wholly lost if the property be conveyed in good faith and for a valuable consideration, prior to the filing of the claim.

**26. Lien in other cases to date from commencement of building.**

Part 2 of section 13, *supra*, provides:

"In all other cases, the lien of the claim shall take effect as of the date of the visible commencement, upon the ground, of the work of building the structure or other improvement, and shall be paid out of the proceeds of a judicial sale of the property described therein, in preference to any estate, charge or lien of which the claimant had not actual or constructive notice at that time, except municipal and tax claims and the exemption allowed by law."

The commencement of the building is the first work done on the foundation.<sup>22</sup> Since a secret lien is thus given, it is necessary to aver in the face of the lien such date; or an intervening mortgage or judgment will take priority.<sup>23</sup> The date of filing the lien is conclusive.<sup>24</sup> It was held, however, where the mortgage recited the buildings it was discharged by the sale.<sup>25</sup> The section above mentions constructive notice, which has been defined as follows:

"Whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding."<sup>26</sup>

Where there is a conflict of testimony as to whether the last work was for construction or the purpose of altering what had been previously completed the question is for the jury.<sup>26a</sup> If the last item of charge is manifestly a mistake, the lien is precluded.<sup>26b</sup>

**27. Preference of estate, charge or lien of which claimant had actual or constructive notice.**

Part 3 of section 13, *supra*, is as follows:

"An estate, charge or lien of which the claimant had actual or

<sup>22</sup> Parrish's Ap., 83 Pa. 111; Rush v. Able, 90 Pa. 153.

<sup>23</sup> Hilliard v. Tustin, 172 Pa. 354.

<sup>24</sup> Reading v. Hopson, 90 Pa. 494; Wheelock v. Harding, 4 Supr. C. 21.

<sup>25</sup> Reynolds v. Miller, 177 Pa. 168.

<sup>26</sup> Green, J., in Hottenstein v. Lerch, 104 Pa. 454, quoted by Orlady, J., in Tabor Street, No. 1, 26 Supr. C. 167. (See Maul v. Rider, 59 Pa. 167.)

<sup>26a</sup> Day v. Penna. R. Co., 35 Supr. C. 586.

<sup>26b</sup> Deichley's Est., 35 Supr. C. 442; Commercial, Etc., Co. v. Thompson, 17 D. R. 996.

constructive notice before the date of such visible commencement, upon the ground, if given to secure advances of money, knowingly to be furnished for the purpose of making the improvement in whole or in part, shall have, with prior liens and encumbrances, a preferential claim upon the funds raised by a judicial sale of said property, to the extent only of the actual value of the property immediately prior to such visible commencement of the work; but the proceeds of such sale, above such value, shall be applied to the payment of the mechanics' claim in preference to such estate, charge or lien. The lien of every such claim shall bind only the interest of the party named as owner of the property at the time of the contract, or subsequently acquired by him; but no forfeiture or surrender of a leasehold or tenancy, whether before or after filing the claim, shall operate to prejudice its lien against the fixtures, machinery, or other similar property described therein."

### 28. Requisites of claim.

Section 11 of the act of 1901, before amended in 1905, furnished a complete series of averments to comply with the law in case of a lien for an original structure. It is still instructive as the form given herewith follows it, in order to come within the provisions of the law. While amendments are allowed, saving intervening rights, and under limitations, by section 51 of the act of 1901, *infra*, it is best to get the claim in right at the start.

If a claim avers a contract with a certain person, but fails to aver that this person contracted with the owner, the lien is defective.<sup>27</sup> It was held that an amendment of a mistake in the name of a contractor could not be made after six months have expired.<sup>28</sup> The necessity of a contract, either express or implied, with the owner is fundamental.<sup>29</sup> Without such contract there is no power to lien the building.<sup>30</sup> A mechanic's lien law is one conferring a special privilege and being in derogation of common right must be strictly construed against him who invokes it. It must be self-sustaining and comply with the law.<sup>31</sup> The mechanic's lien is a pure creature of statute, favoring and intending to favor certain classes of persons, and not all alike, formerly having no existence, and latterly a somewhat wider scope. The power which gave it may at any time take it away.<sup>32</sup> So a contract with the owner is essential and must be averred.<sup>33</sup> A claim was stricken off which failed to aver entire performance or that the claimant was relieved from it,<sup>34</sup> and naked

<sup>27</sup> Fenner v. Real Est. Trust Co., 13 D. R. 47.

<sup>28</sup> Horton v. Watson, 8 C. C. 143.

<sup>29</sup> McElroy v. Braden, 152 Pa. 78; Nice v. Walker, 153 Pa. 123.

<sup>30</sup> Singerly v. Doerr, 62 Pa. 9; Harlan v. Rand, 27 Pa. 511; Duff v. Hoffman, 63 Pa. 191; Schroeder v. Galland, 134 Pa. 277; Waters v. Wolf, 162 Pa. 153.

<sup>31</sup> Smith v. Spooner, 3 Pickens (Mass.), 239; Sprague v. Birdsall, 2 Cowen, 419; Westmoreland, Etc., Assn. v. Connor, 216 Pa. 543; American Car, Etc., Co. v. Alexandria Water Co., 215 Pa. 520; Day v. Penna. R. Co., 35 Supr. C. 536; Wolf Co. v. Penna. R. Co., 29 Supr. C. 439.

<sup>32</sup> Best v. Baumgardner, 22 W. N. C. 351; 122 Pa. 17.

<sup>33</sup> Tebay v. Kirkpatrick, 146 Pa. 120.

<sup>34</sup> Bohem v. Seabury, 141 Pa. 594.

averments by a subcontractor without specifying character and amount are insufficient.<sup>35</sup> Insufficiency of description, however, only affects the owner and not the contractor.<sup>36</sup> Inadequacy or description is for the jury.<sup>36a</sup> A personal service of the written notice must be averred in the lien, by a subcontractor, but it is not necessary to embrace a copy in the lien. It may be filed with it.<sup>37</sup> One case holds that it need not be averred when and how the notice was given, but notice is still essential.<sup>37a</sup>

The court may determine from the averment of erection and continuous construction of a building that it is a new structure.<sup>38</sup> The lien should show on its face from what date it is claimed;<sup>39</sup> and whether claimed against the fee or a less estate, this because the notice and time are different in liens against these classes of estate.<sup>40</sup> Under prior laws claimant was not required to sign the statement for lien.<sup>41</sup> But under the act of 1901, it was required to be signed and sworn to, which a clerk familiar with the facts is competent to do.<sup>42</sup> But the amendment of 1905, omits this as well as other important matters.

#### 29. Averments as to work and materials.

According to good pleading, a copy of the contract and specifications, when they are important to determine the amount, character, etc., of the work and materials, should in all cases be filed with the claim, although the plans need not be, when not an integral part of the contract.<sup>43</sup> If claimant cannot get such specifications, an averment of this fact is enough,<sup>44</sup> especially when he demanded them from the contractor<sup>45</sup> and where there were no written specifications.<sup>46</sup> Incongruous claims for work should not be joined, such as for the contractor and other work for the owner.<sup>47</sup> The same strictness which is required from a subcontractor is not required from a contractor who files a lien.<sup>48</sup> It is important to specify the kind of work done,<sup>49</sup> especially by a subcontractor.<sup>50</sup> Lumping

<sup>35</sup> *Brown v. Myers*, 145 Pa. 17.

<sup>36</sup> *Wethered v. Garrett*, 140 Pa. 224.

<sup>36a</sup> *Morrison v. Swarthmore Natl. Bank*, 9 Del. Co. 573.

<sup>37</sup> *Thirsk v. Evans*, 211 Pa. 239.

<sup>37a</sup> *Miller v. Fitz*, 17 D. R. 933; 41 Supr. C. 582. (See *East End, Etc., Co. v. Greensburg, Etc., Co.*, 16 D. R. 779.)

<sup>38</sup> *Mercer, Etc., Co. v. Kreaps*, 18 Supr. C. 1.

<sup>39</sup> *Fenner v. Real Est. Trust Co.*, 13 D. R. 47.

<sup>40</sup> *Maddocks v. McGann*, 12 D. R. 701.

<sup>41</sup> *Sturdevant v. Nugent*, 9 Kulp, 176.

<sup>42</sup> *Billmeyer, Etc., Co. v. Brubaker*, No. 1, 17 York, 113.

<sup>43</sup> *Knelly v. Horwath*, 208 Pa. 487; *Warren v. Johnson*, 53 Pitts. L. J. 134; *Geo. H. Soffel Co. v. Jones*, 17 D. R. 790.

<sup>44</sup> *Thirsk v. Evans*, 211 Pa. 239.

<sup>45</sup> *James v. Homoyer*, 21 Montg. 88.

<sup>46</sup> *Shee v. Walker*, 21 Montg. 169.

<sup>47</sup> *Simpson v. Cameron*, 3 D. R. 612.

<sup>48</sup> *Benore v. Leonard*, 6 Lack. L. N. 198; *Vanaciver v. Churchill*, 35 Supr. C. 212; *Warren v. Johnston*, 33 Supr. C. 617.

<sup>49</sup> *Wolfe v. Keeley*, 9 D. R. 515.

<sup>50</sup> *Chapman v. Faith*, 18 Supr. C. 578.

charges are not to be made.<sup>51</sup> Where the lien filed does not comply with the law and the time to file has not expired, a new lien may be filed which does.<sup>52</sup> The date of commencement and completion must be averred. If the owner orders the work stopped definitely that completes it so far as the right to lien is concerned.<sup>52a</sup>

### 30. Loss of lien by fire.

The lien is lost by the destruction of the building by fire, whether before or after the filing.<sup>53</sup> But for alteration and repairs after a fire a lien may be laid.<sup>54</sup> But if only one of a number of buildings is burned the lien is unimpaired as to the remainder.<sup>55</sup> The lien may also be lost by destruction of the building by a storm.<sup>55a</sup>

### 31. M. L. D. as notice.

Under the act of June 16, 1836, P. L. 695, a Mechanic's Lien Docket was required to be kept by the prothonotary, the purpose of which was and is to give notice to purchasers and incumbrancers of mechanics' liens and by the description therein of the property, against which the claim is filed, they are affected with notice to the amount of the claim, as against the property described.<sup>56</sup>

### 32. Parties.

The act of 1901, *supra*, which was intended to be a consolidation of all the acts to date in one homogenous code defines the parties to the record, but there are still some of the cases which preceded it instructive to the practitioner.<sup>57</sup>

Since the married women's emancipation acts of 1887, and 1893, it is not necessary to notice coverture.<sup>1</sup> Naming the owner as "Estate of Mary Reece, deceased," was held sufficient.<sup>2</sup> All that is now necessary to hold a married woman's separate estate, in addition to the usual averments in a lien, is that the work was done or materials furnished for its improvement.<sup>3</sup>

A non-resident may be claimant,<sup>4</sup> also a non-registered foreign corporation.<sup>4a</sup> One who merely furnishes lumber for a building is

<sup>51</sup> King v. First Brethren Church, 14 D. R. 265.

<sup>52</sup> Mulherin, Etc., Co. v. Jones, 5 Lack. Jur. 72.

<sup>52a</sup> Fay v. Ice Co., 19 D. R. 93.

<sup>53</sup> Baird v. Otto, 12 C. C. 510, following Gross v. Camp, 4 C. C. 461.

<sup>54</sup> Dickey and Shaw's Ap., 19 W. N. C. 79; 115 Pa. 73.

<sup>55</sup> Montgomery v. Keystone Fibre Co., 1 Supr. C. 261.

<sup>55a</sup> Lehr v. Schroth, 1 Lehigh Co. 4. (See *infra*, par. 54, as to insurance.)

<sup>56</sup> Harbach v. Kurth, 131 Pa. 177.

<sup>57</sup> For reference to all these cases, see vol. 12, Pepper & Lewis' Digest of Decisions. Obviously in a work like this, not all the cases can be digested.

<sup>1</sup> Wolf v. Oxnard, 152 Pa. 623; Milligan v. Phipps, 31 W. N. C. 561; 153 Pa. 208.

<sup>2</sup> Reece v. Haymaker, 164 Pa. 575.

<sup>3</sup> Shryock v. Buckman, 121 Pa. 248.

<sup>4</sup> Wethered v. Garrett, 140 Pa. 224; Voigtman v. S. R. Moss Cig. Co., 26 Lanc. L. R. 17.

<sup>4a</sup> Scott Mfg. Co. v. Morgan, 23 Montg. Co. 144; Northern, Etc., Co. v. Brewing Co., 6 Schuylkill Co. 23.

not a contractor, without more.<sup>5</sup> It is highly important that the subcontractor properly sets out the name of the contractor, as well as the fact of a contract.<sup>6</sup> Where a material man furnishes materials to the record owner of a house and has no knowledge of sale, conveyance or agreement, and the deed is subsequent in date to his furnishing, his lien against the vendee as owner and the vendor as contractor is good.<sup>7</sup>

### 33. Notice of filing lien, after having filed it.

Section 21 of the act of 1901, *supra*, provides:

"Within one month after the filing of the claim, the claimant shall serve a notice upon the owner of the fact of the filing of the claim, giving the court, term and number and the date of filing thereof, and shall file of record in said proceeding an affidavit setting forth the fact and manner of such service. A failure to serve such notice and file an affidavit thereof within the time specified, shall be sufficient ground for striking off the claim."

This section applies equally to contractors and subcontractors, and without it, the claim will be stricken off. It cannot be allowed *nunc pro tunc*.<sup>8</sup> Verbal notice is insufficient.<sup>9</sup> The subcontractor must give this notice after filing, as well as the notice of intention to file the day before completion.<sup>10</sup> It was doubtfully held to be a discretionary power to strike off the lien.<sup>11</sup> This notice may be served on the one in possession.<sup>12</sup> The affidavit should be signed, but the omission is not fatal, where the *jurat* shows that the oath was taken before the officer.<sup>13</sup> The month meant is a calendar and not lunar month.<sup>13a</sup>

### 34. Form of notice and proof of service.

Notice of having filed a claim must be given the owner, within one month after the filing of the claim, as follows:

To ———, owner,

Sir: Please take notice that I, John W. Reed, claimant *sur* mechanics' lien, did on — day of —, A. D. 19—, file in the office of the prothonotary of the Court of Common Pleas, in and for — County, State of Pennsylvania, entered in Mechanic's Lien Docket No. —, Term 19—, a mechanic's lien against and upon a certain

<sup>5</sup> *Brown v. Cowan*, 110 Pa. 588.

<sup>6</sup> *Goodfellow v. Manning*, 148 Pa. 96; *Murta v. Stephenson*, 12 C. C. 653.

<sup>7</sup> *McCollum v. Riale*, 163 Pa. 603; *Schroeder v. Galland*, *supra*, distinguished.

<sup>8</sup> *Compton v. Sankey*, 13 D. R. 535; *Walker v. Gouron*, 16 D. R. 750; *Hicks v. Riebling*, 54 Pitts. L. J. 109; *Thompson v. Radell*, 42 Supr. C. 105; *Rush v. Radell*, 42 Supr. C. 107.

<sup>9</sup> *Walter v. Powell*, 13 D. R. 677; *Nagle v. Lehigh Saengerbund*, 14 D. R. 472; *Smith Lumber Co. v. O'Brien*, 16 D. R. 966; *Keel v. Rhoads*, 17 D. R. 139.

<sup>10</sup> *Maddocks v. McGann*, 12 D. R. 701; *Cipriano v. Radell*, 25 Mont'g, 138; *Rush v. Weller*, 25 Mont'g, 138.

<sup>11</sup> *Gerrard v. Ecker*, 12 D. R. 332; *Mock v. Roscoe*, 14 D. R. 774.

<sup>12</sup> *Stoner v. Hileman*, 12 D. R. 525; *Haas v. Hay*, 10 D. R. 504.

<sup>13</sup> *Burns v. Judge*, 12 Luz. L. R. 425.

<sup>13a</sup> *Lillo v. Coal Co.*, 56 Pitts. L. J. 274.

building [or buildings] and appurtenances with the curtilage described as follows: [Here describe the same and its situation and location.]

John W. Reed,  
Claimant.

— County, State of Pennsylvania, ss:

Personally before me came John W. Reed, the said claimant and the affiant who being duly sworn according to law deposeth and saith that the foregoing notice was duly served upon the owner — according to law — in the manner following, to-wit: [Here set forth the facts.]

Sworn to and subscribed before me, etc.

[This notice and affidavit must be filed with the prothonotary “within one month after filing of the claim.”]

### 35. Determination of value of property — Division.

Section 14 of the act of 1901, *supra*, provides:

“Upon the petition of any claimant having or being entitled to a lien, the actual value of the property bound by such advance money, estate, charge, or lien, and the amount of the advances actually made, shall be determined prior to a judicial sale of the property, a stay being granted for that purpose should justice so require; but if application be not made prior to the sale, the same shall be determined upon the distribution of the fund realized thereby. And the court, upon petition of any such claimant, may also require that a tract of land about to be sold at judicial sale part of which is bound by or liable for such claim, shall be so divided that the part which is so bound, or liable, shall be sold separately from the rest of the tract if it can equitably be done; and, if not, then it or an auditor appointed after the sale, shall determine the relative value of the part bound by and that free of the claim, and the fund realized shall be distributed accordingly.”

### 36. Waiver of right to file lien — Contracts against filing.

Section 15 of the act of 1901, *supra*, as amended April 24, 1903, P. L. 297, is as follows:

“The right to file a claim may be waived by agreement between the claimant and the party with whom he contracts, or by any conduct which operates to equitably estop the claimant. If the legal effect of the contract between the owner and the contractor is, that no claim shall be filed by any one, such provision shall be binding; but the only admissible evidence thereof, as against a subcontractor, shall be proof of actual notice thereof to him, before any labor or materials [are] furnished by him; or proof that a duly written and signed contract to that effect has been filed in the office of the prothonotary of the Court of Common Pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant, and the prothonotary shall index the same, making the contractor the defendant and the owner the plaintiff. The only admissible evi-

dence that such a provision has, notwithstanding its filing, been waived in favor of the claimant, shall be a written agreement to that effect, signed by all those who, under the contract, are interested antagonistically to the claimants' allegation. The giving of credit or the receiving of collateral security shall not operate to waive the right to file a claim, but shall delay voluntary proceedings thereon by the claimant until the time of credit shall have expired. A release signed by the claimant shall not operate as a waiver of the right to file a claim for labor or materials subsequently furnished, unless it shall appear thereby that such was the express intent of the party signing the same, but such release shall be so construed as to fully carry out that intent."

Section 18 provides for the filing and indexing of all contracts as notice. See *infra*. Par. 75.

### 37. Utility and efficacy of a contract against liens.

There being no natural reason why a mechanic or material man should have a lien for his labor or materials, any more than a butcher, grocer, tailor or provision dealer should have a lien for what he sells to a mechanic or other person on credit, and the new code being full of elegant intricacies and equitable refinements, the safest practical course for an owner is always to exact a complete contract against filing of any liens whatsoever and have it recorded and indexed according to the foregoing section.

The subcontractor will then be charged with notice of its stipulations.<sup>14</sup> It requires such a covenant against the right to file any lien as is free from doubt on its face. The language should not be susceptible of a fair and reasonable interpretation to the contrary; such as that contractor will furnish bond to protect the owner against liens.<sup>15</sup> A stipulation is sufficient to cover the contractor himself which provides that no lien shall be filed by any "subcontractor, material man or other person furnishing labor or materials under the said contract."<sup>16</sup> If the contract excludes all liens the material man is bound by it.<sup>17</sup> But an agreement to produce releases from all parties and to deliver the building free from liens does not exclude the right to file a lien.<sup>18</sup> The stipulation should be in plain words that no lien shall be filed against the building, improvement and property by any one whatsoever. If the original contract contains no unequivocal stipulation a subsequent release by the contractor will not affect the subcontractor's right.<sup>19</sup>

<sup>14</sup> *Schroeder v. Galland*, 134 Pa. 277; *Benedict v. Hood*, 134 Pa. 289; *Wilkinson v. Brice*, 148 Pa. 153; *Bolton v. Hey*, 148 Pa. 156; *Taylor v. Murphy*, 148 Pa. 337.

<sup>15</sup> *Bithell v. Diven*, 18 Supr. C. 178.

<sup>16</sup> *North End Lumber Co. v. O'Donnell*, 191 Pa. 114; *Montello Brick Works v. Hoot*, 14 D. R. 8. (See *Wolf v. Glassport Lumber Co.*, 210 Pa. 370; also *Glassport Lumber Co. v. Wolf*, 213 Pa. 407.)

<sup>17</sup> *Bevan v. Thackara*, 143 Pa. 182; *Dersheimer v. Maloney*, 143 Pa. 532; *Ballman v. Heron*, 160 Pa. 377.

<sup>18</sup> *Murphy v. Morton*, 139 Pa. 345; *Moore v. Carter*, 146 Pa. 492; *Loyd v. Krause*, 147 Pa. 402.

<sup>19</sup> *Willey v. Topping*, 146 Pa. 427.



A stipulation to release is not a contract against the right to file<sup>20</sup> and a subcontractor who has no notice of it is not bound.<sup>21</sup>

There must be a covenant, either express or by necessary implication against all liens.<sup>22</sup>

The subcontractor has a right to notice of an express covenant which precludes his right to file.<sup>23</sup> Where the material man had no notice and could have none his right remains;<sup>24</sup> also where there is a fraud in the holding of the title;<sup>25</sup> or where one of several houses is not included in the clause excluding liens.<sup>26</sup>

A subcontractor, however, by becoming surety for the contractor in a contract against liens thereby estops himself from filing a lien.<sup>27</sup> One who steps into the place of the contractor after a sheriff's sale is bound by his contract.<sup>28</sup> If the contract is not clear, the subcontractor is not bound by the construction put upon it by the owner and contractor.<sup>29</sup> The waiver cannot be inferred.<sup>30</sup> If the owner, having exacted such a contract, subsequently makes a new contract with a material man, which does not exclude the right to lien, he will be bound by it.<sup>31</sup> And if he makes a contract not excluding liens, he cannot, after materials are furnished, make a contract which will affect the material man as to materials ordered on the day the contract was made.<sup>32</sup> But as to materials furnished later, he having notice, he can file no lien.<sup>33</sup> A subcontractor signing a release of liens, cannot afterwards allege a parol contemporaneous agreement that all were to sign, the contractor not being shown as acting for the party taking the advance money mortgage.<sup>34</sup> If a stipulation against liens is obtained by fraud on the part of the owner it will be vitiated.<sup>34a</sup> A tenant in common may contract with his co-tenants for improvement and his waiver will hold.<sup>34b</sup> Unless a contract is filed the subcontractor is not bound by it.<sup>34c</sup> A sale of material on the personal credit of the owner or contractor is some evidence of waiver of the right to lien.<sup>34d</sup> The taking of notes by the contractor is not a waiver of the right

<sup>20</sup> Taylor v. Murphy, 148 Pa. 337.

<sup>21</sup> Cook v. Murphy, 150 Pa. 41.

<sup>22</sup> Schmid v. Palm, Etc., Co., 162 Pa. 211; Howarth v. Chester, Etc., Church, 162 Pa. 17; Fidelity, Etc., Assn. v. Jackson, 163 Pa. 208; Morris v. Ross, 184 Pa. 241.

<sup>23</sup> Creswell Iron Works v. O'Brien, 156 Pa. 172; Lucas v. O'Brien, 159 Pa. 535; Comth. Title Co. v. Ellis, 5 D. R. 33.

<sup>24</sup> McCollum v. Riale, 163 Pa. 603.

<sup>25</sup> Ballman v. Herron, 169 Pa. 510.

<sup>26</sup> Green v. Thompson, 172 Pa. 609.

<sup>27</sup> Rynd v. Pittsburg Natatorium, 173 Pa. 237.

<sup>28</sup> Marshall v. Brick, 174 Pa. 190.

<sup>29</sup> Sullivan v. Hancock, 2 Supr. C. 525.

<sup>30</sup> Waters v. Wolf, 2 Supr. C. 200.

<sup>31</sup> Spring Brook Lumber Co. v. Watkins, 26 Supr. C. 199.

<sup>32</sup> Lee v. Williams, 22 Supr. C. 564.

<sup>33</sup> Lee v. Williams, 26 Supr. C. 405.

<sup>34</sup> Dowd v. Crow, 205 Pa. 214.

<sup>34a</sup> Vansciver v. Churchill, 35 Supr. C. 212.

<sup>34b</sup> Westmoreland, Etc., Assn. v. Connor, 216 Pa. 543.

<sup>34c</sup> Hedden v. Wainwright, 20 Montg. Co. 37.

<sup>34d</sup> Scott Mfg. Co. v. Morgan, 217 Pa. 367.

to lien.<sup>34e</sup> A contract to release the lien as soon as filed is a waiver of the right to lien at all.<sup>34f</sup>

A separate contract may be entered into, distinct from the main building contract<sup>34g</sup> if it shows consideration on its face. Where the owner assigns his interest, and a new contract is made with the assignee, without waiver, a lien may be filed although the original contained a waiver.<sup>34h</sup> A subcontractor having no notice of a new contract in which the right to lien is waived, is not bound by it<sup>34i</sup> although he was told that a new contract was contemplated. The contract against liens passes with a conveyance of the property and the subcontractor's right is limited by it.<sup>34j</sup> The signature of the contractor binds him and those subject, although the owner did not sign.<sup>34k</sup> One who buys a building claiming a release has the burden of proving it.<sup>34l</sup>

### 38. Form of stipulation against liens.

A brief form is as follows:

"And the said Will Frank, contractor, for and in the consideration of the sum of one dollar to him paid by the said James Jacks, owner, the receipt whereof is hereby acknowledged, further agrees that no lien of any kind shall be filed by any one whatsoever, against said building, improvement and property herein mentioned and described, on account, or by virtue of, or under this agreement."

### 39. Notice of the title and estate.

All persons who furnish labor or materials are bound to take notice of the title of the apparent owner at the time, as well as the general character of the building and what labor and materials are proper. If the occupant is a mere intruder the lien must fall.<sup>35</sup> If the lien is filed against the property held by a trustee it must set forth the right of the trustee to contract and subject the property to lien.<sup>36</sup> A lien may be filed against a corporation in the hands of a receiver, when it relates back beyond the appointment of the receiver.<sup>37</sup>

### 40. Priority of lien.

A mechanic's lien takes its place in distribution in the order of judgments, when subsequent to the judgment on which the property is sold.<sup>38</sup> Proof must be made that the building was commenced before the incumbrance attached, that the work was done or materials furnished by the claimant in and about the construction of the

<sup>34e</sup> *Am. Car, Etc., Co. v. Alexandria Water Co.*, 221 Pa. 529.

<sup>34f</sup> *Wyss-Thalman v. Beaver Valley Br'g Co.*, 216 Pa. 435, 443.

<sup>34g</sup> *Shook v. Geiselman*, 22 Montg. Co. 124; *Burger v. Cigar Co.*, 225 Pa. 400.

<sup>34h</sup> *Pognacco v. Faber*, 221 Pa. 326; 224 Pa. 18.

<sup>34i</sup> *Lee v. Williams*, 30 Supr. C. 349.

<sup>34j</sup> *Pennock v. Realty Co.*, 224 Pa. 437.

<sup>34k</sup> *Burger v. Cigar Co.*, 225 Pa. 400.

<sup>34l</sup> *Kreusler v. Glukoff Co.*, 223 Pa. 174.

<sup>35</sup> *Taylor v. Murphy*, 148 Pa. 337.

<sup>36</sup> *Fenner v. Real Estate Trust Co.*, 13 D. R. 47.

<sup>37</sup> *Fisher, Etc., Co. v. Susquehanna, Etc., Co.*, 22 *Lanc. L. R.* 292.

<sup>38</sup> *Kendig v. Landis*, 135 Pa. 612.

building and that the claim was filed within the time required by law.<sup>39</sup> It was held under the act of August 1, 1868, in regard to repairs, that a lien filed within six months after the death of the debtor acquired no priority in the distribution on sheriff's sale;<sup>40</sup> also that when filed before the death of the owner it acquired no priority over general creditors.<sup>41</sup> But where the lien was prior to a mortgage and the decedent's estate was sold by the sheriff subject to the mortgage, the lien was prior to a charge on the realty of the widow's selection by order of court.<sup>42</sup> An assignee of a lien filed by a contractor, may contest the lien filed by a subcontractor.<sup>43</sup> But a contractor cannot contest the lien of a subcontractor for want of formality;<sup>44</sup> especially where the owner does not object;<sup>45</sup> neither has a person any standing who is not a party to the record.<sup>46</sup>

Claimants who might have filed but did not file liens in time get no priority.<sup>46a</sup>

#### 41. Striking off.

When a lien is otherwise good it will not be stricken off because some of the items are insufficient.<sup>47</sup> The erroneous items may be cut out.<sup>48</sup> A lien should not be stricken off merely because it was filed in alleged violation of a stipulation against liens.<sup>49</sup> This is particularly the case after plea and issue.<sup>50</sup> A lien by a subcontractor will not be stricken off because the owner has paid the contractor in full.<sup>51</sup> Or a rule to strike off defects not excepted to will not be considered<sup>52</sup> and when the rule is discharged a demurrer on the same ground cannot be filed.<sup>53</sup>

A claim has been stricken off for contradiction—as where it was averred to be for erection, etc., but the bill of particulars showed for alteration, etc., two distinct rights.<sup>54</sup> Unless it avers entire performance or the grounds of relief therefrom, it will be stricken off.<sup>55</sup> If regular in form a lien will not be stricken off, after an award of arbitrators against the claim, and an appeal, the question of payment being one for a jury.<sup>56</sup> From the refusal to strike

<sup>39</sup> Nolt v. Crow, 22 Supr. C. 113.

<sup>40</sup> Hoff's Ap., 102 Pa. 218.

<sup>41</sup> Watts v. Vezin, 12 W. N. C. 250.

<sup>42</sup> Miller's Ap., 22 W. N. C. 510; 122 Pa. 95.

<sup>43</sup> Keim v. McRoberts, 18 Supr. C. 167.

<sup>44</sup> Cordes v. Ralston, 12 D. R. 438.

<sup>45</sup> Funck v. Central, Etc., Co., 14 D. R. 490.

<sup>46</sup> James v. Homoyer, 21 Montg. Co. 88.

<sup>46a</sup> Langhein's Est., 15 D. R. 961.

<sup>47</sup> Mercer, Etc., Co. v. Kreaps, 18 Supr. C. 1; Burger v. Cigar Co., 225 Pa. 400.

<sup>48</sup> Walter v. Powell, 13 D. R. 667; Simpson v. Cameron, 3 D. R. 612.

<sup>49</sup> King v. Reese, 11 D. R. 357; Gallagher v. Gangwisch, 11 D. R. 615.

<sup>50</sup> Wagner v. Killian, 15 Lanc. L. R. 238.

<sup>51</sup> James v. Homoyer, 21 Montg. 88.

<sup>52</sup> Maddocks v. McGann, 12 D. R. 701.

<sup>53</sup> Benore v. Leonard, 6 Lack. L. N. 198.

<sup>54</sup> Morrison v. Henderson, 126 Pa. 216.

<sup>55</sup> Bohem v. Seabury, 141 Pa. 594.

<sup>56</sup> Smaltz v. Ryan, 112 Pa. 423.

off a lien no appeal lies; but from an order striking it off, it does.<sup>57</sup> A lien should show on its face all the statutory requisites of validity or it will be stricken off.<sup>58</sup> But when the owner denies the contractual relation and this is unanswered it will be stricken off.<sup>58a</sup>

On the motion to strike off, waiver of lien is not available unless such waiver appears of record.<sup>59</sup> Nor is any other matter alleged *dehors*.<sup>60</sup> But defects apparent on the face of the record must be taken advantage of by motion to strike off or by demurrer.<sup>61</sup> Pleading to the *sci. fa.* is a waiver of defects as to dates in the lien.<sup>62</sup>

A lien will not be stricken off for matters in contradiction of it which may be raised as a defense to the *sci. fa.*<sup>62a</sup> A lien for alterations which is for less than \$100 will be stricken off on motion.<sup>62b</sup>

#### 42. Notice by defendant to issue scire facias.

Section 31 of act of 1901, *supra*, provides:

"Any party named as a defendant in the claim filed, or admitted to defend thereagainst, may file as of course and serve a notice upon the claimant and the use claimant, if any, to issue a *scire facias* thereon within fifteen days after notice so to do. If no *scire facias* be issued within fifteen days after the affidavit of service of notice is filed of record, the claim shall be stricken off by the court, upon motion. If a *scire facias* be issued in accordance with such notice, the claimant shall not be permitted to discontinue the same, or suffer a nonsuit upon the trial thereof; but a compulsory nonsuit shall be entered by the court if the plaintiff does not appear, or withdraws or for any reason fails to maintain his claim."

#### 43. Issuance of sci. fa.—Affidavit with præcipe.

Under the 11th clause of the act of July 9, 1901, P. L. 614, the plaintiff "shall file with his præcipe an affidavit, by himself, his agent or attorney, setting forth that he has caused inquiries to be made in the neighborhood of the property, of at least three of those residing upon or nearest thereto, whose names and residences are given and the dates of the inquiries stated, and that he believes the persons named by him in such affidavit are the real owners of said property; whereupon all such persons shall be made parties to the writ."

This innovation has made considerable trouble and the failure to observe it necessitated the passage of an act subsequently April 18, 1905, P. L. 213, to validate sales under mortgages and patch up titles.

<sup>57</sup> Carter v. Caldwell, 147 Pa. 370.

<sup>58</sup> Wharton v. Investment Co., 180 Pa. 168.

<sup>58a</sup> Cox v. Croft, 39 Supr. C. 551.

<sup>59</sup> Titus v. Elyria Oil Co., 1 D. R. 204.

<sup>60</sup> Clark v. Miller, 14 C. C. 227.

<sup>61</sup> Pittsburg, Etc., Co. v. Will, 5 D. R. 618.

<sup>62</sup> Klinefelter v. Baum, 172 Pa. 652.

<sup>62a</sup> Woodring v. Brady, 17 D. R. 519; *Alberts Co. v. Opperman*, 55 Pitts. L. J. 236.

<sup>62b</sup> Hill v. Rush, 57 Pitts. L. J. 164.

**44. Form of præcipe and affidavit.**

The præcipe may be in the following form:

Frank Otis v. Jabez Green, owner, or reputed owner, and William A. Whiston, contractor.	}	In the Court of Common Pleas of ——— County. No. ———. M. L. D. ——— Term, 19—,
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Issue *sci. fa. sur* mechanic's lien in above stated case returnable next return day.

———,   
Plaintiff's Attorney.

To ———, Esq.  
Prothonotary.

July 1, 1910.

——— County, ss:

Frank Otis [or his agent or attorney] personally appeared before me and being sworn says that on the — day of —, 1910, he caused inquiries to be made in the neighborhood of the property described in the lien to No. —, — term, 190, M. L. D., of —, residing at —, of —, residing at —, and of —, residing at —, and that he believes said Jabez Green [or others] is the real owner of said property.

Frank Otis.

Sworn to, etc.

**45. Form of *sci. fa. sur* mechanic's lien.**

Section 32 of the act of June 4, 1901, P. L. 431, was amended by the act of April 17, 1905, P. L. 172, so as to read as follows:

"Section 32. The proceedings to recover the amount of any claim, as aforesaid, shall be by writ of *scire facias* in the following form, viz.:

——— County, ss:

The Commonwealth of Pennsylvania,

To the sheriff of said county, greeting:

Whereas —, hath filed a claim in our Court of Common Pleas — for the county of —, against — for the sum of —, for (work done or materials furnished, or both, as the case may be) to (or on) a certain structure, to-wit: [describing it as in the claim.].

And whereas, it is alleged that said sum still remains due and unpaid to the said —, now, we command you that you make known to the said —, that — be and appear before the judges of our said court, at a Court of Common Pleas to be held at — on the first Monday of — next, to show if anything — know or have to say why the said sum of — should not be levied of the said structure to the use of the said —, according to the form, decree and affect of the act of assembly in such case made and provided, if to them it shall seem expedient; and have you then and there this writ.

Witness the Honorable — —, President of our said court, at —, the — day of —, Anno Domini, 19—.

[Seal]

— —, Prothonotary.

**46. Service of sci. fa. or acceptance of service — Posting and publication.**

Section 33 of the act of 1901, *supra*, is as follows:

"The defendants or their counsel may accept service of said writ of *scire facias*, but if service be not accepted, the writ shall be served by the sheriff as in the case of a summons. If the service has not been, or cannot be fully made in the county in which the writ is issued, then alias or *pluries* writs may issue in like form, or the sheriff may depute the sheriff of any other county, in the commonwealth, to make such service, should the defendants or any of them be found therein.

If service cannot be made upon the defendants or any of them, in any of the ways above set forth, then service may be had by serving the person or persons in possession of the property described in the claim, if any, with a like copy thereof, or by posting a brief notice of the contents of said writ upon the most public part of said property, if no one be found in possession thereof, and by advertising a like brief notice, once a week for four successive weeks in one newspaper of general circulation in the county, and in the legal periodical, if any, designated by the court for that purpose. Said notice shall always state that judgment may be entered and the property sold, if an affidavit of defense be not filed within fifteen days after a date named, which shall be the date fixed for the last advertisement. Service of any such writ may be made at any time within three months from the date on which it was issued, but it shall be served and returned at the earliest time possible, and the plaintiff may require its return at any time, whether or not it be actually served."

The later act, *supra*, also provides for service by mailing in a registered letter, which see.

If the *terre-tenants* are not named in the writ or the return of service they cannot be added after five years.<sup>1</sup>

**47. Judgment by default — Rule for judgment on insufficient affidavit — Rule to reply.**

"Section 34. If no affidavit of defense be filed within the time designated, judgment may be entered and damages assessed by the prothonotary, by default, for want thereof. If no affidavit of defense be filed by the contractor, judgment may be entered against him for want thereof, and the damages assessed, though an affidavit of defense be filed by the owner; but no judgment for want thereof shall be entered against the owner, if an affidavit of defense be filed by the contractor. If an affidavit of defense be filed, a rule may be taken for judgment for want of a sufficient affidavit of defense, or for so much of the claim as is insufficiently denied, with

<sup>1</sup> Hood v. Norton, 202 Pa. 114.

leave to proceed for the residue. The defendant may, by rule, require the plaintiff to reply, under oath or affirmation, to the statements set forth in the affidavit of defense, and after the replication has been filed may move for judgment on the whole record."

**48. Judgment against contractor — Opening — Marking to use of owner.**

"Section 35. If service be accepted for the contractor, or if he shall have been personally served with the original *scire facias*, or any *scire facias* to revive, or if it be left for him with an adult member of his family, or the family with whom he resides, or if he appears to or takes any action in the case, and judgment be entered against him, it shall have all the effect of a personal judgment in a suit at common law; and executions may, from time to time, be issued against him thereupon, or the same may be revived, transferred to other counties, or suits brought thereupon in other jurisdictions, with like effect, though the owner successfully defends against the claim, or proceedings be still pending thereon. If the owner pays any judgment finally recovered on the claim, the claimant shall, upon payment of costs, mark the personal judgment or judgments against the contractor to the use of the owner, and shall transfer to the latter any note or other collateral security he may have for his claim; but the court may, upon petition of the contractor, open the judgment or cause the return of the securities, if there are any equities as between such owner and contractor which shall require such action, and thereafter try the issues raised in such proceedings as in other cases.<sup>1a</sup>

**49. Defenses against the sci. fa.— More specific statement.**

"Section 36. In addition to the defenses growing out of the insufficiency of the claim itself, or of the proof of the facts necessary to sustain it as a claim against the structure or other improvement, any defense which would defeat the action were it a personal one against the contractor to recover for the particular work or materials required to be done or furnished, under the contract of the owner, or which shows that the claim was intentionally filed for a grossly excessive amount, shall wholly defeat the claim; and proof that the work in certain particulars was not in accordance with that contract shall defeat it *pro tanto*. Minor defects, or a failure to complete in minor particulars, shall operate as a defense only to the extent necessary to repair or complete the work. For the purpose of enabling a proper defense to be made, the court may order a more specific statement of the claim, or an examination of the books and papers referred to therein, and may strike off the claim for a failure to comply with the order, as in other cases.

Where the contract was for a sum total this is a good defense against a claim on an alleged oral contract with charges by items at current prices.<sup>2</sup>

When a question of fact comes up in the issue as to whether the

<sup>1a</sup> Commercial, Etc., Co. v. Thompson, 17 D. R. 996.

<sup>2</sup> Yaukey v. Buckman, 18 Supr. C. 378.

materials were furnished on the credit of the building or the contractor or other person, the matter may be properly submitted to a jury.<sup>3</sup> The same is true where it is alleged that the contractor was prevented by the owner from completing his contract.<sup>4</sup> The defendant may set up in his affidavit a contract against filing.<sup>4a</sup> Payment or tender is available, even when the contractor company is in the hands of a receiver.<sup>4b</sup>

Where a replication avers another contract which does allow liens to be filed it is *dehors* the lien.<sup>4c</sup>

#### 50. Intervention and substitution.

"Section 24. Any person having an interest in the property described in the claim, whether existing at the time of the claimant's contract or acquired subsequently thereto, may, by agreement of the parties or by leave of court, intervene as a party defendant and make defense thereto, with the same effect as if he had been originally named as a defendant in the claim filed. And the claimant may, by writing filed at his costs, strike off the name of any defendant therein, and may substitute as a defendant, and issue a *scire facias* against any person who may have acquired an interest as owner after the time of said contract, or who is the personal representative of an owner or contractor, who has died, either before or after filing the claim, but such substitution shall always be without prejudice to any intervening rights."

One who cannot show title in himself to the real estate cannot have judgment on a *sci. fa.* opened and be let in to defend.<sup>5</sup> A trustee in a mortgage covering the property and the owner of a judgment on another mechanic's lien cannot intervene on a *sci. fa.* on another mechanics lien, because a judgment on this is *res inter alios acta* and the lien must be proved before the auditor to entitle the claimant to participate.<sup>6</sup> The subrogation given the creditor of the subcontractor by sections 22 and 28 of the act of 1901, *infra*, is simply a personal relation and confers no new lien. It was not intended to carry the force of the lien beyond the subcontractor.<sup>7</sup>

#### 51. Amendments of record papers — Enlargement of time by the court.

"Section 51. Any claim, petition, answer, replication, *scire facias*, affidavit of defense, or other paper filed of record, may be amended from time to time by agreement of the parties, or by leave of the court, upon petition for that purpose, under oath or affirmation, setting forth the amendment desired, that the averments therein contained are true in fact, and that by mistake they were

<sup>3</sup> Rider-Ericsson Co. v. Fredericks, 25 Supr. C. 72.

<sup>4</sup> Birney v. Davis, 8 Del. Co. 235.

<sup>4a</sup> Voigtman v. Cigar Co., 26 Lanc. L. R. 17.

<sup>4b</sup> Alberts Co. v. Opperman, 55 Pitts. L. J. 236.

<sup>4c</sup> Kyle v. Graham, 11 Del. Co. 217.

<sup>5</sup> Pace v. Yost, 10 Kulp, 538.

<sup>6</sup> Watt v. Eckels, 11 D. R. 570.

<sup>7</sup> Tennessee, Etc., Co. v. Grant, 14 D. R. 453.



omitted from or wrongfully stated in the particulars as to which the amendment is desired. Such amendments shall be of right, saving intervening rights, except that no amendment of the claim shall be allowed, after the time for its filing has expired, which undertakes to substitute an entirely different property from that originally described in the claim, or a wholly different party as the defendant, with whom the claimant contracted; but the description of the property or the name of such defendant may be amended so as to be made more accurate, as in other cases of amendment. If the names of the owner and contractor be correctly stated and the description of the property be reasonably accurate, the claim shall be sufficient notice to the owner, purchasers and lien creditors, though it may have to be amended in other particulars.

The court may, for cause shown and filed of record, enlarge the time for requiring the filing of the claim, affidavit of defense, answer or replication, for issuing a *scire facias*, or for entering security, by rule or standing order; and any judgment by default may be opened by the court, upon cause shown; but no enlargement of the time for requiring the filing the claim or for issuing a *scire facias*, shall extend the same beyond the time herein provided for preserving or retaining the lien thereof."

This section has enlarged the scope of amendment, except as to matters therein limited, and amendments which are allowable may be moved at any time down to and upon the trial of the cause.<sup>8</sup> The date from which the lien is claimed may be supplied, if the statement contains the facts on which it is based;<sup>9</sup> or that notice was served, the motion being allowed after the time for filing had expired;<sup>10</sup> or striking out names of parties included by mistake,<sup>11</sup> or that defendant was the owner of the fee and that no note or collateral security was taken for the claim.<sup>12</sup> Amendment may be had to supply specifications,<sup>13</sup> especially when the subcontractor did not have a copy.<sup>14</sup> The claim, however, should furnish the basis, saving intervening rights.<sup>15</sup> But the plaintiff's name cannot be so amended as to allow a lien to be filed after six months.<sup>16</sup> An amendment of a party's name may be made when it does not substitute a different party.<sup>17</sup>

An amendment purely formal after discharge of the lien by entering security under section 25, act 1901, *infra*, will not discharge the

<sup>8</sup> Getz v. Brubaker, 17 York, 84; Mulherin, Etc., Co. v. Jones, 5 Lack. Jur. 72; Thirsk v. Evans, 211 Pa. 239; Hiestand v. Keath, 26 Lanc. L. R. 225.

<sup>9</sup> Sinnott v. Beard, 14 D. R. 619.

<sup>10</sup> Wyoming, Etc., Co. v. Turnbach, 30 C. C. 408.

<sup>11</sup> Herr v. Harnish, 13 Lanc. Bar. 175.

<sup>12</sup> Hoover v. Lebo, 14 D. R. 238.

<sup>13</sup> Warren v. Johnston, 33 Supr. C. 617.

<sup>14</sup> Day v. Penna. R. Co., 35 Supr. C. 586; Morrison v. Swarthmore Natl. Bank, 9 Del. Co. 573.

<sup>15</sup> Beam v. Geiselman, 16 D. R. 579.

<sup>16</sup> Holthouse v. Bray, 31 Supr. C. 200.

<sup>17</sup> Rodgers Sand Co. v. Pittsburg, Etc., R. Co., 17 D. R. 377; Dyer, Etc., Co. v. Moss Cigar Co., 27 Lanc. L. R. 83.

surety.<sup>18</sup> This power of amendment is confined to the court having the records. The Orphans' Court, on distribution, cannot alter a scintilla of it.<sup>19</sup> An amendment substituting the wife as owner instead of her husband, is allowable before the time for filing the lien has passed;<sup>20</sup> and so of an averment of notice of intention to file.<sup>21</sup>

## 52. Practice on rules, petitions, answers, replications, etc.—Facts taken as admitted.

"Section 52. Any rule granted under the provisions of this act may be made returnable at such time as the court may direct, either therein or by rule of court, or by special or standing order. All petitions, answers and replications shall be under oath or affirmation. Answers must be filed and served within fifteen days after service of the petition, and rules and replications must be filed within fifteen days after service of the last of the answers. Replications must be confined to a reply to new matter set forth in the answers. The facts averred by either party and not denied in the answer or replication of the other, shall be taken as true in all subsequent proceedings in the cause, without the necessity for proof thereof, unless amended as herein set forth. Any fact necessarily found by the court in finally determining a rule, shall also be taken as true, in all subsequent proceedings in the cause, without the necessity for proof thereof, unless either party, by writing filed and served at least ten days prior to the time fixed for trial, requires that it be submitted to a jury."

## 53. Service of notices, etc.

"Section 53. All notices, petitions and rules shall be served upon counsel for the parties interested, or upon the parties themselves, in the manner bills in equity are served; or upon the owner by leaving a copy with the party in possession of the structure or other improvement; or in default of service, then in such manner as the court shall direct."

## 54. Pleading and practice.

Under the old laws the short plea of "no lien" was held bad.<sup>22</sup> The proper plea then was "*nil debet*."<sup>23</sup> Now, under *non assumpsit*, the defendant may set up any equitable defense showing failure of consideration, wholly or in part.<sup>24</sup> Without notice of special matter the plea of payment has only its common law effect, which means actual payment.<sup>25</sup> Before judgment a mechanic's lien may be impeached by any one having an interest in its validity, but after judg-

<sup>18</sup> Vansciver v. Churchill, 35 Supr. C. 212.

<sup>19</sup> Deichley's Est., 35 Supr. C. 442.

<sup>20</sup> Miller v. Fitz, 17 D. R. 933.

<sup>21</sup> Lord v. O'Brien, 16 D. R. 965.

<sup>22</sup> Snyder v. Kohler, 3 W. N. C. 156.

<sup>23</sup> Schultz v. Asay, 8 W. N. C. 219.

<sup>24</sup> Blessing v. Miller, 102 Pa. 45.

<sup>25</sup> Smaltz v. Ryan, 112 Pa. 423.

ment it cannot be attacked collaterally.<sup>26</sup> Pleading to the *sci. fa.* waives objections to formal defects in the lien.<sup>26a</sup>

Lien proceedings are *in rem* and are not affected by a receivership, and permission need not be first obtained from the court.<sup>27</sup> An issue will not be awarded where a lien is fatally defective.<sup>28</sup> At the trial is the time to object that the work was not done on the faith of the building but on the credit of the contractor.<sup>29</sup> An affidavit of defense is insufficient which alleges that the defendant himself contracted and the contractor named was a subcontractor to whom the materials were furnished on his own credit.<sup>30</sup> A *scire facias* is, however, not an action within the act of February 24, 1834, P. L. 80,<sup>31</sup> but it cannot be issued to a return day less than 15 days distant.<sup>32</sup>

A judgment may be taken for the amount admitted to be due in an affidavit of defense to the *sci. fa.*<sup>33</sup> Where the parties submit a dispute to the court in a matter of claim between contractor partners, paid to one of them, the decision is a bar to subsequent proceedings to contest by motion or formal bill.<sup>34</sup> It is no objection to the right to file a lien that the owner and contractor gave a note to the material man if it was not paid.<sup>35</sup> The entry of a judgment by amicable *sci. fa.* after the revival, cannot be attacked for irregularity in the time of entry.<sup>36</sup> Dispute as to the date of completion of the work is for the jury.<sup>36a</sup>

#### 55. Insurance, when structure is destroyed by fire or otherwise — Subrogation.

"Section 49. In case the structure or other improvement bound by or liable for any such claims, or which would be so liable but for a waiver thereof, shall be destroyed or removed by fire or other casualty prior to the payment of the claims, any insurance placed upon the property by the owner, contractor or subcontractor because of such improvement, and actually received or to be received by him because of its destruction or removal, shall, after the insured has received all premiums paid and any money actually expended by him on account of such improvement, inure to the benefit of claimants and use-claimants under him, with the same effect as if they were parties to the contract of insurance; and any party in interest may by petition filed in his case, or by bill in equity if no claim be actually filed, compel the application of such surplus of insurance money, in

<sup>26</sup> Imperial Refining Co.'s Ap., 149 Pa. 139; *contra*, Wrigley v. Mahaffey, 5 D. R. 389.

<sup>26a</sup> Clark v. Bittle, 11 Del. Co. 80.

<sup>27</sup> Malaney v. Mears, 5 D. R. 420.

<sup>28</sup> Wolfe v. Oxnard, 152 Pa. 623.

<sup>29</sup> Hoffmaster v. Knupp, 15 C. C. 140.

<sup>30</sup> Catanach v. Cassidy, 159 Pa. 474.

<sup>31</sup> Reece v. Haymaker, 164 Pa. 575.

<sup>32</sup> Lumber Co. v. Ottenheimer, 4 D. R. 730. (As to alternative return days, see Crawford v. Shoe, 14 C. C. 419.)

<sup>33</sup> Roberts v. Sharp, 33 W. N. C. 324; 161 Pa. 185.

<sup>34</sup> Straw v. Smith, 179 Pa. 376.

<sup>35</sup> Brubaker's Est., 19 York, 29; Walter v. Powell, 13 D. R. 667.

<sup>36</sup> Byer v. Dale, 29 C. C. 43.

<sup>36a</sup> Day v. R. Co., 224 Pa. 193.

the same way and manner, to the same parties and in the same proportions, as if the fund were realized by a judicial sale of the property and there was no waiver of liens. If any insurance placed upon the property because of such improvement shall inure also to the benefit of a mortgagee, ground-rent owner, or other person having an estate in, charge upon or encumbrance against such land and improvement, the said claimants or use-claimants, after such person shall have been paid in full, shall be subrogated to his rights against the owner and property, to the extent of the difference between the money recovered by and that paid out by such owner, but not exceeding the amount of insurance actually paid."

#### 56. Security — Manner of taking and approval.

"Section 50. Wherever security is required to be given in accordance with the provisions of this act, it may be approved by the prothonotary, subject to an appeal to the court as in other cases. If thereafter the security be found to be insufficient, new security may be required within a given time; in default of the entry of which, the cause may proceed with the same effect as if none had been given, the sureties, however, remaining liable. By agreement of the parties, or upon approval by the court after notice, new security may be entered in lieu of that originally taken and an *exoneratur* entered on the first bond, or the security given may be limited to a particular property, if clear of encumbrance, and if the security be entered as a lien upon said property."

#### 57. Compulsory nonsuit — Recovery of costs.

"Section 37. A compulsory nonsuit, unless reversed or set aside, shall operate to bar all further proceedings on the claim. If judgment be finally recovered in favor of the claimant, it shall not have the effect of a personal judgment against the owner, if he be not also the contractor, except for the costs of the proceeding. To recover the costs adjudged to the successful party, he may issue execution, as in personal actions." (See "Executions.")

A compulsory nonsuit under this section does not bar an action in assumpsit for a valid claim.<sup>37</sup>

#### 58. Writ of *scire facias* to revive judgment.

"Section 40. The judgment upon said claim may be revived by writ of *scire facias* in the following form:

The Commonwealth of Pennsylvania, to C. D. and E. F., Greeting:

Whereas, A. B., claimant, on the — day of —, A. D. 19—, recovered judgment in the sum of — dollars against you that the following described property be sold to satisfy the same:

[Here describe property in full.]

And whereas, We have been given to understand that though judgment as aforesaid was rendered, yet the amount thereof is still due and unpaid, and remains as a lien against said property; now you are hereby notified to file your affidavit of defense to A. B.'s claim upon said judgment, if any defense you have, in the office of the

<sup>37</sup> Commercial, Etc., Co. v. Thompson, 17 D. R. 996.

prothonotary of our said court, within fifteen days after the service of this writ upon you. If no affidavit of defense be filed within that time, said judgment may be revived against you, for the amount set forth, with interest from the time of its recovery, the said property to be sold to recover the whole thereof.

Witness the Honorable ———, President Judge of our said court, this ——— day of ———, A. D. 19—.

[Seal.]

—————,  
Prothonotary.

#### 59. Amicable sci. fa. to revive — Terre tenant.

Section 40, continued:

"But the parties to the judgment may agree upon an amicable *scire facias* to revive, or to an amicable judgment of revival, upon such terms as may be agreed upon, with the same effect as if a *scire facias* in the form aforesaid had been duly issued, served and returned. If a *terre-tenant* whose deed has been duly recorded, is not suggested as a defendant and made a party to the *scire facias* to revive, the amicable *scire facias* to revive, or the amicable judgment of revival, or shall not be made a party and served within the period prescribed for reviving the lien of ordinary judgments, the lien of the claim shall be lost so far as his interest in the property is concerned."

#### 60. Service of *scire facias* to revive.

"Section 41. The defendants or their counsel may accept service of said writ of *scire facias* to revive, but if service be not accepted the writ shall be served by the sheriff as in the case of a summons." [Here follow the same provisions as to service, in section 33, *supra*, q. v.]

#### 61. Practice on sci. fa. to revive.

"Section 42. The practice and procedure following said *scire facias* to revive, so far as applicable shall be the same as in the case of the original *scire facias* to collect the claim."

#### 62. Entry of proceedings on judgment index.

"Section 43. Every claim filed, *scire facias* issued, verdict recovered, and judgment entered, in accordance with the provisions of this act, shall be entered on the judgment index of the court. When a claim is stricken off or satisfied, the name of a defendant stricken out, a *scire facias* discontinued or quashed, or a verdict or judgment stricken off, set aside by granting a new trial, or otherwise reversed or satisfied, a note thereof shall be made on said judgment index, but not in an appealable matter until the expiration of the time for such appeal."

A judgment for want of an affidavit of defense may be entered against a corporation which is in the hands of a receiver but no execution will be allowed to go out upon it.<sup>33</sup> If the record shows that judgment was taken by a subcontractor who had no right to

<sup>33</sup> Fisher, Etc., Co. v. Susquehanna, Etc., Co., 23 Lanc. L. R. 398.

lien, a subsequent mortgagee will not be concluded by said judgment.<sup>39</sup>

### 63. Form of *levari facias* to sell.

"Section 44. Execution upon any judgment recovered upon any such claim, except where the property named is essential to the business of a quasi-public corporation, shall be by writ of *levari facias*, in the following form:

The Commonwealth of Pennsylvania, to the Sheriff of — County,  
Greeting:

*Whereas*, A. B., claimant, on the — day of —, Anno Domini, 19—, recovered judgment in the sum of — dollars, with interest from the — day of —, Anno Domini, 19—, and costs amounting to — dollars, in our Court of Common Pleas of said county, of — Term, 19—, Number —, M. L. D.,<sup>40</sup> against C. D. and E. F., that the following described property in your bailiwick be sold to satisfy the same, viz.:

[Here describe the property in full.]

*Now this is to command you*, That you expose the said property to sale by public vendue and outcry, after due advertisement according to law, and that return of said sale, with the moneys realized thereby, and this writ, you make to our said court on the — day of — Anno Domini, 19—.

Witness the Honorable —, President Judge of our said court, this — day of —, Anno Domini, 19—.

[Seal.]

Prothonotary.

The writ of *levari facias* issues upon a record and signifies that "you cause to be levied" the particular property bound by such record. The præcipe for this writ should give the names of the parties and an accurate reference to the record as the basis. The attorney may attach a description of the property as contained in the record, if he sees fit. The levy, advertisement and sale are the same as in other sales of real estate. See "Executions," *supra*.

### 64. Title acquired by purchaser — Sale where structure lies in different counties.

"Section 45. The title acquired at the sheriff's sale under such writ shall be the title which was bound by the lien, as hereinbefore set forth; but no mortgage, ground-rent, or other charge upon or estate in the land, shall be affected by such sale, unless upon the record existing at the time of sale, some lien upon the property, prior in date, is also discharged thereby.

"Where the structure or other improvement, the subject of the lien, shall be situate in more than one county, the whole thereof shall be sold under a writ of *levari facias* in the county where the principal part thereof shall be; but notice of such sale shall be given in every county where any part thereof is situate, to the same extent

<sup>39</sup> Prudential Trust Co. v. Hildebrand, 34 Supr. C. 249, overruling Holt v. Crow, 22 Supr. C. 113.

<sup>40</sup> The number of the judgment on the *sci. fa.* is meant, and the number of the lien on the M. L. D. can be inserted also.

as if the whole thereof were in that county, and the sheriff's deed shall be acknowledged and recorded in every such county."

**65. Sale of leasehold or other tenancy — Option of purchaser.**

"Section 47. If a leasehold estate or other tenancy, bound by or liable for any such claim, be sold at judicial sale, whether under proceedings on the claim, or otherwise, the purchaser shall, unless the lease provides otherwise, have the option of affirming the lease or tenancy, and continuing as a tenant under all the terms and conditions of such letting, or of removing the property subject to such claim, unless the owner, upon notice so to do shall elect to purchase the estate and property so bought, at a value to be determined by the majority of three appraisers, selected by the parties or appointed by the court."

**66. Security for stay of proceedings — Effect of as admission, etc.**

"Section 48. At any time before the property is sold, approved security may be entered for a stay of proceedings until the expiration of one year after the date of filing the claim. The entry of such security by the owner, before the entry of judgment on the claim, shall be equivalent to an admission by him that the property is liable for the claim. The entry of such security by the contractor, before the entry of judgment on the claim, shall be equivalent to an admission by him that he has no defense to the recovery of judgment against himself, but shall not debar the owner from defending [against] the claim.

"After the stay has expired, the claimant may proceed upon the claim and the bond given separately or simultaneously. If payment is made by the owner, the bond given by the contractor shall be assigned to the use of the owner, and he may recover thereupon the amount paid, or any part thereof, if the accounts as between himself and the contractor shall justify such recovery."

**67. Satisfaction on payment, etc.—Penalty for failure to satisfy, after notice.**

"Section 54. If the claim shall be paid or otherwise satisfied or discharged at any time after filing, or if a wilfully false claim shall be filed, it shall be the duty of the claimant or his legal representatives, at the request of the owner or of any other person interested, and on the payment of costs, if any be due, to enter satisfaction on the record of such claim, which satisfaction shall forever discharge the lien. In such cases, a refusal to satisfy the claim for a period of sixty days after notice so to do, served upon the claimant or his agent or attorney, shall subject such claimant to a suit as for a penalty, at the hands of the party aggrieved, in such sum as the jury shall determine to be just, but not exceeding the amount of the claim."

**68. Distribution of fund — Order.**

"Section 55. Every distribution under the provisions of this act shall be made as follows:

"1. To use-claimants the amounts due to them, but not exceeding in the aggregate the sum distributable to the lien of the subcontractor through whom they claim.

"2. To subcontractors the amounts due to them, after deducting any sums awarded to use-claimants under them.

"3. To contractors the amounts due to them, after deducting any sums awarded to subcontractors and use-claimants under them.

"4. To the owner, any balance remaining. If the amount distributable to any of said classes shall be insufficient to pay in full, the claims in that class shall abate proportionately."

On distribution interest will be allowed only to the day of the sale.<sup>41</sup>

Where the land was sold by an order from the Federal Court, two years after the lien was filed and before a *sci. fa.* issued, the sale discharging all liens, such lien was fixed upon the fund as of the date of the confirmation of the sale, if found to be valid and no *sci. fa.* can issue.<sup>42</sup>

#### 69. Priority of wages or labor claims.

"Section 56. In every distribution hereafter made under legal proceedings in any court, if any portion of the funds for distribution shall have been realized because of labor or materials furnished to any structure or other improvement by the party whose estate is to be distributed, any distributee claiming for labor done, or labor or materials furnished to such structure or other improvement, shall be entitled to priority against the portion of the fund thus realized."

This section does not apply where there is a prior mortgage and the value of the land was greater than that given to it by the mechanic's lien.<sup>43</sup> Nor does it secure priority to claimants who might have filed liens and did not.<sup>44</sup>

The act of May 12, 1891, P. L. 54, giving priority to the wages of laborers of almost every kind, as named therein, provides also for filing their claims in the same manner as mechanic's liens are filed.

Holders of corporate bonds secured by a mortgage are entitled to preference over mechanic's liens filed for work begun after the mortgage was recorded, although some of the bonds were sold later.<sup>44a</sup>

#### 70. Receipt for labor, etc.

"Section 57. As a condition precedent to payment for labor done, or labor or materials furnished to a structure or other improvement, the party making the same shall be entitled to demand from the person entitled thereto, a receipt, stating the amount thereof and for what it is given."

#### 71. Scope of remedy and effect of judgment.

Section 58 of the act, *supra*, provides:

"Nothing herein contained shall alter or in any manner affect

<sup>41</sup> Allen v. Oxnard, 152 Pa. 621.

<sup>42</sup> New Jersey Bridge Co. v. West Chester, Etc., R. Co., 35 C. C. 78.

<sup>43</sup> Egbert v. Riley, 22 Montg. Co. 54.

<sup>44</sup> Langbein's Est., 15 D. R. 961; Hytovitz's Est., 56 Pitts. L. J. 141.

<sup>44a</sup> Rauch v. Island Park Assn., 226 Pa. 178.



the other rights and liabilities of those entitled to file claims under the provisions of this act; it being intended hereby only to furnish and regulate the remedies herein set forth, and to provide means for the enforcement of such remedies; but a judgment on the merits, in favor of or against the contractor, shall have the effect of debarring any further proceedings against him personally."

### 72. Appeals.

"Section 59. From any definite judgment, order or decree, entered by the Court of Common Pleas under any of the provisions of this act, or from the refusal to open a judgment entered by default, an appeal may be taken by the party aggrieved to the Supreme Court or Superior Court as in other cases."

The word "definite" above should be definitive, equivalent to final as distinguished from interlocutory; so an appeal will not lie from an order discharging a rule to show cause, etc.<sup>45</sup> But striking off a lien after issuing a *sci. fa.* is a final order from which an appeal lies.<sup>46</sup> An auditor's report on a fact, confirmed below, will not be reversed on appeal, except for plain error.<sup>47</sup> On error, the lower court will not be reversed when the appellant failed to print the contract or the evidence.<sup>48</sup> The time required to prosecute the appeal is not to be excluded in computing the limitation of the lien.<sup>49</sup> On appeal, the interlocutory orders may be reviewed, if made matters of exception properly.

### 73. Contract for payment in other than legal tender.

Having considered the practice on mechanic's liens in logical order from the inception to the finality, there remain some incidental features enacted in the code of 1901, which will be considered in these concluding paragraphs. Section 16 of said act provides:

"Where a contract between the owner and contractor provides that payment shall be made in other than legal tenders, such contract shall have no legal effect as against the subcontractor or those claiming under him, unless actual notice thereof shall have been given the claimant or use-claimant before any labor or materials furnished by him; or, a duly written and signed contract to that effect shall have been filed in the office of the prothonotary of the Court of Common Pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant. Such provision of the contract shall not bar the right to file a claim to recover the amount due in legal tenders; but the owner may file a petition, under oath or affirmation, setting forth the facts, under the term and number of the claim first filed, and making all the parties who have filed or are entitled to file claims, par-

<sup>45</sup> Kurrie v. Cottingham, 209 Pa. 12; A. G. Breitweiser Co. v. Scott, 33 Supr. C. 627.

<sup>46</sup> Orr v. Rogers, 29 Supr. C. 175.

<sup>47</sup> Bradley v. Gaghan, 204 Pa. 511.

<sup>48</sup> Keim v. McRoberts, 18 Supr. C. 167.

<sup>49</sup> Kountz v. Consolidated Ice Co., 36 Supr. C. 639.

ties respondent, and praying appropriate relief; whereupon the court shall grant a rule to show cause why the relief prayed for should not be allowed. The court shall from the pleadings, aided as to the material disputed facts, if any, by depositions or by a hearing at bar, make such order or decree as the facts shall warrant. If the court shall find that payment was agreed to be made in other than legal tenders, it shall decree that upon the owner complying with his part of the agreement, within such time as the court shall designate, all the claims filed or which shall thereafter be filed by the parties respondent, as to whom the owner has not waived his right, shall be stricken from the record; and the payments to be made by the owner in other than legal tenders shall be made liable by the decree of the court to the parties interested, in the same manner and to the same extent as the structure or other improvement itself would have been if no such provision had appeared in the contract, and distribution shall be made as herein set forth and upon equitable principles. Other parties interested may intervene at any time before actual distribution. Should other parties than the respondents subsequently file claims, such claims shall be stricken off, upon motion of the owner, unless it be proved that the claimant did not know of the pendency of said proceedings, did not participate in the proceeds of the payments actually made, through ignorance thereof, in time for him to intervene, and yet gave him no notice of the proceedings, in which event, the claim shall be proceeded on as if no such provision appeared in the contract."

**74. Contract for payment at given times — Stay of execution on judgments.**

Section 17 of the act, *supra*, provides:

"When the contract between the owner and the contractor provides that payments shall only be made at given times, such contract shall be efficacious as against the subcontractor or those claiming under him, if actual notice thereof shall have been given to the claimant or use-claimant, before any labor done or labor or materials furnished by him; or a duly written and signed contract to that effect shall have been filed in the office of the prothonotary of the Court of Common Pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant. If the contract be written, signed and filed within the times above set forth, and the owner complies with his part thereof, the structure or other improvement shall not be liable to claims in the aggregate in excess of the balance of the contract price remaining unpaid, or which should have remained unpaid, whichever is greatest in amount at the time notice was first given the owner of an intention to claim a lien upon such property; such notice, if given in good faith, inuring to the benefit of all claimants. The court shall stay all executions upon judgments recovered upon such claims if payments are not due, and the owner may pay into court the whole balance found due under said contract, in accordance with the provisions of this section; whereupon the court shall order the claims to be stricken off, upon petition,

answer and replication, in the manner and with the effect provided herein in cases where payment is to be made in other than legal tenders."

**75. Filing and indexing of contracts.**

Section 18, act of 1901, *supra*, provides:

"The subcontractors shall be bound, to the extent of the notice given by the contract as signed and filed, though it be but part of the entire contract or contracts between the owner and contractor. When filed, the prothonotary shall enter it in the judgment index, in the name of the contractor, and shall be responsible for any neglect of duty in that regard, as in other cases."

**76. Actual notice of contract impairing rights, etc.—Rescission.**

"Section 19. When any contract for labor or materials to be furnished to a structure or other improvements shall be so drawn as to affect or in any manner impair the rights and remedies given to a claimant or use-claimant, or to postpone the time of payment for a period exceeding six months after the last of the labor or materials are furnished, it shall be the duty of the party making such contract, whether duly written, signed and filed or not, to give actual notice thereof to those contracting with him, prior to the time of the making of the contract with or the employment of such party. A failure so to do shall be sufficient ground for a rescission of the contract by the party theretofore ignorant of the fact, and the recovery by him *pro rata*, by lien or otherwise, for the labor or materials furnished to the time of rescission. And the same right of recovery, by lien or otherwise, shall exist where the structure or other improvement is never completed, but through no fault of the claimant, unless it be destroyed by fire or other casualty."

**77. Suspension of contract by bankruptcy or insolvency proceedings.**

"Section 20. Where proceedings in bankruptcy or insolvency are instituted by or against any contractor or owner, they shall operate to suspend all proceedings upon any contract or subcontract with him for labor to be done or labor or materials to be furnished to the structure or other improvement, and if he be adjudicated a bankrupt or insolvent, or if he should die, then such contractor or subcontractor may, at his option, refuse to proceed further under his contract; and such contractor or subcontractor may, upon the happening of any such contingency, by notice to those contracting with him, suspend and end his contracts with such third parties, who shall have a like right, and so on down to the last party connected with the structure or other improvement. When any such contract has been suspended or ended, the right to file a claim or to sue under the contract shall remain, and may be exercised with the same effect as if further proceedings, under such contract, had been determined by consent of all parties."

**78. Substitution of party as use claimant.**

"Section 22. Where a claim has been filed which includes unpaid items of labor or materials, furnished by one who contracts with the claimant, whether or not such party is himself entitled to file a claim against the property, such party may, at any time before actual payment or satisfaction of the claim, file of record in said proceeding a petition, under oath or affirmation, setting forth how his interest arises and the extent thereof, and praying that he be substituted as a use-claimant to the extent of his said interest, but not exceeding the balance due to the claimant; whereupon the court shall grant a rule upon the claimant, the owner and the contractor to show cause why the relief prayed for should not be allowed.

The court shall from the pleadings, aided as to the material disputed facts, if any, by depositions or by a hearing at bar, make such order or decree as the facts shall warrant. If there be a dispute as to the amount to which the petitioner is entitled as against the claimant, that dispute shall be settled upon the distribution of the fund paid on account of said claim, or by a suit at common law, if such suit shall have been brought, or by an issue in said proceedings, and the court may make such orders in relation to the matter as upon equitable principles should be made. After a copy of said petition and rule shall have been served upon the owner or contractor, payments made by him, or a release or discharge given by the claimant, shall not defeat or in any manner affect the rights of the use-claimant; but in other respects the trial of any issue upon the claim shall be as if between the claimant and defendants only."

**79. Proceedings where errors in the lien are alleged — Jury trial.**

"Section 23. Any party having a lien against estate in or charge upon the property included in such claim, may file his petition, under oath or affirmation, averring that the date mentioned in the claim as the time when the structure or other improvement was commenced is incorrect, or that the claim is filed against more land than should be justly included therein, or that for any reason the claim is postponed to the rights of the petitioner, and praying an appropriate decree; whereupon the court shall grant a rule upon such claimant to show cause why the relief prayed for should not be allowed, and shall stay proceedings on the claim pending the hearing of the rule, should justice so require.

At the instance of others than those personally served, with the *scire facias*, such rule shall be allowed, though judgment be recovered on the claim.

The court shall from the pleadings, aided as to the material disputed facts, if any, by depositions or by a hearing at bar, make such order or decree as the facts shall warrant. Like proceedings shall be had if the petition shall aver that the claim is for any reason invalid, has been paid, waived or released, or should not legally or equitably be allowed as a claim against the property; but the material disputed facts in such cases, if any, shall at the request of either party, be tried by a jury without further pleadings.

When such request is granted by the court, the fact thereof shall be entered on the judgment index as a *lis pendens*, with the same effect as if a writ of *scire facias* had duly issued upon said claim."

**80. Petition of any defendant or intervenor for rule—Practice.**

"Section 25. Any defendant named in the claim, or any person allowed to intervene and defend thereagainst, may present his petition, under oath or affirmation, setting forth that he has a defense in whole or in part thereto, and of what it consists; and praying that a rule be granted upon the claimant to file an affidavit of the amount claimed by him, and to show cause why the petitioner should not have leave to enter security, or pay money into court in lieu of the claim; whereupon a rule shall be granted as prayed for.

Upon the pleadings filed, or from the claim and the affidavit of defense, and without a petition where an affidavit of defense has been filed, the court shall determine how much of the claim is admitted or not sufficiently denied; and shall enter a decree that, upon the payment by such petitioner to the claimant, of the amount thus found to be due, with interest and costs, if any thing be found to be due; or, upon payment into court, if the claimant refuses to accept the same, and upon entering approved security in at least double the balance claimed and probable costs; or, upon payment into court of a sum sufficient to cover the balance claimed, with interest and costs, that such claim shall be wholly discharged as a lien against the property described therein, and shall be stricken from the judgment index. Thereafter the material disputed facts, if any, shall be tried by a jury, without further pleadings, with the same effect as if a writ of *scire facias* had duly issued upon said claim to recover the balance thereof; but the jury shall be sworn to try the issues between the claimant and the parties signing the bond, or between the claimant and the party who paid the fund into court, as the case may be; and verdict, judgment and execution shall follow as in an action commenced at law."<sup>50</sup>

**81. Assignment or transfer of claim.**

"Section 26. Any claim filed or to be filed under the provisions of this act may be assigned or transferred to a third party, either absolutely or as collateral security; but no such assignment or transfer shall impair or in any manner affect the rights of use-claimants, or give the assignee any other rights than his assignor had. Payment to the claimant of the amount of his claim, or the finishing of the contract by one who is a guarantor or surety of or for the claimant, unless such guaranty or suretyship inures to the benefit of the owner, shall operate as an equitable assignment of the claim, with a paramount equity in his favor as against any other assignee, but a secondary right as against any defendant or use-claimant. In either case, if the claim be not already filed, the assignee may file it in the name of the assignor to his use. If it be already filed, it shall be marked to the use of the assignee."

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<sup>50</sup> *Vansciver v. Churchill*, 35 Supr. C. 212.

**82. Removal or detachment of structure prohibited.**

"Section 27. No structure or other improvement bound by or liable for any such claim shall be removed or detached from the premises on which it is bound, pending the determination of the validity of such claim and its payment if adjudged to be valid, unless by virtue of a title obtained by judicial sale, or by one owning the land and not named as a defendant, or acquiring title through a defendant; and the court, upon proof of an attempt or intention to remove or detach the same by or for a party defendant, or by one succeeding to the title of such defendant, shall upon entering approved security enjoin such removal or detaching, until and unless approved security be first entered to protect the claimant in the amount of his recovery. If the structure or other improvement be in fact removed, it shall be liable for the claims filed, except in the hands of a purchaser for value, after removal and without notice; as shall the land also, if it was bound while the structure or other improvement was on it."

**83. Dubious and incongruous sections.**

Sections 28 to 30 inclusive, relating to summons and action at law for labor and materials, are dubious provisions, as a part of a lien law, at best, and not germane. Section 28 was declared void as special legislation providing a new mode of collecting debts, contravening section 7, art. 3, of the constitution.<sup>51</sup>

Section 46 in respect to a *quasi*-public corporation has been declared void.<sup>52</sup> The "*quasi*-public corporation" referred to is evidently what is generally known as a "public service corporation."

**84. Claims for purely public purposes — Notice to commonwealth or any division or subdivision.**

Section 6 of the act of 1901, *supra*, as amended by the act of April 22, 1903, P. L. 255, provides a method of collection in lieu of a lien as follows:

"Where labor or materials are furnished for any structure or other improvement for purely public purposes, in lieu of the lien given by this act, any subcontractor who has furnished labor or materials thereto may give a written and duly sworn notice to the commonwealth, or any division or subdivision thereof, or any purely public agency thereunder, being the owner of the structure or other improvement, setting forth the facts which would have entitled him to a lien as against the structure or other improvement of a private owner; whereupon, unless such claim be paid by the contractor, or adequate security be given or have been given to protect all such claimants, the commonwealth or the division or subdivision thereof, or purely public agency thereunder, shall pay the balance actually due the contractor into the Court of Common Pleas of the county in which the structure or other improvement, or the principal part thereof, is situate, for distribution to such parties as would be

<sup>51</sup> *Vulcanite, Etc., Co. v. Allison*, 220 Pa. 382; *Trexler v. Kuntz*, 36 Supr. C. 352; *Dombach v. Smedley, Etc., Co.*, 24 Lanc. L. R. 201. (See also *Sterling Bronze Co. v. Syria Imp. Assn.*, 226 Pa. 475.)

<sup>52</sup> *Vulcanite Paving Co. v. Phila. R. T. Co.*, 220 Pa. 603.

entitled thereto were it paid into court in the case of a private owner; and the commonwealth hereby does, and any division or subdivision thereof, or any purely public agency thereunder, may require that any contract for public work shall, as a condition precedent to its award, provide for approved security to be entered by the contractor to protect all such parties. If a dispute arises as to the balance actually due, the amount admitted shall be paid into court, and a suit brought to recover the disputed part, in the name of the contractor to the use of the parties interested, and any amount recovered shall be distributed as above set forth."

**85. Sale of structure or other improvements without the ground.**

Section 38 of the act of 1901 provides:

"Any claimant for an entirely new erection and construction of a structure or other improvement, having recovered judgment upon his claim, may, except where the property named is essential to the business of a *quasi*-public corporation, file a petition in the court in which such claim is filed, setting forth that the party contracting for the structure or other improvement was not capable of binding the land, has forfeited or otherwise lost all interest therein, that the prior estate, charges and encumbrances exceed the value of the land, or that, by reason of any other facts in said petition averred, it is advantageous to the lien-claimants that the structure or other improvement should alone be sold for the benefit of the claimants; whereupon a rule shall be granted upon all parties interested, having filed or being entitled to file claims upon the defendants therein, and upon every person having an interest in the property including the then owner and any ground rent owner, mortgagee, lien claimant or encumbrancer, to show cause why the prayer of the petition should not be granted. From the pleadings, aided as to the material disputed facts, if any, by depositions or a hearing at bar, the court shall determine the questions raised; and if it is decided that it would be advantageous to the claimants to have the structure or other improvement alone sold, then the court shall enter a decree, upon equitable terms, that the land on which the structure or other improvement stands shall be exonerated from the lien of the claims, and the structure or other improvements shall alone be sold to pay the claims, unless the owner shall, within a time fixed, pay all claims that have ripened into final judgment, and give approved security to pay all subsequent judgments recovered thereon, the lien of such claims to remain in the meantime; or unless within such time he shall, by writing filed agree to pay into court for the benefit of the claimants, and of himself in case of a surplus, the appraised value of the structure or other improvements, as determined by a majority of three appraisers, selected by the parties or appointed by the court. If the structure or other improvement is alone sold only those who furnished labor thereupon or furnished labor or materials thereto, shall be entitled to come in on the fund realized at the sale, and the purchaser thereat shall have sixty days within which to remove the same from the land which was exonerated from the claim."

**86. Appointment of sequestrator — Delivery of possession under writ of hab. fac. poss.**

"Section 39. After the expiration of twenty days from the recovery of judgment upon any claim, except in cases where the property named is essential to the business of a *quasi*-public corporation, the court shall, upon the petition of such judgment creditor, appoint a sequestrator of the rents, issues and profits of the property bound by the judgment, unless in the meantime an appeal be taken and approved security given to operate as a supersedeas. If the owner against whom the judgment is entered be in possession of the property sequestered, the court shall, upon petition filed and served, grant a rule, and, if it be made absolute, award a writ in the nature of a writ of a *habere facias possessionem*, directed to the owner, commanding him to deliver such possession to the sequestrator within fifteen days thereafter, unless such property be occupied by the owner and his family for a home, in which case he shall be entitled to retain possession for a period of three months from the time the petition was served upon him."

Section 38 of the Act of June 4, 1901, P. L. 431, was declared unconstitutional as being in violation of Sec. 7, Art. 3, *Henry Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486.



entitled thereto were it paid into court in the case of a private owner; and the commonwealth hereby does, and any division or subdivision thereof, or any purely public agency thereunder, may require that any contract for public work shall, as a condition precedent to its award, provide for approved security to be entered by the contractor to protect all such parties. If a dispute arises as to the balance actually due, the amount admitted shall be paid into court, and a suit brought to recover the disputed part, in the name of the contractor to the use of the parties interested, and any amount recovered shall be distributed as above set forth."

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## CHAPTER XLVI.

### SCIRE FACIAS SUR MORTGAGE.

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3. Incidents of mortgages.
4. Proceeding by *sci. fa.* on mortgage — act of 1705.
5. Character of the *sci. fa.*
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#### 1. Character of a mortgage.

It is not within the scope or purpose of this work to give a treatise on mortgages, but only to deal with the practice in their enforcement. A few preliminary principles, however, are essential,

to understand what follows. In a late case, Dean, J. said (1): A mortgage is but a chose in action and not an estate in land. Where a widow entitled to a dower interest joins with her husband's heirs in a conveyance of the land and her interest is secured to her by means of a mortgage executed by the grantee, her estate in the land ceases and she has merely a debt due her by the grantee.

## 2. Defeasances to deeds.

The act of June 8, 1881, P. L. 84, relating to defeasances is amended by the act of April 23, 1909, P. L. 137, so as to read as follows:

"That no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage unless the said defeasance is in writing, signed and delivered by the grantee in the deed to the grantor; and insofar as it may effect any subsequent grantee or mortgagee of such real estate, for value, unless it is also acknowledged and recorded in the office for the recording of deeds and mortgages in the county wherein the said real estate is situated, before the execution and delivery of such subsequent grant or mortgage; and such defeasances shall be recorded and indexed as mortgages by the recorder."

The effect of this is to eliminate two things from the act of 1881: *First*, that the defeasance "is made at the time the deed is made"; *second*, that to be effective as to the grantee himself it must be acknowledged and recorded "within sixty days from the execution thereof." The recording of it is by this act made necessary only to affect "grantees or mortgagees."

Hence many cases reported fall with the change made by the act of 1909, *supra*, as far as mortgages made since its passage are concerned.

Prior to this act it was held that a defeasance, unless acknowledged and recorded as required by the act of 1881, did not convert the deed into a mortgage.<sup>1</sup> But a parol agreement to reconvey such portion as was not appropriated to the debt is not within the act of 1881, especially if fraud be proved;<sup>2</sup> nor is an agreement to pay the excess.<sup>3</sup>

## 3. Incidents of mortgages.

A mortgage is usually accompanied with notes or bonds recited

<sup>1</sup> Fenton v. Fenton, 208 Pa. 358. (See also Bonstein v. Schweyer, 212 Pa. 19; Jackson v. Pittsburg, 36 Supr. C. 274; McCarthy v. Delamater, 34 C. C. 577.)

<sup>2</sup> Lohrer v. Russell, 207 Pa. 105; Safe Deposit, Etc., Co. v. Linton, 213 Pa. 105; Rockhill's Est., 29 Supr. C. 28; McDonald v. Sturtevant, 195 Pa. 648. (See P. & L. Dig., vol. 12, cols. 20449-63; vol. 2, C. R. A., cols. 3293-4-5; O'Donnell v. Vandersaal, 213 Pa. 551; Metzger v. Lehigh, Etc., Co., 220 Pa. 535; King's Est., 215 Pa. 59; O'Connor v. Decker, 30 Supr. C. 539.)

<sup>3</sup> Goodwin v. McMinn, 193 Pa. 646; 204 Pa. 182.

<sup>4</sup> Moran v. Munhall, 204 Pa. 242; Bank of Commerce v. Peace, 27 Supr. C. 643.

and designated in the mortgage, as of even date, the payment whereof is a condition of the mortgage. When some of these notes are paid the fact of payment will be taken as evidence of delivery of the mortgage and the notes although some were paid before the delivery of the mortgage.<sup>5</sup>

A mortgage payable at a certain date "without interest" is payable at that date and if not then paid, interest is collectible from such date.<sup>6</sup>

The rights of a mortgagee cannot be affected in any manner by the acts of the mortgager in relation to the mortgaged property.<sup>7</sup>

In case the bond and warrant accompanying the mortgage contains a stipulation that the mortgager shall pay the taxes on the premises and on failure to do so the whole principal shall become due and execution may issue for the sum with an attorney's commission of five per cent. on default, the mortgagee may give notice of such default and proceed to enforce his claim, on refusal.<sup>8</sup>

Under the act of April 28, 1903, P. L. 327, mortgagers may be personally discharged, on tender of payment.

The act of April 22, 1903, P. L. 241, amended the act of April 17, 1866, P. L. 108, so as to authorize a notary public to take acknowledgments of deeds, mortgages, leases, etc.

The lien of a mortgage commences from the time it is filed with the recorder of deeds for record, no matter when he actually enters it;<sup>9</sup> and if several are recorded at the same time they are payable *pro rata* on distribution.<sup>10</sup> The judgment on a bond accompanying a mortgage relates to the date of the lien of the mortgage.<sup>11</sup>

The interest on a mortgage in Pennsylvania is at the rate of six per cent.,<sup>12</sup> unless a less rate is agreed upon<sup>13</sup> and is payable in the same kind of money as the principal.<sup>14</sup> The death of the mortgagee, without appointment of an administrator, does not stop interest.<sup>15</sup> When the property is sold on a *lev. fa.* under the mortgage interest stops on the day of the sale.<sup>16</sup> But if the sale of the premises is on another's suit and the mortgage is not discharged mortgagee has no claim for interest in the proceeds.<sup>17</sup>

#### 4. Proceeding by *sci. fa.* on a mortgage.

The act of January 12, 1705, 1 Sm. L. 59, largely regulates proceedings upon a *sci. fa. sur* mortgage, where there are no waivers and certificates of no set-off or defeasance.

<sup>5</sup> Moyer v. Dodson, 212 Pa. 344; P. & L. Dig., vol. 12, col. 20492.

<sup>6</sup> Weaver's Est., 22 Lanc. L. R. 414.

<sup>7</sup> People's Natl. Bank v. Liquid Carbonic Co., 226 Pa. 503.

<sup>8</sup> Yost v. Coyle, 226 Pa. 455.

<sup>9</sup> Brooke's Ap., 64 Pa. 127; Wood's Ap., 82 Pa. 116; Bonstein v. Schweyer, 212 Pa. 19.

<sup>10</sup> Carnahan v. Dyer, 2 Am. L. R. 121.

<sup>11</sup> McCall v. Lenox, 9 S. & R. 302; DeWitt's Ap., 76 Pa. 283; Larimer's Ap., 22 Pa. 41.

<sup>12</sup> Mills v. Wilson, 88 Pa. 118.

<sup>13</sup> McElwain's Est., 11 Lanc. L. R. 193.

<sup>14</sup> McCalla v. Ely, 64 Pa. 254.

<sup>15</sup> Bouillion's Est., 9 W. N. C. 14.

<sup>16</sup> Mohn v. Hiester, 6 Watts, 53.

<sup>17</sup> Field v. Oberteuffer, 2 Phila. 271.

Section 6 of that act after the "for as much," is as follows:

"That where default or defaults have been or shall be made or suffered, by any mortgager or mortgagers of any lands, tenements or other hereditaments within this province, or by his, her or their heirs, executors, administrators and assigns, of or in payment of the mortgage money, or performance of the condition or conditions which they or any of them should have paid or performed, or ought to pay or perform in such manner and form, and according to the purport, tenor and effect, of the respective provisos, conditions or covenants, comprised in their deeds of mortgage or defeasance, and at the days, times and places, in the same deeds respectively mentioned and contained; that in every such case, it shall and may be lawful to and for the mortgagee or mortgagees, and him, her or them, that grant the said deeds of defeasance, and his, her and their heirs, executors, administrators or assigns, at any time after the expiration of twelve months, next ensuing the last day whereon the said mortgage money ought to be paid, or other conditions performed as aforesaid, to sue forth a writ or writs of *scire facias* which the clerk of the Court of Common Pleas for the county or city where the said mortgaged lands or hereditaments lie, \* \* \* is hereby impowered and required to make out and dispatch, directed to the proper officer, requiring him, by honest and lawful men of the neighborhood to make known to the mortgager or mortgagers his, or their heirs, executors or administrators, that he or they be and appear before the magistrates, judges or justices of the said court or courts, to shew if anything he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution for payment of the said mortgage money, with interest, or satisfy the damages which the plaintiff in such *scire facias* shall, upon the record suggest, for the breach or nonperformance of the conditions.

And if the defendant in such *scire facias* appears, he or she may plead satisfaction or payment of part or all the mortgage money, or any other lawful plea, in avoidance of the deed or debt, as the case may require: But if the defendants in such *scire facias* will not appear on the day whereon the same writ shall be made returnable, then, if the case is such as damages only are to be recovered, an inquest shall be forthwith charged to enquire thereof; and the definitive judgment therein, as well as all other judgments to be given upon such *scire facias*, shall be entered, that the plaintiff in the *scire facias* shall have execution by *levari facias*, directed to the proper officer; by virtue whereof the said mortgaged premises shall be taken in execution, and exposed to sale in manner aforesaid; and upon sale, conveyed to the buyer or buyers thereof, and the money or price of the same rendered to the mortgagee or creditor; but for want of buyers \* \* \* to be delivered to the mortgagee or creditor, in manner and form as is herein above directed,<sup>18</sup> concerning other lands and hereditaments, to be sold or delivered upon executions for other debts or damages; and when the said lands and hereditaments shall be so sold or delivered as aforesaid, the person or persons to whom they shall be so sold or delivered, shall

<sup>18</sup> Section 4 of the same act, providing writ of *liberari facias*.

and may hold and enjoy the same, with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged and freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagers, their heirs or assigns; and such sales shall be available in law, and the respective vendees, mortgagees or creditors, their heirs and assigns, shall hold and enjoy the same, freed and discharged as aforesaid; but before such sales be made, notice shall be given, in writing, in manner and form as is hereinabove directed concerning the sales of lands upon executions, any law, or usage to the contrary notwithstanding."

##### 5. Character of the *scire facias*.

Whilst a *scire facias* is only a personal action so far as service of the writ is concerned, two returns of *nihil* being equivalent to service,<sup>19</sup> it is not an action of *assumpsit*, so that a statement of the mortgage must be filed.<sup>20</sup> It is otherwise a proceeding *in rem* to foreclose the equity of redemption and convert the pledge into money.<sup>21</sup> Notice of it must be taken the same as *lis pendens*.<sup>22</sup> It is "civil process" suspended as against persons in the actual military service of the government.<sup>23</sup>

And it was held to be original process under the U. S. stamp act, liable to the revenue tax.<sup>24</sup> This writ will lie on a mortgage although not recorded;<sup>25</sup> or if defectively recorded;<sup>26</sup> or one fraudulently satisfied of record;<sup>27</sup> or a deed absolute on its face with a separate defeasance reducing it to a mortgage;<sup>28</sup> but not on an unsealed instrument amounting only to an equitable mortgage.<sup>29</sup> It will also lie against an assignee for the benefit of creditors of a corporation<sup>30</sup> or where a mortgage was satisfied by mistake.<sup>31</sup> A subsequent acquisition of the land by the mortgager after a divestiture by sale, does not restore the right to a second mortgagee of the former holding.<sup>32</sup> Unless the mortgage otherwise provides a *sci. fa.* will not issue for interest over-due or on instalments.<sup>33</sup> But nearly all mortgages now executed have a covenant providing for

<sup>19</sup> Kennedy v. Baker, 159 Pa. 146.

<sup>20</sup> Smith v. Weyant, 4 C. C. 386; Lessing, Etc., Assn. v. Lentz, 10 D. R. 257.

<sup>21</sup> Woodward, C. J., in Hartman v. Ogborn, 54 Pa. 120; Wilson v. McCullough, 19 Pa. 77; Evans v. Wilmer, 210 Pa. 624.

<sup>22</sup> Anderson v. Love, 31 Pitts. L. J. 136; Ladley v. Creighton, 70 Pa. 490.

<sup>23</sup> Coxe v. Martin, 44 Pa. 322; section 4, act April 18, 1861, P. L. 408; section 59, act April 28, 1899, P. L. 133; Sheetz v. Wynkoop, 74 Pa. 198; Land, Etc., Co. v. Rambo, 174 Pa. 566.

<sup>24</sup> Edwards' Ap., 66 Pa. 89.

<sup>25</sup> Solms v. McCulloch, 5 Pa. 473; McLaughlin v. Ihmsen, 85 Pa. 364; Hosie v. Gray, 71 Pa. 198.

<sup>26</sup> Tryon v. Munson, 77 Pa. 250.

<sup>27</sup> Lancaster v. Smith, 67 Pa. 427.

<sup>28</sup> Wharf v. Howell, 5 Binney, 499.

<sup>29</sup> Spencer v. Haynes, 12 Phila. 452.

<sup>30</sup> Kisterbock v. Building Assn., 7 Phila. 185.

<sup>31</sup> West's Ap., 88 Pa. 341.

<sup>32</sup> Rauch v. Dech, 116 Pa. 157.

<sup>33</sup> Fickes v. Ersick, 2 Rawle, 166.

such issuance upon default and that then the whole mortgage shall become due, which has been held legal.<sup>34</sup> In case of such default no demand is necessary to be made on the mortgager,<sup>35</sup> since the duty is upon him to seek the mortgagee and prevent default,<sup>36</sup> unless the mortgagee is responsible for the failure to pay.<sup>37</sup> A partial payment is not sufficient.<sup>38</sup> But where a mortgage was assigned and the *terre-tenant* gave the assignee a declaration of no set-off, the *terre-tenant* who claims he was ready to pay the interest but did not know to whom he was to pay and had no notice, may have the *lev. fa.* set aside.<sup>39</sup>

#### 6. Issuance on default of condition.

When default has been made by the mortgager or one who holds his title a subsequent tender is unavailing against the *sci. fa.* unless accepted by the mortgagee or his assignee;<sup>40</sup> or unless it be for purchase money and the title of the mortgagee is in question.<sup>41</sup> Such acceptance is not a waiver of the right to issue as to subsequent installments.<sup>42</sup> Mere delay is not evidence of waiver.<sup>43</sup>

The *terre-tenant* is bound to take notice of the time of payment in the mortgage recited in his deed.<sup>44</sup> The bond may be resorted to in order to determine the time of payment.<sup>45</sup>

#### 7. Time of issuance.

There being no contract or stipulation as to default or time of issuance, a *sci. fa.* may issue at the expiration of twelve months from the date of the mortgage.<sup>46</sup> This limitation was put in the act for the benefit of the mortgager, which he may waive, as already seen.<sup>47</sup> A married woman is competent to make such waiver as to her separate estate.<sup>48</sup> A waiver to be binding must be explicit<sup>49</sup> and the nonpayment of interest is not a breach of condition authorizing the issuance before the twelve months, unless the mortgage so de-

<sup>34</sup> Huling v. Drexell, 7 Watts, 126; Bucks Co. Trust Co. v. Laufer, 5 Northam. 369; Nicholas v. Putnam, Etc., Co., 7 Northam. 36; Oaks v. Fisher, 20 C. C. 74; Robinson v. Loomis, 51 Pa. 78.

<sup>35</sup> Warwick Iron Co. v. Morton, 148 Pa. 72.

<sup>36</sup> Atkinson v. Walton, 162 Pa. 219.

<sup>37</sup> Singer v. Costigan, 1 W. N. C. 28; Kennedy v. Fenton, 15 W. N. C. 468.

<sup>38</sup> Thompson v. Johnson, 1 Phila. 506.

<sup>39</sup> Pancoast v. Haas, 1 W. N. C. 264. (But see Gaskill v. Schenerle, 2 W. N. C. 156.)

<sup>40</sup> Gulden v. O'Byrne, 7 Phila. 93; Thouron v. Goodwin, 1 W. N. C. 95; Holland v. Sampson, 5 Cent. R. 533; Warwick Iron Co. v. Morton, 148 Pa. 72.

<sup>41</sup> Stephenson v. Carpenter, 82 Pa. 515.

<sup>42</sup> Parsons v. Keystone Natl. Bank, 34 Leg. Int. 297.

<sup>43</sup> Atkinson v. Walton, 162 Pa. 219.

<sup>44</sup> Hummel v. Siddal, 11 Phila. 308.

<sup>45</sup> Kennedy v. Ross, 25 Pa. 256.

<sup>46</sup> Mutual Savings Fund v. Henneberg, 2 Leg. Rec. R. 150.

<sup>47</sup> Griffith v. Nolen, 1 W. N. C. 158. (See n. 34, *supra*.)

<sup>48</sup> Black v. Galway, 24 Pa. 18.

<sup>49</sup> Pittsburg Bank v. Zmeidinger, 7 D. R. 694; Walker v. Tracey, 1 Phila. 225; Whitecar v. Worrell, 1 Phila. 44.



clares it.<sup>50</sup> It is not competent for the mortgager subsequent to sale to waive the time as to his *terre-tenant*.<sup>51</sup> By agreement, the parties may extend the time and the limitation of the act, *supra*, does not then apply.<sup>52</sup>

#### 8. Place where *sci. fa.* must issue.

The *sci. fa.* is so far a local action that it must issue in the county wherein the land lies;<sup>53</sup> but where the land lies in two or more counties, it may issue in any county in which some of it lies, whether the tracts adjoin on a county line.<sup>54</sup>

Section 1 of the act of March 27, 1877, P. L. 26, provides:

"That where the real estate bound by the lien of a mortgage shall be situate in two or more counties, it shall be lawful for the mortgagee or his assignee or assignees to issue his writ of *scire facias* to enforce the collection of said mortgage in the courts of either of said counties where the said mortgage may be recorded, and proceed to obtain judgment thereon, in accordance with the act of assembly of one thousand seven hundred and five and shall have all the remedies provided in and by said act: *Provided*, That the sale made under a writ of *levari facias* issued on the judgment in the county where the judgment shall have obtained, shall be sufficient to vest in the purchaser the entire estate of the mortgager in the premises bound by said mortgage, as well in the county where the said *scire facias* may have been issued as in the other counties where the said mortgage may have been recorded: *And provided further*, That before sale shall be made under said writ of *levari facias*, exemplification of the record of the judgment shall be taken from the county where the same was obtained, and entered in the courts of the other counties where said mortgage may have been recorded; and advertisement of the sale shall be made by the sheriff in at least one newspaper published in each of the other counties, in addition to the advertisement as now directed by law in the county in which the sale is to be made."

#### 9. Service of *scire facias* in other counties.

"Section 2. It shall be lawful for the sheriff to go beyond his bailiwick into any county in which any of the lands bound by the mortgage are situated, for the purpose of serving the writ of *scire facias* or other process issued upon such mortgage upon the mortgager or mortgagers."

#### 10. Power of court where the judgment is.

"Section 3. The court of the county in which the judgment may be obtained upon any such mortgage as aforesaid, may make any order which may appear to them just and equitable, directing the lands to be sold in parcels as divided by the county lines or otherwise as

<sup>50</sup> *Dunn v. Lewis*, 16 Phila. 117.

<sup>51</sup> *Elkinton v. Fithorn*, 1 T. & H. Pr., section 801.

<sup>52</sup> *Wallace v. Hussey*, 63 Pa. 24.

<sup>53</sup> *Treaster v. Fleisher*, 7 W. & S. 137; *Tryon v. Munson*, 77 Pa. 250.

<sup>54</sup> Act March 23, 1877, P. L. 26; *Prospect, Etc., Assn. v. Russell*, 36 W. N. C. 260.

may best suit the interest of parties having liens upon the land in the different counties."

**11. Scire facias by assignee of mortgage.**

The act of April 22, 1863, P. L. 567, provides:

"That in any *scire facias*, or suit, upon any mortgage bond or other obligation, although the same may have been assigned and the assignment thereof recorded, as required by the act of ninth of April, one thousand eight hundred and forty-nine, the assignee or assignees may sue or proceed thereon, in his or their own name or names, or in the name or names of the mortgagee or mortgagees, or obligee or obligees, to the use of such assignee or assignees; and such assignee or assignees, or person or persons, having an equitable or legal interest therein, shall be entitled, in actions now pending, or hereafter to be brought, at any time, before verdict of judgment, on application to the proper court, to have the record so amended as to the parties in any suit, as will enable the proper plaintiff or plaintiffs to proceed in such suit, with the like effect as if the proper party had been placed on the record at the commencement of the suit; and the court on such application shall amend such record accordingly."

**12. Petition or sci. fa. on dispute as to amount due.**

Section 1 of the act of May 25, 1887, P. L. 270, provides:

"That in all cases, where any mortgage may have become and remained due and payable by its terms and conditions for the space of one year or more, and any dispute shall have arisen between the parties as to the amount to be paid upon said mortgage in order to satisfy the same in full, it shall be lawful for the mortgager or mortgagers, his, her, or their legal representatives, or the owner or owners of the mortgaged premises, or any or either of them, to petition the court of Common Pleas of the county wherein the mortgaged premises are situate, setting forth the premises, whereupon the said court shall direct the sheriff of said county to serve a notice, stating the facts set forth in the petition, on the holder or holders of any such mortgage, or his or her or their legal representative or representatives, requiring the said parties to cause a writ of *scire facias* to be issued, returnable to the next term, upon the aforecited mortgage, together with a statement duly verified of the amount claimed to be due upon the said mortgage, and the said cause shall thereupon be proceeded with in due course of law, in the same manner and form as is practiced in the courts of this commonwealth in the case of *scire facias* upon mortgages and mechanics' liens: *Provided*, That no nonsuit shall be allowed or discontinuance permitted of said *scire facias*, without the consent of all parties and the court."<sup>55</sup>

The proceedings must be in the county where the mortgage is recorded.<sup>56</sup>

**13. Order for discharge and satisfaction.**

Section 2 of the act of 1887, *supra*.

"If the holder or holders of the mortgages, referred to in the

<sup>55</sup> Hayes, *in re*, application of, 15 Montg. Co. 61.

<sup>56</sup> Ollendike's Pet., 9 D. R. 95.

first section of this act, shall refuse or neglect for the space of sixty days, after the notice required by the first section of this act shall have been served by the sheriff, to issue a writ of *scire facias* to collect the balance claimed to be due upon the said mortgage, it shall be lawful for the mortgager or mortgagers or the owner or owners of the mortgaged premises, to pay into court the amount admitted by him or them to be due upon the said mortgage, and the said court, on due proof being made of the service by the sheriff of the notice required by this act, is hereby authorized and required to decree and direct that satisfaction shall be entered upon the record of said mortgage by the recorder of the proper county, on payment of the costs due relative to entering satisfaction thereon, which said satisfaction so entered shall forever discharge and release the same, and shall likewise bar all actions brought or to be brought thereon, as fully and effectually to all intents and purposes, as if the said satisfaction had been entered by the legal holder or holders of said mortgage."

#### 14. Mortgages of leaseholds — Foreclosure.

Section 8 of the act of April 27, 1855, P. L. 369, provided for mortgaging of leasehold estates of certain kinds, and the act of April 3, 1868, P. L. 57, provided the same remedies for collection "which mortgagees of real estate have."

Under the act of April 3, 1868, P. L. 57, *supra*, the procedure to foreclose is the same as in mortgages on real estate and the vendee of a leasehold estate takes it subject to the rents and a lien of a mortgage stipulated in a deed, the land remains liable to the extent of its actual value; but the vender has no action at law or in equity against the vendee until he has been forced to pay the mortgage either wholly or in part.<sup>56a</sup>

#### 15. Memorandum of action to be recorded.

Section one of the act of April 3, 1860, P. L. 630, provides:

"That whenever any action shall be brought upon a mortgage or recognizance of record, it shall be the duty of the prothonotary of the court in which the action is brought, to furnish to the recorder of deeds, or the clerk of the court where such mortgage or recognizance is or may be recorded, a memorandum of the names of the parties, the number and term, and the date of such action; and it shall be the duty of the recorder or clerk to enter the same upon the record of such mortgage or recognizance."

The failure of the prothonotary to perform this duty does not affect the title of the purchaser.<sup>57</sup>

#### 16. Certificate of satisfaction to be recorded.

Section 2 of the act of April 3, 1860, P. L. 630, provides:

"That whenever a judgment, obtained in any action upon a mortgage or recognizance as aforesaid (section 1) shall have been satisfied upon the record thereof, either by the receipt of the plaintiff or by return of execution, it shall be the duty of the prothonotary,

<sup>56a</sup> Blood v. Crew Levick Co., 171 Pa. 339.

<sup>57</sup> Wheelock v. Harding, 4 Supr. C. 21.

upon the application of the defendant, to furnish a certificate of such entry of satisfaction or return, under the seal of the court; and upon the presentation of the same, it shall be the duty of such recorder of deeds, or clerk, to mark such mortgage or recognizance satisfied." <sup>58</sup>

Section 3 fixes the fees of each officer at 20 cents.

#### 17. Præcipe for the writ.

The præcipe in this proceeding is a highly important paper, since, if the writ itself is defectively issued as to averment of the default, the præcipe may be resorted to in assistance; <sup>1</sup> as where the latter refers to the record on which the writ issues, whilst the writ omitted that. <sup>2</sup> Since the act of 1901, an affidavit must accompany the præcipe. Failure to comply with the provisions of this act required an act of the legislature to cure the titles of purchasers. <sup>3</sup> Such affidavit has been allowed to be filed *nunc pro tunc*, in ejectment. <sup>4</sup>

#### 18. Form of præcipe and affidavit.

A. H. Horvitch, assignee  
of A. H. Bortree

vs.

Thomas Eaton, executor of the  
Estate of Elizabeth Evans, deceased;  
and

Margaret Marie Reese, Mirion Gillespie,  
May Sylvania Eaton, Elmer Elsworth  
Roberts & Idris Roberts, children, heirs  
& devisees of said Elizabeth Evans;  
and

Joseph Alanski, *terre-tenant*.

To W. M. Bunnell, Prothonotary,

Sir:—

In the Court of Com-  
mon Pleas of Lacka-  
wanna County.

No. ———.  
October Term, 1910.

Issue *scire facias* in the above entitled case, returnable *sec. leg.*

#### SUR MORTGAGE GIVEN BY

John D. Evans and Elizabeth Evans to A. H. Bortree, by Indenture dated October 8, 1902, and recorded in the office for the recording of deeds and mortgages in and for Lackawanna County on October 9, 1902, in Mortgage Book No. 135, page 122. Assigned by A. H. Bortree to A. H. Horvitch on July 8, 1909; assignment recorded in the office for the recording of deeds and mortgages in and for Lackawanna County in Mortgage Book 168, page 566; and

Mortgaging the premises therein described to secure the payment of a certain bond given by John D. Evans and Elizabeth Evans, dated October 8th, 1902, in the penal sum of two thousand (\$2000) Dollars conditioned for the payment of one thousand (\$1000) Dol-

<sup>58</sup> Comth. v. Lane, 3 W. N. C. 546; mandamus to recorder refused.

<sup>1</sup> Hosie v. Gray, 71 Pa. 198.

<sup>2</sup> Smith v. Weyant, 4 C. C. 386.

<sup>3</sup> Act April 18, 1905, P. L. 213; April 1, 1909, P. L. 102.

<sup>4</sup> King v. Grannis, 29 Supr. C. 367; Kolb v. Steckel, 11 Northam. 274; Mullen v. Mullen, 17 D. R. 1097; Colture v. Bertholf, 15 D. R. 422.

lars at the end of five years from date to-wit, on the 8th day of October, A. D. 1907, with interest at six per cent. payable semi-annually from the date of said mortgage; and

Providing that the said mortgagee, his representatives or assigns, upon default for thirty days in payment of said principal sum or of any installment thereof or upon default for thirty days in the payment of interest as agreed, or of any premium of insurance, for thirty days after written notice of its being due shall have been given to the mortgagors or their representatives, or mailed to their proper address, or upon default in the payment of any tax assessed against the said premises for one year after the first day of January next succeeding its assessment, may forthwith without prejudice to any other remedy, sue out a writ of *scire facias* thereon for the immediate recovery of said principal, with all interest, premiums of insurance, attorney's commission of five per cent., which is hereby claimed, and all costs, including the cost of recording said mortgage, without further stay; nor shall any waiver of this provision be held effectual, unless in writing for a valuable consideration.

And now the plaintiff avers that the said John D. Evans and Elizabeth Evans, their heirs and legal representatives have defaulted for more than thirty days and still continue to default in the payment of the principal sum of one thousand (\$1000) Dollars secured by the aforesaid mortgage, which payment was due October 8, 1907, and that said parties have also defaulted for more than thirty days in the semi-annual payments of interest due as provided in said mortgage, the default in the payment of said interest having continued since October 8, 1908.

Wherefore the whole principal debt of one thousand (\$1000) dollars aforesaid has been due and payable with interest, attorney's commission of five per cent., which is hereby claimed and costs, in accordance with the following

#### STATEMENT

Condition money of said mortgage unpaid....	\$1000
Interest from October 8, 1908.....	105
Attorney's commission 5%.....	50

Ammerman & Maxey,  
Plaintiff's Attorneys.

July 8, 1910.

Lackawanna County, ss:

A. H. Horvitch, being duly sworn according to law deposes and says that he is the plaintiff above named and that to the best of his knowledge and belief the real owners of the premises charged in the within *scire facias sur* mortgage are the defendants therein named, to-wit: Thomas Eaton, executor of the estate of Elizabeth Evans, deceased; and Margaret Marie Reese, Mirion Gillespie, May Sylvania Eaton, Elmer Elsworth Roberts and Idris Roberts, children, heirs and devisees of said Elizabeth Evans.

Sworn to and subscribed before me  
this 8th day of July, A.D. 1910.

\_\_\_\_\_  
Notary Public.

### 19. The writ.

The writ follows the *præcipe* and supplies a declaration, so that no statement of cause of action need be filed.<sup>5</sup> It may be made returnable to an intermediate return day and the alias to the next term or *vice versa*,<sup>6</sup> or a subsequent return day of the same term.<sup>7</sup> Section 39 of the act of June 13, 1836, made writs of *sci. fa.* returnable the same as a summons, also provided for service in the same manner,<sup>8</sup> the latter being now regulated by the act of July 9, 1901, P. L. 614.

The *sci. fa.* performs the double function of process and declaration; if defective on its face as process it will be quashed; if defective only in averring the debt, it may be demurred to; and a motion to quash is improper.<sup>9</sup> If the *sci. fa.* sets forth the principal of the mortgage, alleges default in the condition whereby it became due and payable and the assessment of damages is within the sum, in the absence of any irregularity, a judgment for want of an appearance will not be stricken off.<sup>10</sup> Where by a rule of court, as in Delaware county, to entitle a plaintiff for judgment for want of an affidavit of defense, he must file with his *præcipe* a statement of the amount due, referring to the book and page of the records, it was held insufficient, averring that the mortgage is "recorded at Media in H. No. 10, p. 490."<sup>11</sup> It should designate the office, place, county, the record of mortgages, book number and page.

### 20. Form of writ.

Luzerne County, ss:

#### THE COMMONWEALTH OF PENNSYLVANIA,

To the Sheriff of said County, Greeting.

Whereas, in and by a certain Indenture made the — day — A. D., one thousand nine hundred and —, and recorded the — day of —, A. D., 19—, in Mortgage Book, No. —, page —, between —, of the County of —, and —, of the County of —, reciting that whereas the said —, in and by his certain obligation or writing obligatory under his hand and seal —, duly executed, bearing even date therewith, stands bound unto the said —, in penal sum of — dollars conditioned for the payment of — dollars and — cents unto the said — [description of obligation or obligations].

And the said —, as well for and in consideration of the aforesaid debt or sum of — dollars, and for the better securing the payment thereof, with interest, unto the said —, his heirs, executors, administrators and assigns, in discharge of the recited obligation, as for and in consideration of the further sum

<sup>5</sup> *Assn. v. Gardiner*, 2 W. N. C. 95; *Morris v. Buckley*, 11 S. & R. 168.

<sup>6</sup> *Magaw v. Stevenson*, 1 Grant, 402; *Stevens v. North, Etc., Co.*, 35 Pa. 265; *Haupt v. Davis*, 79 Pa. 238.

<sup>7</sup> *Schwartz v. McClurg*, 25 Pitts. L. J. 185.

<sup>8</sup> *Perry v. Davis*, 12 D. R. 12.

<sup>9</sup> *Baker v. Keystone Coal Co.*, 14 Luz. L. R. 5.

<sup>10</sup> *Lessing Bldg. Assn. v. Lentz*, 10 D. R. 257.

<sup>11</sup> *Scott v. Calvert*, 10 Del. Co., 60.

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of —, unto him in hand well and truly paid by the said —, the receipt whereof is hereby acknowledged, did grant, bargain, release and confirm unto the said — [description of property],

together with the appurtenances; to have and to hold the same unto the said —, his heirs and assigns, to his and their only proper use and behoof forever.— And in and by the said indenture it was provided always, nevertheless, that if the said —, his heirs, executors, administrators or assigns, should and did well and truly pay or cause to be paid unto the said —, his executors, administrators or assigns, the aforesaid sum of — dollars on the days and times thereinbefore mentioned and appointed for the payment thereof, together with the lawful interest therefor, without any fraud or any further delay, and without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever, then and from thenceforth as well as the said indenture and the estate thereby granted as the said recited obligation should ease, determine and become void; anything therein contained to the contrary in anywise notwithstanding. And whereas the said sum of —, [specifying the sum or sums due] with the interest thereof, as yet remains unpaid, as we have been given to understand, and the said —, praying that a fit remedy in this behalf may be provided, we command you, that by good and lawful men of your bailiwick, you make known to the said — [name of mortgager or mortgagers], that — be and appear before our Judge at Wilkes-Barre; at our Court of Common Pleas for the County of Luzerne, there to be held on the — Monday of — next, to show, if anything — know or — to say why the said mortgaged premises, with the appurtenances, ought not to be taken in execution and sold, to satisfy the debt and interest aforesaid, if to — it shall seem expedient. And have you then and there the names of those by whom you shall so make it known to — and this writ.

Witness the Hon. John Lynch, President Judge of said Court at Wilkes-Barre, the — day of —, in the year of our Lord one thousand nine hundred and —.

[Seal]

— — —,  
Prothonotary.

#### 21. Parties to the writ.

The act of April 29, 1909, P. L. 289, requires the recorder of deeds, etc., to refuse to record any "mortgage, assignment or agreement given to secure the payment of money" unless there is attached thereto and made a part thereof, a certificate signed by the "mortgagee, assignee or person entitled to interest," or his attorney or agent "setting forth the precise residence of such mortgagee, etc."

The present owner of the mortgage is the party entitled to sue, but in case of the death of the mortgagee or assignee, not his heirs, but his legal representatives must sue;<sup>12</sup> and where the mortgage was

<sup>12</sup> Griffin v. Brower, 21 C. C. 188.

taken by an administrator for purchase money, on his death the party plaintiff is the administrator *de bonis non*.<sup>13</sup> Where the plaintiff files a paper that no others are interested in the mortgage than those named he is bound by his statement.<sup>14</sup> Whilst the purchaser of land at a sheriff's sale which had been fraudulently conveyed is not strictly a *terre-tenant*, if he is brought in, he may defend.<sup>15</sup> A guardian to whom a mortgage is made for certain wards is the proper plaintiff, although some of the minors may have attained their majority.<sup>16</sup> One of three to whom a mortgage is assigned may issue the writ although the other two protest, their course being to file a disclaimer which will relieve them from costs.<sup>17</sup> Persons named as owners in the plaintiff's affidavit with the *præcipe* must be made parties.<sup>18</sup> If the mortgage has been executed by an agent the principal must be made defendant, not the agent;<sup>19</sup> on a purchase money mortgage, the nominal purchaser.<sup>20</sup> If a mortgager borrows the money as administrator under an order of court, to pay the debts of his decedent, he will be held as though he had not been administrator.<sup>21</sup> Judgment cannot be taken against heirs and legal representatives who have not been made parties and brought into court.<sup>22</sup> But it seems notice is not required under the act of Feb'y 24, 1834, P. L. 70, to the heirs and legal representatives.<sup>23</sup> The act of 1705, *supra*, does not require *terre-tenants* to be made parties,<sup>24</sup> but they may be allowed to intervene *pro interesse suo*, by the court.<sup>25</sup> After judgment they will not be allowed to intervene on a rule to open, unless they show some special equitable cause which will appeal to justice,<sup>26</sup> as that the *sci. fa.* issued prematurely;<sup>27</sup> or that they paid the mortgage.<sup>28</sup> A *terre-tenant* not served may appeal from a judgment entered against the executor of the mortgager for want of an affidavit of defense.<sup>29</sup> But the executor of a deceased *terre-tenant* cannot intervene.<sup>30</sup> A second mortgagee who claims that the first mortgage

<sup>13</sup> Brooks v. Smyser, 48 Pa. 86.

<sup>14</sup> Morris v. Buckley, 11 S. & R. 168.

<sup>15</sup> Buckley v. Sturtevant, 28 Supr. C. 552.

<sup>16</sup> Young v. Malone, 218 Pa. 222.

<sup>17</sup> Baker v. Keystone Coal Co., 14 Luz. L. R. 5.

<sup>18</sup> Kaufhold v. Burke, 5 Lack. Jur. 223.

<sup>19</sup> Maus v. Wilson, 15 Pa. 148.

<sup>20</sup> Singerly v. Thomas, 1 W. N. C. 39.

<sup>21</sup> Miller's Pet., 3 D. R. 393.

<sup>22</sup> Brown v. Wagner, 1 Mona. 102.

<sup>23</sup> Hare v. Mallock, 1 Miles, 268; Tryon v. Munson, 77 Pa. 250; Taylor v. Young, 71 Pa. 81; Linn v. Peters, 2 Pearson, 169; Hiyer v. Hayward, 14 Supr. C. 56.

<sup>24</sup> Mather v. Clark, 1 Watts, 491; Clark v. McClimmons, 30 Pitts. L. J. 43; Mevey's Ap., 4 Pa. 80; Pardee v. Green, 2 Kulp, 432.

<sup>25</sup> Fraley v. Steinmetz, 22 Pa. 437; Hobson v. Webster, 9 W. N. C. 206; Cassel v. Menge, 14 Lanc. L. R. 73.

<sup>26</sup> Pardee v. Green, 2 Kulp, 432; Mevey's Ap., 4 Pa. 80; Sauer v. Martin, 10 Kulp, 436.

<sup>27</sup> Elkinton v. Fithorn, 1 T. & H. Pr. section, 801.

<sup>28</sup> Packer v. Owens, 164 Pa. 185.

<sup>29</sup> Mutual, Etc., Co. v. Tenan, 188 Pa. 239.

<sup>30</sup> Dutill v. Sully, 9 W. N. C. 573.



was satisfied and that the *sci. fa.* was collusively issued may defend and therefore is not entitled to an injunction.<sup>31</sup>

## 22. Description and averment of default.

The courts have sustained defective and discordant descriptions in *præcipes* and writs on the ground that they refer to the record of the mortgage which is notice to all the world;<sup>32</sup> but, we, being unwilling to encourage lazy, indifferent and lame and halt practice, here urge care and precision, since the papers now required cut short old-time circumlocution and what ought to be in the record might better be placed there in the first instance.

Since the *sci. fa.* takes the place of a declaration in pleading, it must show the immediate cause of action, and therefore it must aver the condition to be broken, upon which the right of its immediate issuance is based.<sup>33</sup> Whilst courts have allowed amendments,<sup>34</sup> by the *præcipe*, especially;<sup>35</sup> yet why mince words? The practice is not to be encouraged, by patching up in subsequent proceedings.<sup>36</sup> If the writ is prematurely issued it is matter for defense by the mortgager denying default.<sup>37</sup> If the dates of the obligations do not appear in the mortgage the burden of proving that he is not in default is upon the defendant.<sup>38</sup> Depositions on a rule to open judgment are no part of the record and the judgment will not be reviewed.<sup>39</sup> The failure to pay interest or principal within the time specified in the mortgage is sufficiently averred when such failure is stated.<sup>40</sup>

The *sci. fa.* need not show affirmatively the right of the plaintiff to sue, as that he has letters testamentary, etc.<sup>41</sup>

The *sci. fa.* may be so amended as to include properties omitted from it by mistake;<sup>42</sup> but the line is drawn at changing it to an action of assumpsit on the bond.<sup>43</sup>

## 23. Amicable *sci. fa.*

In an amicable *scire facias* a reference to book and page in the office of the recorder of deeds, etc., in the county where recorded sufficiently describes the premises to sustain a judgment;<sup>44</sup> but the agreement to the action must show that there is a mortgage and what it is,<sup>45</sup> the better practice being to incorporate a copy in the

<sup>31</sup> *Excelsior Savings' Fund v. Ingram*, 9 Del. Co. 503.

<sup>32</sup> *Tryon v. Munson*, 77 Pa. 250; *Wheeling v. Harding*, 4 Supr. C. 21; *Ryan v. Casey*, 1 Pearson, 153.

<sup>33</sup> *Swift v. Allegheny, Etc., Assn.*, 82 Pa. 142; *Lewis v. Flatly*, 4 C. P. R. 176.

<sup>34</sup> *Swatara, Etc., Assn. v. Foley*, 2 Pearson, 265.

<sup>35</sup> *Hosie v. Gray*, 71 Pa. 198.

<sup>36</sup> *Smith v. Weyant*, 3 C. C. 608.

<sup>37</sup> *Rhoads v. Reed*, 89 Pa. 436.

<sup>38</sup> *Roberts v. Halstead*, 9 Pa. 32.

<sup>39</sup> *George v. Tradesman's, Etc., Assn.*, 1 Walker, 533.

<sup>40</sup> *Schupp v. Schupp*, 17 W. N. C. 236.

<sup>41</sup> *Lawrence v. Korn*, 184 Pa. 500.

<sup>42</sup> *Potter v. Grambo*, 1 W. N. C. 484.

<sup>43</sup> *Eckert v. Phillips*, 4 C. C. 514.

<sup>44</sup> *Sanderson v. Phinney*, 2 Walker, 526.

<sup>45</sup> *Morris v. Buckley*, 11 S. & R. 168.

agreement. A purchaser of the land sold under a *lev. fa.* on such judgment takes good title.<sup>46</sup> The mortgager may by his acts estop himself from challenging the regularity of the judgment.<sup>47</sup>

**24. Service of the writ, upon mortgager.**

As to the mortgager, personal service has never been required, since by the ancient practice from the English courts two returns of *nihil* have been held equivalent to *scire feci*, and the act of July 9, 1901, P. L. 614, expressly preserves it.<sup>1</sup> It provides as follows, as amended by act of April 23, 1903, P. L. 261:

"The plaintiff \* \* \* in any writ of *scire facias sur mortgage* \* \* \* or some person in his behalf, shall file with his præcipe an affidavit, setting forth, to the best of his knowledge, information and belief, who are the real owners of the land charged, or in the action of ejectment are claimants thereof, as the case may be; and all such persons shall be made parties to the writ, and shall then be served by the sheriff as follows:

(a) By adding to the writ and serving, as in the case of a summons, all persons other than those named in the writ, who may be found in possession of said land or any part thereof; or, if no one be found in possession thereof, then by posting a true and attested copy of the writ on the most public part of said property; and,

(b) By serving, as in the case of a summons, such of those named in the writ as may be found in the county in which the writ issues; and,

(c) By serving, as in the case of a summons, such of those named in the writ as may be found in any other county of the commonwealth, by the sheriff thereof, who shall be deputed for that purpose by the sheriff of the county in which the writ issues; and

(d) By mailing a true and attested copy of the writ, in a registered letter, to such of those named in the writ as cannot be served within the commonwealth. But if the plaintiff or some person in his behalf in an affidavit filed shall aver that he does not know, and has not been able to ascertain, the owners or claimants of the property, or their addresses, or the names or addresses of some of them, then service upon the persons in possession of the property, or posting in default thereof, and service as above set forth upon those who can be served, and two returns of *nihil habet* as to the rest of those named in the writ, shall constitute a full service of such writ.

*Provided*, however, that nothing herein contained shall in any wise alter or affect the practice and manner of service upon the original covenantor, provided by the first section of the act, approved April 8, 1840, nor shall anything herein contained in any wise alter or affect the ancient practice of service upon the original mortgager by two returns of *nihil habet*."

<sup>46</sup> *Burdick v. Norris*, 2 Watts, 28.

<sup>47</sup> *McCullough v. Wilson*, 21 Pa. 436. (See *Wilson v. McCullough*, 19 Pa. 77.)

<sup>1</sup> *Hartman v. Ogborn*, 54 Pa. 120; *Murray v. Weigle*, 118 Pa. 159; P. & L. Dig., vol. 12, cols. 20960-1-2; *Stewart v. Oatman*, 11 D. R. 635; *Davis v. Boggs*, 34 C. C. 235.

The requirement is "*nihil habet*" and not "*non est inventus*." But if the first return is "*non est*" and the second "*nihil habet*," the judgment is not void but only voidable at the motion of the defendant.<sup>2</sup> A single service of "*nihil habet*" is no service at all. Other forms of service under the act of 1901, must follow the act, as by mailing the writ.<sup>3</sup> If a person in possession is not made a party to the writ as required, mere posting on the premises does not affect him and he is not bound by the judgment.<sup>4</sup> It is the duty of the sheriff to add the name of the person in possession and upon him he must make personal service. His return of service upon an adult member of the family is not good.<sup>5</sup> Under the act of April 23, 1903, P. L. 261, where the plaintiff files an affidavit that he does not know and has been unable to ascertain the owners or claimants or their addresses, service on the parties in possession and two returns of "*nihil habet*" as to the others is sufficient.<sup>6</sup> Such service by "*nihil habet*" is good although the mortgager is dead.<sup>7</sup> But if the fact of death appears in the plaintiff's affidavit and the sheriff's return is "*mortuus est*," judgment will not be given without raising an administrator.<sup>8</sup> The court will exercise its equitable powers, where it is shown that the mortgager is dead.<sup>9</sup>

#### 25. Service upon terre tenants.

"A *terre-tenant*, in a general sense, is one who is seised or possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment a *terre-tenant* is, in a more restricted sense, one, other than the debtor, who becomes seised or possessed of the debtor's lands, subject to the lien thereof. Those only are *terre-tenants* therefore, in a technical sense, whose title is subsequent to the incumbrance."<sup>10</sup> The remainderman is not a *terre-tenant* to a mortgage of the life estate, entitled to intervene.<sup>11</sup> But a wife may intervene against a mortgage made in fraud of her rights as such.<sup>12</sup> Where husband and wife convey land the vendee may be served with the *sci. fa.* on a mortgage previously given by the husband.<sup>13</sup> A purchaser at sheriff's sale subject to a mortgage is a *terre-tenant*.<sup>14</sup> So is a devisee.<sup>15</sup>

If the *terre-tenant* is served with notice, as was the practice under the act of 1705, he was bound to make any defense he had to the

<sup>2</sup> Brundred v. Egbert, 164 Pa. 615.

<sup>3</sup> Brennan v. Redfern, 11 D. R. 248; West, Etc., Assn. v. Dunn, 10 Northam. 361.

<sup>4</sup> Nevil v. Heinke, 22 Supr. C. 614.

<sup>5</sup> Brennen v. Redfern, 11 D. R. 248. [See form of return.] Kaufhold v. Burke, 5 Lack. Jur. 223.

<sup>6</sup> Monges v. Marcus, 14 D. R. 367.

<sup>7</sup> Stewart v. Oatman, 11 D. R. 635.

<sup>8</sup> First Natl. Bank of Kane v. Ryan, 14 D. R. 450.

<sup>9</sup> Freemansburg, Etc., Assn. v. Billig, 30 Supr. C. 101.

<sup>10</sup> Clark, J., in Hulett v. Mutual, Etc., Co., 114 Pa. 142.

<sup>11</sup> Edmonson v. Nichols, 22 Pa. 74.

<sup>12</sup> Killinger v. Reidenhauer, 6 S. & R. 531.

<sup>13</sup> Hulett v. Mutual, Etc., Co., 114 Pa. 142.

<sup>14</sup> Woods v. White, 36 Leg. Int. 156.

<sup>15</sup> Cassel v. Menge, 14 Lanc. L. R. 73.

*sci. fa.*<sup>16</sup> If not served any defense he might have had to the *sci. fa.* he could set up in ejectment by the purchaser.<sup>17</sup> But if the evidence would have afforded no defense to the *sci. fa.* it is inadmissible in ejectment.<sup>18</sup> The evidence having been fairly submitted on the trial as to payment, the verdict of the jury will not be reversed.<sup>19</sup>

Under the act of 1705, *supra*, actual service upon the *terre-tenant* was required to bind him<sup>20</sup> and he was made a party thus: "with notice to — — —, *terre-tenant*."

As a mere occupant as tenant under the *terre-tenant* must be served by the act of 1901, it is to be noted that it was held that service upon such lessee is not service upon the *terre-tenant*.<sup>21</sup> The sheriff's return of service is conclusive as to the manner of making service.<sup>22</sup> If it is false the remedy is by action.<sup>23</sup> But the sheriff may have leave to amend his return, even after action against him.<sup>24</sup>

## 26. Pleas.

The proper plea when the mortgage is denied is *non est factum*.<sup>25</sup> The plea of *nul tiel record* is not available.<sup>26</sup> It being an action *in rem*, the plea of *plene administravit* is not proper, by an administrator.<sup>27</sup> Having pleaded *non est factum*, and the plaintiff having offered the record in evidence and rested, and the defendant offers the mortgage, he cannot then object that the plaintiff has not proved the execution and delivery of the mortgage.<sup>28</sup>

## 27. Defenses — Fraud — Forgery, etc.

As "fraud vitiates everything," a fraud in obtaining a mortgage is a matter of defense<sup>29</sup> and a fraud between mortgager and mortgagee may be attacked by a purchaser of the premises at sheriff's sale.<sup>30</sup> But if the mortgagee is innocent, not having participated, the mortgager cannot defend on that ground.<sup>31</sup>

If a married woman is compelled to sign a mortgage on her separate

<sup>16</sup> Nace v. Hollenback, 1 S. & R. 540; Blythe v. McClintic, 7 S. & R. 341; Stevens v. North Penna. Coal Co., 35 Pa. 265.

<sup>17</sup> Cowan v. Getty, 5 Watts, 531; Evans v. Meylert, 19 Pa. 402.

<sup>18</sup> Sweetzer v. Atterbury, 137 Pa. 188.

<sup>19</sup> Coursin v. Shrader, 146 Pa. 475.

<sup>20</sup> Huckenstein v. Love, 98 Pa. 518; Bryn Mawr Trust Co. v. Wilkins, 10 Montg. Co. 101.

<sup>21</sup> Cowan v. Getty, 5 Watts, 531.

<sup>22</sup> Blythe v. Richards, 10 S. & R. 261; Citizens', Etc., Assn. v. Heiser, 150 Pa. 514; Smith v. Hooton, 3 D. R. 250.

<sup>23</sup> Cassel v. Menge, 14 Lanc. L. R. 73.

<sup>24</sup> Justice, Etc., Assn. v. Battles, 2 W. N. C. 492; Brundred v. Egbert, 164 Pa. 615.

<sup>25</sup> Lancaster v. Smith, 67 Pa. 427.

<sup>26</sup> Frear v. Drinker, 8 Pa. 520; Roberts v. Halstead, 9 Pa. 32.

<sup>27</sup> Hotz v. Thompson, 12 W. N. C. 386.

<sup>28</sup> Clymer v. Groff, 10 Del. Co. 221; 220 Pa. 580.

<sup>29</sup> Cridge v. Hare, 98 Pa. 561; Hoffsommer v. Smith, 1 Kulp, 340; Harrison's Est., 31 Supr. C. 485.

<sup>30</sup> Buckley v. Sturtevant, 28 Supr. C. 552.

<sup>31</sup> Stoddart v. Robinson, 54 Pa. 386.

estate, by threats to imprison her husband, no recovery can be had.<sup>32</sup> But if she buys property and mortgages her separate estate as security this is neither fraud nor duress.<sup>33</sup> Forgery is a good defense;<sup>34</sup> also that the mortgage was never delivered and that the acknowledgment was false and fraudulent.<sup>35</sup> As between the mortgager and mortgagee a mortgage given without consideration and to defraud creditors has been held to be binding,<sup>36</sup> notwithstanding the maxim above quoted. It has, however, also been held that where a sale and mortgaging were effected to defraud creditors the vendee as mortgager could successfully combat the mortgage;<sup>37</sup> also the *terre-tenant* can do likewise;<sup>38</sup> or a married woman, so far as her interest goes in her husband's lands."<sup>39</sup> But a mortgagee cannot defraud his creditors by extinguishing the mortgage.<sup>40</sup> Although the husband, to defraud creditors, put his property in the name of the wife and they then joined in a mortgage a *terre-tenant* subsequent thereto cannot defend against the *sci. fa.*<sup>41</sup>

### 28. Want, failure or illegality of consideration as a defense.

An illegal consideration or the failure of a consideration is a valid defense, the burden of proof being on the mortgager;<sup>42</sup> as where it is mutual.<sup>43</sup>

Or where the mortgagee rescinds.<sup>44</sup> An assignee will be affected with notice of a contract which allows rescission of the mortgage.<sup>45</sup> Where a mortgager executed a post-mortem mortgage, for a deed which was never delivered by the grantor named in it, by covin getting possession of the deed after the death of the grantor therein named, the mortgage is void as well as the deed.<sup>46</sup>

Consideration is imported in an instrument under seal, and want of it is therefore not a defense against a mortgage<sup>47</sup> and a slight consideration, as extension of time is legal.<sup>48</sup> A mortgage will not be invalidated except on clear and strong grounds.<sup>49</sup> But if the debt be made up of stock gambling transactions in part, it will be void *pro tanto*, from public policy.<sup>50</sup>

<sup>32</sup> McGrory v. Reilly, 2 W. N. C. 587; 14 Phila. 111.

<sup>33</sup> Zents v. Shaner, 7 Atl. 197.

<sup>34</sup> Henry, Etc., Assn. v. Walton, 181 Pa. 201.

<sup>35</sup> Wister v. Pollitt, 5 C. C. 192.

<sup>36</sup> Williams v. Williams, 34 Pa. 312; Bonesteel v. Sullivan, 104 Pa. 9.

<sup>37</sup> Rowland v. Martin, 6 Atl. 223; approved in Buckley v. Sturtevant, 28 Supr. C. 552, as to a third person.

<sup>38</sup> Woods v. White, 36 Leg. Int. 156.

<sup>39</sup> Killinger v. Reidenhauer, 6 S. & R. 531.

<sup>40</sup> Brown v. Scott, 51 Pa. 357.

<sup>41</sup> Schwartz v. Kleber, 7 Atl. 209.

<sup>42</sup> Saalfeld v. Manrow, 165 Pa. 114; Second, Etc., Assn. v. Bullard, 1 Del. Co. 122; Roberts v. Lentz, 30 Supr. C. 407.

<sup>43</sup> M'Crelish v. Churchman, 4 Rawle, 26.

<sup>44</sup> Welch v. Mole, 8 W. N. C. 248.

<sup>45</sup> Scott v. Hough, 151 Pa. 630.

<sup>46</sup> Kay v. Gray, 24 Supr. C. 536.

<sup>47</sup> Clymer v. Groff, 220 Pa. 580.

<sup>48</sup> Saalfeld v. Manrow, 165 Pa. 114.

<sup>49</sup> Bucks Co. R. Co. v. Guarantors' Finance Co., 23 C. C. 101.

<sup>50</sup> Wolf v. Heineman, 50 Pitts. L. J. 139.

Where the mortgagee pays the money to the conveyancer after the mortgage has been executed and the conveyancer embezzles the money the mortgager must suffer the loss if any.<sup>51</sup> The mortgager who gives the mortgage as collateral for a loan to another person, may defend as to any sum above that actually loaned.<sup>52</sup>

### 29. Want of title in mortgager.

The lack of title is not a defense. The mortgage covers only such title as the mortgager has.<sup>53</sup>

### 30. Usurious interest as a defense.

Usurious interest cannot be recovered,<sup>1</sup> whether to be collected or deducted in advance by raising the principal of the mortgage,<sup>2</sup> but usury in the bond cannot be deducted from a mortgage entered as security.<sup>3</sup> The satisfaction of a mortgage and taking of a new one does not legalize usury,<sup>4</sup> but the defense is personal and does not pass with an assignment of a contract to purchase land.<sup>5</sup> The mortgager may interpose the defense *pro tanto* even after he has parted with the title, in order to avail himself of it on the bond.<sup>6</sup> The mortgagee may file a relinquishment of the usurious interest on the bond and thus stop the defense after sale on the mortgage.<sup>7</sup> Where a married woman joined her husband in a mortgage of her real estate and afterwards the title became vested in her husband she was held estopped from alleging usury.<sup>8</sup> If matters little what contracts the parties make, their contracts are of no avail as against the usury law which is an exercise of the police power.<sup>9</sup> But when the land is sold with a warrant of title the *terre-tenant* has his remedy on his warranty, and cannot defend against the *sci. fa.* on the ground of usury.<sup>10</sup> The act of May 22, 1858, P. L. 622, forbids a subsequent mortgage or judgment creditor from raising the question of usury on distribution, unless there are facts which show an intent to defraud creditors.<sup>11</sup>

### 31. Payment, set-off, credits.

Payment, wholly or in part is a good defense to the *sci. fa.*,<sup>12</sup>

<sup>51</sup> *Hellerman v. Steinmetz*, 23 Montg. Co. 125.

<sup>52</sup> *Scott v. Calvert*, 10 Del. Co. 60.

<sup>53</sup> *Faucett v. Harris*, 185 Pa. 164; *Penna. Co., Etc., v. Beaumont*, 190 Pa. 101; *P. & L. Dig.*, vol. 12, col. 20974; *Kay v. Gray*, 6 Lack. Jur. 202; 30 Supr. C. 450; *Ex. Sav. Fund v. Cochran*, 220 Pa. 634; *Townsend v. Boyd*, 217 Pa. 386.

<sup>1</sup> *Turner v. Calvert*, 12 S. & R. 46.

<sup>2</sup> *Lutz v. Winkler*, 2 W. N. C. 273; *Haspel v. Martin*, 35 Supr. C. 57.

<sup>3</sup> *Carlisle v. Bindley*, 81 Pa. 229.

<sup>4</sup> *Reap v. Battle*, 155 Pa. 265.

<sup>5</sup> *Industrial, Etc., Co. v. Hare*, 216 Pa. 389.

<sup>6</sup> *Huckenstein v. Love*, 98 Pa. 518; *Parker v. Sulouff*, 94 Pa. 527.

<sup>7</sup> *Reap v. Battle*, 155 Pa. 265.

<sup>8</sup> *Broomell v. Anderson*, 8 Atl. 764.

<sup>9</sup> *Kennedy v. Quigg*, 6 Supr. C. 53. (See Bierly on Police Power, State and Federal, 1907.)

<sup>10</sup> *Bonnell's Ap.*, 5 Cent. R. 738; *Stayton v. Riddle*, 114 Pa. 464.

<sup>11</sup> *Lombaert v. Morris*, 2 Del. Co. 457; *Miners', Etc., Bank v. Roseberry*, 81 Pa. 309.

<sup>12</sup> *Wells v. Van Dyke*, 106 Pa. 111.

and where there is circumstantial evidence accompanied with writings the whole question may be submitted to the jury.<sup>13</sup> But evidence which would amount to a settlement of a matter in the Orphans' Court, is inadmissible in the Common Pleas.<sup>14</sup> It is not a defense to a *sci. fa.* on a mortgage for money advanced to mine coal that it cannot be enforced, when the mortgagee was to receive his pay from the merchantable coal and that was exhausted.<sup>15</sup> An unexecuted agreement to take the mortgaged land, etc., in satisfaction is no defense.<sup>16</sup> A tender to be good, must be complete and kept up to the end.<sup>17</sup>

The effect of a tender if kept good is to stop interest on the mortgage, and the costs thereafter.<sup>18</sup>

The mortgager may claim as set-off a debt due him from the mortgagee;<sup>19</sup> but no judgment can be awarded him for any excess;<sup>20</sup> nor will a set-off be allowed where the mortgager has parted with his title and has an independent cause of action which will not be affected by this judgment.<sup>21</sup> Unliquidated damages, such as arise from misfeasance or malfeasance<sup>22</sup> or from trespass cannot be set off.<sup>23</sup> The pendency of proceedings in partition is not a defense to the *sci. fa.* since the lien may be restricted to mortgager's purport.<sup>24</sup>

Nor is it a defense that the mortgager has been adjudged a bankrupt;<sup>25</sup> or that a foreign attachment against the plaintiff has been served on mortgager as garnishee.<sup>26</sup>

### 32. Defenses to purchase money mortgage.

To a *sci. fa.* on a purchase money mortgage the mortgager may defend for defect in the quantity of land conveyed;<sup>27</sup> or the quality and character of the property;<sup>28</sup> or the failure of a right of way covenanted for;<sup>29</sup> and, although he has parted with the title he may defend on the ground of fraudulent misrepresentations as to the title, since he may still be liable on the bond.<sup>30</sup> But if the defect in title be known and there was no mistake or fraud he cannot

<sup>13</sup> Cox v. Ledward, 124 Pa. 435.

<sup>14</sup> Harrison v. Weidner, 2 Woodward, 330.

<sup>15</sup> New York, Etc., Co. v. Winton, 208 Pa. 467.

<sup>16</sup> Rohrer v. Schaefer, 14 D. R. 311.

<sup>17</sup> Freemansburg, Etc., Assn. v. Billig, 30 Supr. C. 101.

<sup>18</sup> Phila. Yearly Meeting v. Robinson, 10 Del. Co. 205.

<sup>19</sup> Garrison v. Lentz, 1 W. N. C. 5; Carmalt v. Post, 8 Watts, 406; Gumpert v. Ell, 7 Kulp, 513.

<sup>20</sup> Cooch v. Noble, 2 Leg. Rec. 330; Land, Etc., Co. v. Fulmer, 24 Supr. C. 256.

<sup>21</sup> Hunsicker v. Richardson, 3 D. R. 178.

<sup>22</sup> Ahl v. Rhoads, 84 Pa. 310.

<sup>23</sup> Linen v. Feltz, 3 Law Times, N. S. 107.

<sup>24</sup> Lawrence v. Horn, 184 Pa. 500.

<sup>25</sup> Green v. Arbuthnot, 4 W. N. C. 357.

<sup>26</sup> Atkinson, 3 D. R. 634; Streng v. Holyoke, Etc., Co., 12 Supr. C. 323.

<sup>27</sup> Comegys v. Davidson, 154 Pa. 534.

<sup>28</sup> McNeile v. Cridland, 168 Pa. 16.

<sup>29</sup> Kidd v. Koch, 2 C. C. 285.

<sup>30</sup> Rice v. Olin, 79 Pa. 391.

defend against the *sci. fa.*,<sup>31</sup> neither can he set up an oral agreement to vary the terms of the mortgage;<sup>32</sup> nor that after the purchase of a coal tract an adjoiner had encroached upon him, for he might have rescinded his contract.<sup>33</sup> But eviction from a part of the tract is available as a defense, if by title paramount.<sup>34</sup> A mortgage upon one tract for balance of purchase money on several tracts cannot be defended against for alleged defects in the others.<sup>35</sup>

Under the plea of payment with notice of special matter the defendant may show the record of an ejectment suit for part, decided adversely to mortgagee's title. In case he so defends he should tender a reconveyance of the land; but it has been held this may be done in the Supreme Court.<sup>36</sup> If he improved the land and the title proves faulty, he need not tender reconveyance.<sup>37</sup> If he bought under the belief that the estate was a fee, but was mistaken, and it is only a life estate, he can defend as to the difference in value.<sup>38</sup> The mortgager may set up damages arising from breach of warranty as to part of the premises, but he is not entitled to interest.<sup>39</sup> It seems that to aver that the title is doubtful is not sufficient to prevent judgment.<sup>40</sup> The affidavit should show that the title was bad at the time of the sale, and in what respects.<sup>41</sup> It is sufficient to aver that another has taken possession under a paramount title,<sup>42</sup> though it would be better to aver in what manner it is paramount to that of the vender and mortgagee. An affidavit is not sufficient which avers the conveyance to have been absolute instead of a mortgage under the circumstances.<sup>43</sup>

As to defect of title the affidavit should aver that the vender knew of such defect at the time<sup>44</sup> and that the vendee did not; but a supplemental affidavit may be filed curing this omission.<sup>45</sup> If the vendee has notice of an outstanding title when he buys he cannot defend on this ground;<sup>46</sup> unless the parties agree that the mortgage shall not be paid until it is decided.<sup>47</sup> He is entitled to credit for all incumbrances at the time of purchase, with or without warranty, known or unknown;<sup>48</sup> unless he agrees to pay these as part of the purchase money and the mortgage is given for the

<sup>31</sup> Hart v. Watkins, 52 Pitts. L. J. 273.

<sup>32</sup> Sherman v. Simpson, 52 Pitts. L. J. 53.

<sup>33</sup> Hopper v. Blythe, 53 Pitts. L. J. 42.

<sup>34</sup> Steinhauer v. Witman, 1 S. & R. 438.

<sup>35</sup> Fisk v. Duncan, 83 Pa. 196.

<sup>36</sup> Morris v. Buckley, 11 S. & R. 168.

<sup>37</sup> Poyntell v. Spencer, 6 Pa. 254.

<sup>38</sup> Wilson v. Ott, 173 Pa. 253; 160 Pa. 433.

<sup>39</sup> Wacker v. Straub, 88 Pa. 32.

<sup>40</sup> Massey v. Twibill, 2 W. N. C. 200; Barnes v. Transue, 2 Leg. Rec. 116.

<sup>41</sup> Asay v. Lieber, 8 W. N. C. 125; Singer v. Caldwell, 7 D. R. 583.

<sup>42</sup> Chaffey v. Boggs, 179 Pa. 301.

<sup>43</sup> People's, Etc., R. Co. v. Spencer, 156 Pa. 85. (See vol. 1, "Affidavit of Defense," p. 532, par. 101.)

<sup>44</sup> Peck v. Jones, 70 Pa. 83.

<sup>45</sup> Singer v. Caldwell, 7 D. R. 586.

<sup>46</sup> Bradford v. Potts, 9 Pa. 37.

<sup>47</sup> Hersey v. Turbott, 27 Pa. 418.

<sup>48</sup> Wolbert v. Lucas, 10 Pa. 73.



balance. An affidavit is sufficient which avers failure to procure the title papers as agreed, and consequent loss of advantageous sale.<sup>49</sup>

He may set up an easement as breach of implied covenant against incumbrances, unaffected by proceedings had on some of the bonds and compromises made. The defense of failure of consideration, as distinguished from set-off, is equitable and applicable to successive actions upon all the securities founded on the same consideration.<sup>50</sup> But a parol agreement cannot be set up to the effect that the land was to be unincumbered when it was heavily incumbered.<sup>51</sup> Evidence is admissible that at the time of conveyance there was an outstanding title. The effect of it is an after-consideration.<sup>52</sup> The recitals in the mortgage as to chain of title by deed poll do not bind the vendee who alleges failure of title.<sup>53</sup> Where an alleged purchase money mortgage is not such and is payable to another than the vender, the defense of infancy by the mortgager is available.<sup>54</sup> Any failure of the mortgagee to keep a substantive part of his agreement may be set up against his *sci. fa.*<sup>55</sup>

### 33. Defenses by terre-tenant, to purchase money mortgage.

A *terre-tenant* may set up a fraud upon him by the mortgager and mortgagee, notwithstanding a bill in equity has been dismissed, "without prejudice."<sup>56</sup> The right of the *terre-tenant* to an abatement for deficiency in the land is co-equal to that of the mortgager and no more.<sup>57</sup> The children of a deceased mortgager may avail themselves of any defense that he might have had, but even a minor cannot set up the mortgager's own fraud as a defense.<sup>58</sup> The *terre-tenant* cannot defend on account of an error in name not misleading,<sup>59</sup> nor a condition as to distribution of proceeds from other real estate of mortgager.<sup>60</sup> Nothing short of payment or release is a valid defense.<sup>61</sup> So misdescription is not available;<sup>62</sup> nor a covenant to clear the property of mechanics' liens, as against failure to pay the interest;<sup>63</sup> nor the release upon condition without averring performance of the condition or that the conveyance had been made to the *terre-tenant* in pursuance of the agreement;<sup>64</sup> or that he became owner by purchase at sheriff's sale on the assurance of an agent that he would be admitted to the rights of the mortgager in a building association, the authority of the agent not appearing.<sup>65</sup>

<sup>49</sup> Mallery v. Pearson, 1 Clark, 317.

<sup>50</sup> Eby v. Elder, 122 Pa. 342.

<sup>51</sup> Jewell v. Bannon, 12 C. C. 399.

<sup>52</sup> Murphy v. Richardson, 28 Pa. 288.

<sup>53</sup> Poyntell v. Spencer, 6 Pa. 254.

<sup>54</sup> Citizens', Etc., Assn. v. Arvin, 207 Pa. 293.

<sup>55</sup> Snyder v. Kern, 21 Lanc. L. R. 65.

<sup>56</sup> Ballentine v. Ballentine, 15 Atl. 859.

<sup>57</sup> Hart v. Wilkins, 52 Pitts. L. J. 273.

<sup>58</sup> Harrison's Est., 31 Supr. C. 485.

<sup>59</sup> Wilson v. Jones, 6 W. N. C. 157.

<sup>60</sup> Lewis v. Germania Sav. Bank, 96 Pa. 86.

<sup>61</sup> Mather v. Clark, 1 Watts, 491.

<sup>62</sup> Union Trust Co. v. Mercantile, Etc., Co., 189 Pa. 263.

<sup>63</sup> Hummel v. Siddal, 11 Phila. 308.

<sup>64</sup> Horner v. Warfield, 180 Pa. 103.

<sup>65</sup> Building Assn. v. Gibson, 6 W. N. C. 502.

In an exceptional case of dealing he may be admitted to defend on the ground of no demand and that plaintiff owes him.<sup>66</sup>

#### 34. Special and particular defenses.

A *sci. fa.* on a mortgage to a corporation cannot be defended against on the ground that the loan was in violation of its charter;<sup>67</sup> nor where the corporation is mortgager, can the assignee defend on the ground that the charter has expired.<sup>68</sup> It is no defense to a *sci. fa.* that it was not accompanied by a bond as recited in the mortgage.<sup>69</sup> If there is no contractual relation between the assignee and the mortgager, it is no defense that the former failed to deliver materials for houses being built by him.<sup>70</sup> A beneficiary in a will, when the estate is unsettled, cannot set up his interest as against a mortgage for the interest of testator's widow.<sup>1</sup> A decree in equity declaring a deed void for want of delivery takes away the ground for a mortgage executed, *post mortem*, and put on record by covin of the mortgager.<sup>2</sup> A mortgager whose bond has been paid and who has no longer any interest cannot be admitted to defend.<sup>3</sup> On an allegation of an agreement to extend the time of payment the unsupported oath of the mortgager is insufficient, when opposed by that of the mortgagee.<sup>4</sup> Such agreement without consideration is not binding.<sup>5</sup> The mortgage must have been executed on the faith of such agreement.<sup>6</sup> If the evidence is contradictory the case is for the jury under proper instructions.<sup>7</sup>

#### 35. Form of affidavit of defense where title fails.

Adam Rowe	}	In the Court of Common Pleas of Clinton County.	
v.		<i>Sci. fa. Sur Mortgage.</i>	
James Crowe.	}	No. —.	— Term, 19—.

The defendant above named for answer to the *scire facias* herein issued says that he has a complete and just defense to the whole of the plaintiff's claim, for as much as said recited mortgage was a purchase money mortgage given on the day it purports to have been given as security for the payments to be made upon the real estate therein described: That when said real estate was purchased the title to the same was warranted by the said plaintiff and the same has wholly failed and said plaintiff never had title to the said real estate and defendant has been evicted therefrom by title paramount in one David Schrack, and said plaintiff ought not to have judgment or execution upon his said mortgage.

James Crowe.

[Affidavit to the truth.]

<sup>66</sup> Gordon v. Van Houten, 36 Leg. Int. 85.

<sup>67</sup> M'Lean v. Man, 1 W. N. C. 8.

<sup>68</sup> Kisterbock v. Premium, Etc., Assn., 7 Phila. 185.

<sup>69</sup> Jones v. Rhodes, 1 W. N. C. 38.

<sup>70</sup> Krimm v. Devlin, 206 Pa. 508.

<sup>1</sup> Nelson v. McLaughlin, 20 C. C. 385.

<sup>2</sup> Kay v. Gray, 30 Supr. C. 450; 24 Supr. C. 536.

<sup>3</sup> Evans v. Wilmer, 210 Pa. 624.

<sup>4</sup> Moore v. Moore, 20 Lanc. L. R. 61.

<sup>5</sup> Mellon v. Simpson, 52 Pitts. L. J. 322.

<sup>6</sup> Drape v. Barton, 52 Pitts. L. J. 306.

<sup>7</sup> Carey v. Buckley, 192 Pa. 276.

### 36. Verdict and judgment.

The verdict is either for the plaintiff for the sum to which he is entitled or for the defendant generally. If the jury find for the defendant for a sum named the court will set aside so much thereof and enter a verdict generally.<sup>8</sup> There being no dispute about the facts the court may direct a verdict for the plaintiff.<sup>9</sup> Judgment will be entered thereon as in other cases, unless a motion be made for a new trial within four days.

### 37. Judgment — Entry and form.

A judgment entered in short form on agreement that it should "be as binding and valid as if entered on the verdict of a jury" will support a *lev. fa.* against the *terre-tenant*, when the *sci. fa.* is regular and contains a description of the property mortgaged.<sup>10</sup> A judgment generally, after two returns of *nil* as to the mortgager and on confession of the *terre-tenant* binds both.<sup>11</sup> On a return of *mortuus est*, no judgment can be taken against a *terre-tenant*.<sup>12</sup> If there be a return of *nil* on an alias against the legal representative of the deceased mortgager, the judgment should be by default as against him,<sup>13</sup> the service as to the *terre-tenants* being "made known." Where part of the mortgaged premises has been released from the lien, and the *sci. fa.* includes all, the judgment should be amended, by striking out the part released, and the execution should be restricted to the remainder. Such amendment has been made in the Supreme Court.<sup>14</sup> Such judgment is a lien only on the land and not a personal judgment against the mortgager.<sup>15</sup> It is a judgment directing the payment of money under section 6 of the act of May 19, 1897, P. L. 67, requiring a bond for supersedeas on appeal, and the sureties will be liable for any deficiency if the appeal is dismissed and the property sells for less than the judgment.<sup>16</sup>

### 38. Judgment for want of appearance.

Judgment for want of an appearance may be taken after fourteen days from the day of service. The 34th section of the act of June 13, 1836, P. L. 568, provides for ten days and at the common law four days more are added.<sup>17</sup> Upon two returns of *nil* the fourteen days are computed from the return day of the alias and not the *teste*;<sup>18</sup> otherwise a judgment will be set aside.<sup>19</sup> Under section 39 of the act of 1836, *supra*, judgment for want of an appearance

<sup>8</sup> Cooch v. Noble, 2 Leg. Rec. R. 330.

<sup>9</sup> New York, Etc., Co. v. Winton, 208 Pa. 467.

<sup>10</sup> Wheelock v. Harding, 4 Supr. C. 21.

<sup>11</sup> Cooper v. Borrall, 10 Pa. 491.

<sup>12</sup> Blanchard v. Koller, 12 Phila. 408.

<sup>13</sup> Roberts v. Williams, 5 Wharton, 170.

<sup>14</sup> Oliver v. Campbell, 4 W. N. C. 422.

<sup>15</sup> Excelsior Sav. Fund v. Cochran, 220 Pa. 634.

<sup>16</sup> Comth. v. Cummings, 11 D. R. 355; Merchants' Trust Co. v. Real Est. Trust Co., 215 Pa. 56.

<sup>17</sup> Assn. v. Gardiner, 2 W. N. C. 95.

<sup>18</sup> Faunce v. Subers, 10 Phila. 411; Jones v. Ludwig, 27 Pitts. L. J. 41; Lea v. Union, Etc., Co., 14 W. N. C. 512.

<sup>19</sup> Laws v. McDanel, 1 Clark, 421.

to a *sci. fa.* can only be taken in term time.<sup>20</sup> A judgment for want of an appearance regular on its face cannot be stricken off because the defendant died after the return day and before judgment. The remedy is to apply to have the judgment opened.<sup>21</sup>

### 39. Judgment for want or insufficiency of affidavit.

The action on a mortgage does not come within the act of 1887,<sup>17</sup> but under the rules of practice an affidavit of defense is required.<sup>18</sup> Judgment cannot be taken for want of an affidavit, against an administrator on a *sci. fa. sur* mortgage of his decedent;<sup>19</sup> but it is otherwise where the legal representative executes a mortgage under order of the Orphans' Court.<sup>20</sup> It was held under the act of April 21, 1852, P. L. 386, applying to Berks and Tioga Counties that two returns of *nihil* did not warrant entering judgment for want of an affidavit of defense.<sup>21</sup> On insufficiency of affidavit of defense see Vol. I, p. 532, par. 101.

### 40. No restitution on reversal of judgment.

Section 9 of the act of 1705, *supra*, provides:

"That if any of the said judgments, which do or shall warrant the awarding of the said writs of executions whereupon any lands, tenements or hereditaments, have been or shall be sold, shall, at any time hereafter, be reversed for any error or errors, then and in every such case, none of the said lands, tenements or hereditaments, so as aforesaid taken or sold, or to be taken or sold upon executions, nor any part thereof, shall be restored, nor the sheriff's sale or delivery thereof avoided, but restitution, in such cases, only of the money or price for which such lands were or shall be sold."<sup>22</sup>

### 41. Revival of judgment against legal representative.

Where a judgment is obtained on a *sci. fa.* during the life time of the mortgager, section 33, of the act of Feb'y 24, 1834, P. L. 70, requiring a *sci. fa.* to the legal representative does not apply to a *lev. fa.*<sup>23</sup> If it is followed, however, no harm is done.<sup>24</sup>

### 42. Conclusiveness of judgment — Collateral attack.

Without fraud or collusion a judgment on a *sci. fa.* is conclusive and cannot be attacked collaterally,<sup>25</sup> unless it be void on its face.<sup>26</sup>

<sup>20</sup> Sauer v. Martin, 9 Kulp, 483. (But see Lessing Bldg. Assn. v. Lentz, 10 D. R. 257, under rules of court.)

<sup>21</sup> Lawrence v. Smith, 215 Pa. 534.

<sup>17</sup> Smith v. Weyant, 4 C. C. 386.

<sup>18</sup> Refer to your rules.

<sup>19</sup> Tenan v. Cain, 188 Pa. 242.

<sup>20</sup> Miller's Pet., 3 D. R. 393.

<sup>21</sup> Miner v. Graham, 24 Pa. 491.

<sup>22</sup> Lengert v. Chaninell, 26 Supr. C. 626. (See "Executions" and "Appeals.")

<sup>23</sup> Chambers v. Carson, 2 Wharton, 365; Taylor v. Young, 71 Pa. 81; Hunsicker v. Thomas, 89 Pa. 154; Linn v. Peters, 2 Pearson, 169.

<sup>24</sup> Wallace v. Holmes, 40 Pa. 427.

<sup>25</sup> Ross v. Lynch, 2 Pitts. 472; Glass v. Gilbert, 58 Pa. 266; Brundred v. Egbert, 164 Pa. 615.

<sup>26</sup> Tenan v. Cain, 188 Pa. 242; Smith's Est., 194 Pa. 259.

This applies to the mortgager; but as to the *terre-tenant* without notice a different rule obtains.<sup>27</sup>

It is conclusive as to the amount of the debt<sup>28</sup> and that it was unpaid when judgment was entered.<sup>29</sup> The same rule applies when the mortgage was executed by order of the Orphans' Court;<sup>30</sup> unless it was without jurisdiction.<sup>31</sup> It has been held that the judgment cannot be attacked collaterally because the writ issued prematurely;<sup>32</sup> or that the attorney who confessed judgment was without authority;<sup>33</sup> or that it was entered by default after one return of *nihil*<sup>34</sup> or that a *sci. fa.* returned served was not served as a fact<sup>35</sup> or that the mortgager was living on the premises<sup>36</sup> or that he was dead when two returns of "*nihil*" were made<sup>37</sup> or for fraud, when the same defense was made to the *sci. fa.*;<sup>38</sup> or that it embraced more land than was intended;<sup>39</sup> or that it was executed by a *feme covert* in her maiden name<sup>40</sup> and that a married woman's husband did not join<sup>41</sup> or that mortgager was a minor;<sup>42</sup> or that the mortgage was defectively acknowledged;<sup>43</sup> or that the foreclosure was in bad faith and to defraud him, when he had an opportunity to intervene.<sup>44</sup> The judgment is conclusive as to strangers.<sup>45</sup> Where a mortgage is security for joint notes a judgment for the defendant on the *sci. fa.* will bar recovery on all the notes.<sup>46</sup>

#### 43. Execution and incidents.

The proper form of writ to sell land covered by a mortgage is a *levari facias*, notwithstanding the confession of judgment authorizes a *fi. fa.*<sup>47</sup> It issues on a *præcipe* which refers to the number and term of the judgment in the court wherein entered. It cannot issue pending a rule to amend the judgment on the *sci. fa.*<sup>48</sup> Having

<sup>27</sup> See *supra*, par. 33.

<sup>28</sup> *Schnepf's Ap.*, 47 Pa. 37; *Dorris v. Erwin*, 101 Pa. 239; *Murray v. Weigle*, 118 Pa. 159.

<sup>29</sup> *Nace v. Hollenback*, 1 S. & R. 540; *Thompson's Ap.*, 126 Pa. 434; *Dauberman v. Hain*, 196 Pa. 435.

<sup>30</sup> *Murray v. Weigle*, 118 Pa. 159; *Chase v. Brown*, 22 C. C. 598.

<sup>31</sup> *Spencer v. Jennings*, 114 Pa. 618; 123 Pa. 184.

<sup>32</sup> *Sanderson v. Phinny*, 2 Walker, 526.

<sup>33</sup> *Evans v. Meylert*, 19 Pa. 402.

<sup>34</sup> *Allison v. Rankin*, 7 S. & R. 269.

<sup>35</sup> *Blythe v. Richards*, 10 S. & R. 261.

<sup>36</sup> *Colley v. Latimer*, 5 S. & R. 211.

<sup>37</sup> *Warder v. Tainter*, 4 Watts, 270.

<sup>38</sup> *Lewis v. Nenzel*, 38 Pa. 222.

<sup>39</sup> *Market Bank v. Daum*, 33 Pitts. L. J. 8.

<sup>40</sup> *Hartman v. Ogborn*, 54 Pa. 120.

<sup>41</sup> *Butterfield's Ap.*, 77 Pa. 197.

<sup>42</sup> *Kennedy v. Baker*, 159 Pa. 146.

<sup>43</sup> *Edmonson v. Nichols*, 22 Pa. 74; *Michaellis v. Brawley*, 109 Pa. 7; *Benninghoff v. Stephenson*, 161 Pa. 440.

<sup>44</sup> *Hunter v. Baxter*, 210 Pa. 72.

<sup>45</sup> *Maier v. Lindsay*, 13 D. R. 438.

<sup>46</sup> *Boltz v. Muehlhof*, 37 Supr. C. 375.

<sup>47</sup> *McClelland v. Devilbiss*, 1 C. C. 613.

<sup>48</sup> *Saving Fund v. Ball*, 2 Leg. Rec. R. 263.

issued on a judgment more than five years old, unrevived, the sale will not be set aside on motion of the *terre-tenant*.<sup>49</sup>

#### 44. Stay of writ.

Under the act of April 28, 1899, P. L. 133, persons in actual military service are entitled to a stay of this writ, as they were under the prior acts of 1861 and 1887.<sup>50</sup> The court has equitable power to stay a writ upon good cause shown, and impose such terms as are just and proper to meet the circumstances of the case.<sup>51</sup> Unless such equity is shown, the court may not interfere.<sup>52</sup>

#### 45. Alias writs.

One who stays his *lev. fa.* will not be prejudiced in his right to issue an *alias lev. fa.*<sup>53</sup> After a return of "unsold" by the sheriff an alias may issue,<sup>54</sup> or a *pluries*.<sup>55</sup>

#### 46. Form of *levari facias*.

The writ must follow the judgment on the *sci. fa.* and if it omits one or more of the properties it will be fatal and the sale be set aside.<sup>1</sup> Where under the pleadings it is admitted that the widow's dower is charged on the land a *lev. fa.* issued to sell it without reserving such dower is erroneous.<sup>2</sup> And so a *lev. fa.* may issue excepting an oil lease.<sup>3</sup> A *lev. fa.* is irregularly issued on a judgment by default, without an assessment of damages.<sup>4</sup> If the command to levy the debt is omitted, it is a mere clerical error which may be amended in the Supreme Court;<sup>5</sup> so also the interest,<sup>6</sup> which is collectable to the day of the sale.<sup>7</sup>

Following is the form:

Luzerne County, ss:

#### THE COMMONWEALTH OF PENNSYLVANIA.

To the Sheriff of said County, Greeting:

We command you, that without any other writ from us, of the lands and tenements, which were of — —, late of your County, — to-wit: Of a certain [description as in the mortgage]. Together with the hereditaments and appurtenances, in your bailiwick, you cause to be levied as well a certain debt of — dollars with the lawful interest thereof, from the — day of —, as also — dollars like money for costs, which said sum of — dollars

<sup>49</sup> Franklin Fire Ins. Co. v. Fischer, 4 W. N. C. 414; Vastine v. Fury, 2 S. & R. 426.

<sup>50</sup> Breitenbach v. Bush, 44 Pa. 322; Drexel v. Miller, 49 Pa. 246.

<sup>51</sup> Ewart v. Irwin, 1 Phila. 78.

<sup>52</sup> Ins. Co. v. Roberts, 6 Phila. 516.

<sup>53</sup> Wilkinson v. Hiyer, 22 C. C. 667.

<sup>54</sup> Peddle v. Hollingshead, 9 S. & R. 277.

<sup>55</sup> Topper v. Taylor, 6 S. & R. 173.

<sup>1</sup> Stuckert v. Ellis, 2 Miles, 433.

<sup>2</sup> Reidenauer v. Killinger, 11 S. & R. 119.

<sup>3</sup> Wilkinson v. Hiyer, 22 C. C. 667.

<sup>4</sup> Stackpole v. Glassford, 16 S. & R. 163.

<sup>5</sup> Peddle v. Hollingshead, 9 S. & R. 277.

<sup>6</sup> Mohn v. Hiester, 6 Watts, 53.

<sup>7</sup> Mohn v. Hiester, *supra*.

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with the interest and cost aforesaid — —, lately in our County Court of Common Pleas, before our Judges at Wilkes-Barre, by the consideration of the same Court, recovered against the said — —, of the said Messuage, etc., with the appurtenances, to be levied by the default of the said — —, in not paying the said sum of — — dollars with the lawful interest thereof, at the day and time when the same ought to have been paid according to the form and effect of the Act of Assembly of the State of Pennsylvania, in such case made and provided: and have you those moneys before our Judges at Wilkes-Barre, at our County Court of Common Pleas, there to be held the — — Monday of — — next, to render unto the said — — for Debt, Interest and Damages aforesaid, whereof the said defendant — — convict, as appears of record, etc. And have you then and there this writ.

Witness the Hon. Stanley Woodward, President Judge at our said Court at Wilkes-Barre, aforesaid, the — — day of — —, in the year of our Lord one thousand nine hundred —.

[Seal]

— —,  
Prothonotary.

#### 47. Notice and advertisement of sale.

By section 4 of the act of 1705, *supra*, notice of the sale shall be given the defendant ten days before the sale, which provision is still in force.<sup>8</sup> But where the real owner was present at the sale and the price obtained was adequate the sale was not set aside for want of this notice.<sup>9</sup> The *terre-tenant* cannot complain.<sup>10</sup> These excuses, however, all indicate loose and lazy practice, which, as long as the law is in force should not be tolerated. The better practice is to follow the law,<sup>11</sup> and this is indicated by Clayton, J.:<sup>12</sup> "A copy of a properly prepared printed or written hand-bill, delivered to the defendant personally, or left at his dwelling house in the same manner as a summons may be served, would be sufficient; or if the defendant cannot be found in the county a return of that fact would be sufficient. We are of opinion that the sheriff's return should show the service of the required notice, or that the defendant cannot be found."

It was held in an old case that the sheriff's return need not show that notice was given the defendant, but it did not decide that the notice must not be given.<sup>13</sup> If, upon exceptions to the sheriff's bill of costs, it appears that he did not serve notice on the defendant and properly advertise the sale, his printing bill will be disallowed.<sup>14</sup>

The act of 1705, *supra*, was amended by the act of March 27, 1824, P. L. 119, which was held to be still in force.<sup>15</sup> And this re-

<sup>8</sup> Gibbons v. Williams, 10 C. C. 299.

<sup>9</sup> Schrader v. Bramwell, 1 W. N. C. 2.

<sup>10</sup> Fidelity Ins. Co. v. Clendenon, 6 W. N. C. 236.

<sup>11</sup> Faucett v. Harris, 7 D. R. 150.

<sup>12</sup> Gibbons v. Williams, 10 C. C. 299.

<sup>13</sup> Topper v. Taylor, 6 S. & R. 173.

<sup>14</sup> Boyd v. Johnson, 144 Pa. 174.

<sup>15</sup> Haas v. Fisher, 10 D. R. 150.

quired the land to be advertised once a week for three full weeks in a newspaper.<sup>16</sup>

Under the act of June 16, 1836, P. L. 772, as amended by act of July 2, 1895, P. L. 420, the sheriff is required to advertise his sale of real estate "once a week during three successive weeks previous to such sale." It was held that the word week is a period "from Sunday to Saturday" inclusive, and the first advertisement, if within this period, cannot be made twenty-one days before the sale, but must be made in each week for three weeks preceding the sale. But the last week in which the advertisement occurs must be a full week before the day of sale, which puts it over into the next week.<sup>17</sup> A sale made after the return day is not irregular.<sup>18</sup>

Where mortgaged property consists of five adjoining houses and one brings enough to pay the debt, interest and costs, the sale must stop there. The sale of the rest is irregular.<sup>19</sup>

#### 48. Sale of land lying in more than one county.

The sale of lands lying in more than one county must follow the act of March 23, 1877, P. L. 26, *supra*; or no title will be conferred, even if the mortgager be present and did not object but urged the bidding.<sup>20</sup> The description of the land in such case is a matter of great importance and the mortgagee is bound to take notice of the description in the deed, when referred to in the mortgage.<sup>21</sup>

#### 49. Exemptions.

Where the land is sold under the mortgage a mortgager is not entitled to exemptions out of the surplus. It all goes to his judgment creditors.<sup>22</sup> Nor is the widow entitled under the act of April 14, 1851, P. L. 612, to claim the exemption as against the mortgage creditor.<sup>23</sup> She is entitled as against all claims, even though her husband waived the right and the execution issued and was levied before he died, except mortgages and purchase money judgment for the land.<sup>24</sup>

#### 50. Overplus of sale to be paid to mortgager.

Section 7 of the act of 1705, *supra*, provides:

"That when any of the said lands, tenements or hereditaments, which by the direction and authority of this act are to be sold for the payment of debts and damages, in manner aforesaid, shall be sold for more than will satisfy the same debts or damages, and reasonable costs, then the sheriff or other officer, who shall make

<sup>16</sup> Good v. Maule, 8 C. C. 624.

<sup>17</sup> Currens v. Blocker, 21 Supr. C. 30, following Hollister v. Vanderlin, 165 Pa. 248; McKee v. Kerr, 192 Pa. 164.

<sup>18</sup> Ryan v. Casey, 1 Pearson, 153.

<sup>19</sup> Richards v. Brittin, 3 Clark, 207.

<sup>20</sup> Menges v. Oyster, 4 W. & S. 20.

<sup>21</sup> Frick v. Fiscus, 164 Pa. 623.

<sup>22</sup> Saving Fund v. Creighton, 3 Phila. 58.

<sup>23</sup> Nerpel's Ap., 91 Pa. 334; Allentown's Ap., 109 Pa. 75; Kauffman's Ap., 112 Pa. 645.

<sup>24</sup> Beetem v. Getz, 5 Supr. C. 71; Peeble's Est., 157 Pa. 605; Hildebrand's Ap., 39 Pa. 133,

*See Act 1917.*



the sale, must render the overplus to the debtor or defendant; and then, and not before, the said officer shall be discharged thereof upon record, in the same court where he shall make return of his proceedings concerning the said sales."

### 51. Purchaser takes estate of mortgager.

Section 8 further provides:

"That no sale or delivery, which shall be made by virtue of this act shall be extended to create any further term or estate to the vendees, mortgagees or creditors, than the lands or hereditaments so sold or delivered shall appear to be mortgaged for, by the said respective mortgages or defeasible deeds."

A sale will not be set aside because the title of the mortgager was only that of a trustee.<sup>25</sup> If the land sold as described is not that which was described in the mortgage no title passes.<sup>26</sup> The title of the purchaser relates back to the date of the mortgage<sup>27</sup> so that an easement created after the filing of the mortgage is discharged;<sup>28</sup> but not one which was created before the mortgage.<sup>29</sup> The same is true as to a lease.<sup>30</sup> If the mortgagee had no notice of a resulting trust the purchaser is not affected by it.<sup>31</sup> The *cestui que trust* must demand preference in the distribution of the surplus if any.<sup>32</sup> A mortgagee as trustee who buys the land holds it in trust for all who are interested in the mortgage.<sup>33</sup> When the mortgagee buys his title is good although he buys it for less than the mortgage debt and costs;<sup>34</sup> and it will be deemed satisfaction only *pro tanto*, instead of an extinguishment of the mortgage,<sup>35</sup> the parties only having the relation of debtor and creditor;<sup>36</sup> and this applies as well to a cotenant mortgagee<sup>37</sup> but not where the cotenant mortgaged the common estate.<sup>38</sup> A devisee who is also executor is not thereby prevented from taking a purchase money mortgage and buying at the foreclosure of the land.<sup>39</sup> Under the act of April 20, 1846, P. L. 411, the sheriff may take the mortgagee's receipt as a lien creditor.<sup>40</sup> Where the mortgagee buys and defaults so that the property must be resold, the auditor cannot defalk the difference from the mortgage, the remedy being for the sheriff to sue the purchaser who made default.<sup>41</sup> Against the purchaser the *terre-tenant* cannot set up that

<sup>25</sup> Wood v. Allabach, 1 Kulp, 391.

<sup>26</sup> Green v. Scarlett, 3 Grant, 228.

<sup>27</sup> De Haven v. Landell, 31 Pa. 120.

<sup>28</sup> King v. McCully, 38 Pa. 76.

<sup>29</sup> Penna. R. Co. v. Jones, 50 Pa. 417.

<sup>30</sup> Hemphill v. Tevis, 4 W. & S. 535.

<sup>31</sup> Berryhill v. Kirchner, 96 Pa. 489; Logan v. Eva, 144 Pa. 312; Martin v. Jackson, 27 Pa. 504.

<sup>32</sup> Landell's Ap., 105 Pa. 152.

<sup>33</sup> Hinkle's Est., 18 Phila. 100.

<sup>34</sup> Blythe v. Richards, 10 S. & R. 261.

<sup>35</sup> Pierce v. Potter, 7 Watts, 475.

<sup>36</sup> Blackmore's Ap., 4 Penny, 33; Blocher v. Blocher, 1 Pitts. 92.

<sup>37</sup> McHenry's Ap., 61 Pa. 432.

<sup>38</sup> Jack v. Woods, 29 Pa. 375.

<sup>39</sup> Woods v. White, 97 Pa. 222.

<sup>40</sup> Building Assn. v. Steel, 15 Phila. 142.

<sup>41</sup> Smith v. Wilson, 152 Pa. 552; Crawford v. Boyer, 14 Pa. 380.

the *sci. fa.* was not served on the mortgager and that no judgment was taken against him.<sup>42</sup> The purchaser may show that the land was for many years assessed in the name of the mortgager where his wife claims it.<sup>43</sup> A notice of the grantor to the mortgager given at the sale does not affect the mortgager as purchaser for value.<sup>44</sup>

#### 52. Errors and irregularities cured.

The acknowledgment of a sheriff's deed followed by delivery of possession to the purchaser has the effect of a judicial decree and all defects of process and execution are thereby cured.<sup>45</sup>

#### 53. Costs.

The *terre-tenant* is not personally liable for costs, the proceeding on a mortgage by *sci. fa.* being *in rem*,<sup>46</sup> unless he appeals to the equity side of the court for relief.<sup>47</sup> If the sheriff fails to give notice according to law the costs may fall upon him.<sup>48</sup>

#### 54. Attorney's commission for collection.

Where a mortgage embraces a provision for attorney's commission on collection it is not necessary for the mortgagee to demand payment before issuing a *sci. fa.*<sup>49</sup> A married woman, since the act of June 8, 1893, P. L. 334, is bound by such a stipulation.<sup>50</sup> The mortgager is liable on an over due mortgage, unless the mortgagee gave him an extension.<sup>51</sup> The commission may be allowed when a *sci. fa.* issues during an application to pay into court.<sup>52</sup>

The default may be that of another to whom the *terre-tenant* gave the money to pay.<sup>53</sup> Such commission is payable to the mortgagee himself if he is an attorney and proceeds to collect instead of calling in another attorney.<sup>54</sup> But the mortgagee himself, not being an attorney, has no such privilege<sup>55</sup> except in Delaware county.<sup>56</sup> The attorney's commissions may be allowed when the claim is presented in the Orphans' Court on distribution and such contract is not usurious.<sup>57</sup> But no commissions will be allowed on

<sup>42</sup> Taylor v. Beekley, 211 Pa. 606.

<sup>43</sup> Boyer v. Webber, 22 Supr. C. 35.

<sup>44</sup> Dempwolf v. Greybill, 213 Pa. 163.

<sup>45</sup> Benninghoff v. Stephenson, 161 Pa. 440; Wheelock v. Harding, 4 Supr. C. 21. (See P. & L. Dig., vol. 12, col. 21037, for lower court cases.)

<sup>46</sup> Wickersham v. Fetrow, 5 Pa. 260.

<sup>47</sup> City Bldg., Assn. v. Cardwell, 1 Del. Co. 333.

<sup>48</sup> Boyd v. Johnson, 144 Pa. 174.

<sup>49</sup> Warwick Iron Co. v. Morton, 148 Pa. 72; Walter v. Dickson, 175 Pa. 204; Kennedy v. Quigg, 6 Supr. C. 53.

<sup>50</sup> Kuhn v. Ogilvie, 6 D. R. 102; 178 Pa. 303.

<sup>51</sup> Walter v. Dickson, 175 Pa. 204; Lewis v. Germania Sav. Bank, 96 Pa. 86.

<sup>52</sup> Streng v. Holyoke, Etc., Co., 12 Supr. C. 323.

<sup>53</sup> Phila. Trust Co. v. McDaniel, 2 C. C. 102.

<sup>54</sup> Bedell v. McCormick, 19 Phila. 309; Beale v. Green, 16 C. C. 607.

<sup>55</sup> Audenried v. Goodman, 2 Montg. Co. 186.

<sup>56</sup> Weigley v. Charlier, 9 D. R. 670.

<sup>57</sup> Rowe's Est., 22 Supr. C. 597.

a bond entered and issued upon, before maturity of the mortgage.<sup>58</sup> Where shortly after issuance the mortgage sum with interest and \$50 attorney fee were tendered and refused, the Supreme Court entered judgment on the basis of the tender.<sup>59</sup>

Where the mortgager has been "lulled into fancied security" by the mortgagee, and a *sci. fa.* issues upon him without demand and while so lulled, commissions will not be allowed, it seems.<sup>60</sup> It also seems that such commission does not belong to the attorney but to the mortgagee and must be included in the judgment and must not be taxed on the writ as costs.<sup>61</sup> It was held that where the mortgagee in the absence of his counsel satisfied the mortgage without payment of costs and commission, before judgment, the right to commission was gone.<sup>62</sup> Although the commissions are fixed in the contract and belong to one of the contracting parties, under the decisions, the courts will control the commissions.<sup>63</sup>

#### 55. Suit on bond accompanying a mortgage.

The mortgage itself, without an express covenant therein to pay the debt, imports no liability upon which an action of assumpsit (formerly debt) will lie.<sup>1</sup> But if there is an assumption to pay mentioned it is otherwise.<sup>2</sup> A mere acknowledgment of indebtedness<sup>3</sup> or the fact that it is given to secure the payment of a bond is not sufficient to warrant an action of assumpsit upon it.<sup>4</sup> So if there be no bond or independent promise to pay, and the mortgage is not fully satisfied the balance due cannot be set off against the mortgager's share in the estate of her father who held the mortgage.<sup>5</sup> The independent promise to pay need not be in a bond; it may be by parol, and in such case the mortgage is admissible to prove the amount due at its date.<sup>6</sup>

Bonds accompanying a mortgage are now almost universally judgment bonds with warrants to confess and containing the usual waivers, the judgments whereunder are general and a lien upon all the defendant's real estate, and personal as well, leviable out of any property he may have. However, the bond may be so restricted as to cover only the real estate which is mortgaged.<sup>7</sup> If not restricted and revived, it will be general.<sup>8</sup> After long delay and payment of interest on the mortgage, and the estate of the mortgager

<sup>58</sup> *Steigerwald v. Phila. Brewing Co.*, 21 Supr. C. 540. (As to assigned bond and mortgage, see *Gourley v. Thompson*, 11 D. R. 174.)

<sup>59</sup> *Cunningham v. McCready*, 219 Pa. 594.

<sup>60</sup> *Comth., Etc., Assn. v. Stroh*, 20 Lanc. L. R. 123.

<sup>61</sup> *Bronson v. Brown*, 8 D. R. 365.

<sup>62</sup> *Faulkner v. Wilson*, 3 W. N. C. 339.

<sup>63</sup> *Ins. Co. v. Shields*, 12 Phila. 407; *P. & L. Dig.*, vol. 12, cols. 21062-3.

<sup>1</sup> *Scott v. Fields*, 7 Watts, 360; *Baum v. Tonkin*, 110 Pa. 569; *Reap v. Battle*, 155 Pa. 265.

<sup>2</sup> *Smith v. Weyant*, 4 C. C. 386.

<sup>3</sup> *Fidelity, Etc., Co. v. Miller*, 89 Pa. 26.

<sup>4</sup> *Scott v. Fields*, 7 Watts, 360.

<sup>5</sup> *Sherer's Est.*, 17 Lanc. L. R. 382.

<sup>6</sup> *Tonkin v. Baum*, 114 Pa. 414.

<sup>7</sup> *Faulkner's Ap.*, 11 W. N. C. 48. (See *Snevely v. Tarr*, 1 Phila. 220; *Emlen v. Middletown*, 5 Leg. & Ins. Rep. 4.)

<sup>8</sup> *Stauffer v. Ansbacher*, 5 Kulp, 369.

has been distributed in the Orphans' Court it will be presumed that personal liability was released and the legatees will not be held for any deficiency on the mortgage.<sup>9</sup> In case the mortgagee without the knowledge or consent of the mortgager releases part of the mortgaged premises, he cannot afterwards hold the mortgager for any deficiency, on the bond.<sup>10</sup>

A judgment on a bond will not be opened to permit the mortgager to set off a debt which would be available on the *sci. fa. sur* mortgage.<sup>11</sup> Where the owner of a mortgage bond attempts by circumvention of the forum to collect his bond, entering judgment in another county and taking a transcript to the county where the land lies, the execution will be stayed to enable the mortgager to apply to the court of the county where the judgment was confessed for such relief as he may be entitled to.<sup>12</sup> An executor of a *terre-tenant* will be permitted to intervene in a suit on the bond.<sup>13</sup>

Judgment on the bond will not be opened because the conveyancer to whom the money was paid failed to pay over to the mortgager, whose agent he was;<sup>14</sup> nor is it a defense that the mortgage has been lost, mislaid or destroyed.<sup>15</sup> The *terre-tenant* may be allowed to intervene and pay the principal of the mortgage into court.<sup>16</sup>

After a stay of *fi. fa.* expires an alias may issue and the land be condemned.<sup>17</sup>

The bond and mortgage are securities for the same debt and the mortgagee may proceed by ejectment, or by *sci. fa.* on the mortgage or by action on the bond.<sup>18</sup> His remedy on the bond is concurrent with that on the *sci. fa.* and one does not exclude the other.<sup>19</sup> The judgment on the bond relates back to the date of the lien of the mortgage.<sup>20</sup>

If a defense has been allowed or taken on the *sci. fa.* a judgment on the bond will be opened to permit the same defense<sup>21</sup> and an execution cannot issue<sup>22</sup> but proceedings on the judgment will not be stayed without depositions taken on a rule.<sup>23</sup> The court will permit a discontinuance of the *sci. fa.*<sup>24</sup> The judgment on the bond being general the court cannot release property bound by it and restrict its lien to that covered by the mortgage;<sup>25</sup> nor can a *sci. fa.* be changed into assumpsit on the bond.<sup>26</sup> By satisfaction of

<sup>9</sup> Piper's Est., 208 Pa. 636.

<sup>10</sup> Meigs v. Tunnicliffe, 214 Pa. 495.

<sup>11</sup> Faber v. Maddock, 10 Del. Co. 481.

<sup>12</sup> Mynick v. Bicking, 20 Montg. 115.

<sup>13</sup> Stegmaier v. Keystone Coal Co., 15 D. R. 656.

<sup>14</sup> Barnard's Ap., 3 Atl. 764.

<sup>15</sup> Hodgdon v. Naglee, 5 W. & S. 217.

<sup>16</sup> Dever v. Rice, 19 W. N. C. 156.

<sup>17</sup> Busch v. Groswith, 159 Pa. 623.

<sup>18</sup> M'Call v. Lenox, 9 S. & R. 302.

<sup>19</sup> Lyons v. Ott, 6 Wharton, 163.

<sup>20</sup> Hundertmark's Est., 52 Pitts. L. J. 107.

<sup>21</sup> McGinley v. Reilly, 1 W. N. C. 360; Rees v. Rees, 1 W. N. C. 457.

<sup>22</sup> Hicks v. Funston, 5 W. N. C. 428.

<sup>23</sup> Longstreth v. Thornton, 14 Phila. 140.

<sup>24</sup> Tisdall v. Paul, 8 W. N. C. 357.

<sup>25</sup> Allison v. Wilson, 2 W. N. C. 629.

<sup>26</sup> Eckert v. Phillips, 4 C. C. 514.

the judgment on the *sci. fa.* on payment of the amount the debt is extinguished and the bonds fall with it.<sup>27</sup>

If at the sale the property brings enough to satisfy the mortgage, the debt is *prima facie* extinguished.<sup>28</sup> And in the same manner the debt may be extinguished by the holder of the bonds becoming purchaser of the property subject to the lien.<sup>29</sup>

#### 56. Proof of mortgage debt in the Orphans' Court.

The mortgage debt may be proved before an auditor in the Orphans' Court, the same as any other debt.<sup>30</sup> And this is so, although the Supreme Court has reversed the judgment on the *sci. fa.* as absolutely void.<sup>31</sup> Having presented his claim on a certain ground, he cannot on appeal shift position and claim to stand on a different leg.<sup>32</sup> This court may grant relief where satisfaction was entered by mistake.<sup>33</sup>

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<sup>27</sup> *Yeomans v. Rexford*, 35 Pa. 273.

<sup>28</sup> *Hauserman v. Millet*, 2 W. N. C. 570; *Rowe's Est.*, 22 Supr. C. 597.

<sup>29</sup> *Cock v. Bailey*, 146 Pa. 328.

<sup>30</sup> *Crowley's Est.*, 7 D. R. 322.

<sup>31</sup> *Smith's Est.*, 194 Pa. 259.

<sup>32</sup> *Harrison's Est.*, 31 Supr. C. 485.

<sup>33</sup> *Irwin's Est.*, 23 Lane. L. R. 46.

## CHAPTER XLVII.

### SCIRE FACIAS SUR MUNICIPAL AND TAX LIENS.

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#### I. Status of laws.

By act of June 4, 1901, P. L. 364, a system of liens for taxes and municipal assessments was evolved which proved crude and

inefficacious. It embraced taxes of all kinds including assessments upon unseated lands, which from the earliest time were collected by the county treasurer, and the legislature of 1903, hearing from the state at large, promptly, by act of March 26, P. L. 63, eliminated "taxes assessed upon unseated land." Other amendments were made, among which was this remarkable restrictive proviso in the act of April 3, 1903, P. L. 152:

"Provided, however, that in counties in which the filing of liens for county taxes was authorized by law prior to the passage of the act of one thousand nine hundred and one, aforesaid, the method of filing, docketing and indexing liens for county, road, poor, school, borough, school building, township and other taxes assessed in boroughs and townships, in such counties shall remain and be continued thereafter in the same manner and form as in use prior to the passage of said act, approved June fourth, one thousand nine hundred and one, notwithstanding the passage of the same."

In Philadelphia County all taxes were made a lien, in similar language, by the act of Feb. 3, 1824, p. l. 18.

This act was extended to Delaware County by act April 18, 1843, p. l. 332 and to Allegheny County by act April 5, 1844, p. l. 199.

By acts of 1840, p. l. 642, and 1870, p. l. 866, county taxes only were made a lien in Lycoming County and by act 1850, p. l. 453, in Centre County, after two years from date—but no mode of entry provided. The act of June 2, 1881, p. l. 45, provided a general lien law, excepting cities of three classes, which for that reason was declared unconstitutional in *Van Loon v. Eagle*, 171 Pa. 157.

If above amendment is effective it seems to leave the whole state subject to the act of 1901, as to liens for municipal assessments and all of the state except Philadelphia, Allegheny, Delaware, Centre and Lycoming Counties, under the act of 1901, for mode of filing liens for taxes—a most unique result of academic classification and codification contemplating "a complete and exclusive system in itself."

**2. Definition of terms — Taxes — Highway — Tax claim — Municipal claim — Claimant — Contractor — Owner — Property.**

Section 1 of the act of June 4, 1901, P. L. 364, provides:

"That the word 'taxes,' as used in this act, means any county, city, borough, township, school, bridge, road or poor taxes.

The word 'highway,' as used in this act, means the whole or any part of any public street, public road, public lane, public alley, or other public highway.

The words 'tax claim,' as used in this act, mean the claim filed to recover taxes.

The words 'municipal claim,' as used in this act, mean the claim filed to recover for the grading, guttering, macadamizing or otherwise improving the cart ways of any public highway; for grading, curbing, recurbing, paving, repaving, construction or repairing the foot ways thereof; for laying water pipes, gas pipes, culverts, sewers, branch sewers, or sewer connections therein; for assessments for benefits in the opening, widening or vacation thereof; or in changing of water courses or the construction of sewers through

private lands; for the removal of nuisances; or for water rates, lighting rates, or sewer rates.

The word 'claimant,' as used in this act, means the plaintiff or use-plaintiff, in whose favor the claim is filed as a lien.

The word 'contractor,' as used in this act, means the person or persons who, under contract with the legal plaintiff, performed the work, for which the lien is given.

The word 'owner,' as used in this act, means the person or persons in whose name the property is registered, if registered according to law; and in all other cases, means any person or persons in open, peaceable and notorious possession of the property, as apparent owner or owners thereof, if any, and if not, then the reputed owner or owners thereof, in the neighborhood of such property.

The word 'property,' as used in this act, means the real estate subject to the lien, and against which the claim is filed as a lien."

To this definition, the act of March 19, 1903, P. L. 41, adds two classes of improvements, to-wit:

"Or in highways of the first class; or in the acquisition of sewers and drains constructed and owned by individuals or corporations, and of rights in and to use the same."

Which is inserted after, "through private lands."

### 3. Taxes declared a first lien.

"Section 2. All taxes which may hereafter be lawfully imposed or assessed on any property in this commonwealth, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a first lien on said property, together with all charges, expenses and fees added thereto for failure to pay promptly; and such liens shall have priority to, and be fully paid and satisfied out of the proceeds of any judicial sale of said property before any other obligation, judgment, claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made."

It was held under previous acts that the lien dates from the assessment;<sup>1</sup> and has priority over a mortgage.<sup>2</sup> But it was also held that the section above did not give priority over a mortgage entered before its passage<sup>3</sup> or a judgment then of record.<sup>4</sup> But the same principle as to priority of taxes and local assessments over mortgages entered of record since the passage of the act, as was previously maintained is now the law. "The fact that the security of a mortgagee may be diminished because the land is lawfully subjected to a tax for public purposes, does not impair the obligation of his contract within the meaning of the constitution."<sup>5</sup> And where a mortgage was executed on June 4, 1901, the day of approval of

<sup>1</sup> Parker's Ap., 8 W. & S. 449; Dungan's Ap., 88 Pa. 414.

<sup>2</sup> Titusville's Ap., 108 Pa. 600; Allentown's Ap., 109 Pa. 75; Anspach's Ap., 112 Pa. 27.

<sup>3</sup> Martin v. Greenwood, 27 Supr. C. 245; Caner v. Bergner, 27 Supr. C. 220.

<sup>4</sup> Oil City, Etc., Assn. v. Shanfelter, 29 Supr. C. 251.

<sup>5</sup> Olyphant Boro' v. Egreski, 29 Supr. C. 116.



the act, *supra*, it became subject thereto by the continuing force of the prior law incorporated in it and supplied by it, and assessments subsequently made take priority.<sup>a</sup>

The tax lien laws of June 22, 1895, P. L. 111, and 1901, *supra*, as amended by act of May 1, 1907, P. L. 130, were construed recently.<sup>aa</sup> It was held that city taxes for 1901, were divested and discharged by a sale in 1904, when not presented by the collector. Taxes for which a lien is claimed must be filed now in the Court of Common Pleas on or before the last day of the third calendar year after that in which they are payable.<sup>ab</sup>

#### 4. Municipal claims declared a first lien after taxes.

"Section 3. All municipal claims which may hereafter be lawfully imposed or assessed on any property in this commonwealth, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a lien on said property, together with all charges, expenses and fees added thereto for failure to pay promptly, and said liens shall have priority to and be fully paid and satisfied out of the proceeds of any judicial sale, of said property, before any other obligation, judgment, claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made and the taxes imposed or assessed upon said property."

As to priority over mortgages, see notes 2 to 6, *supra*.

#### 5. Lien for taxes — Municipal assessments, etc.

Section 4 as amended by section 2 of the act of March 19, 1903, provides:

"The lien for taxes shall exist in favor of, and the claim therefor may be filed against the property taxed by any county, city, borough, township, school district, road district or poor district to which the tax is payable. The lien for the removal of nuisances shall exist in favor of, and the claim therefor may be filed against the property from which it is removed or by which it is caused, by any city, borough or township, by or for which the nuisance is removed.

The lien for grading, guttering, paving, macadamizing or otherwise improving the cart ways of; for grading, curbing, recurbing, paving, repaving, constructing or repairing the foot ways thereof; or for laying water pipes, gas pipes, culverts, sewers, branch sewers, or sewer connections in any highway; for assessments for benefits in the opening, widening or vacation thereof; or in the changing of water courses or construction of sewers through private lands; or in highways of townships of the first class; or in the acquisition of sewers or drains constructed and owned by individuals or corporations, and of rights in and to use the same; or for water rates, lighting rates or sewer rates, shall exist in favor of, and the claim therefor may be filed against the property, benefited by, the city, borough or township extending the benefit.

<sup>a</sup> Haspel v. O'Brien, 218 Pa. 146, reversing 32 Supr. C. 147.

<sup>aa</sup> Lampus v. Schneider, 57 Pitts. L. J. 141.

<sup>ab</sup> Eckert v. Krugerman, 10 Lack. Jur. 217.

Where the contractor performing the work is to be paid by assessment bills, the lien shall exist for, and the claim shall be filed to his use and he shall under no circumstances have recourse to the city, borough or township authorizing the work."<sup>7</sup>

#### 6. Recovery of municipal claim by lien or action.

The act of April 4, 1907, P. L. 40, is amended by the act of March 25, 1909, P. L. 78, so as to read:

"That hereafter all municipalities of the Commonwealth of Pennsylvania may proceed for the recovery of any municipal claim or claims, whatsoever, by lien or by action of assumpsit; and authority is hereby conferred upon justices of the peace to entertain such actions of assumpsit, to the limits of their jurisdiction."

The act of 1907 was held not retroactive.<sup>7a</sup>

The act of 1901, *supra*, embraces foot ways or sidewalks, but the courts have distinguished between cart ways and foot ways, the former being maintained by a species of local taxation, while in the case of sidewalks the assessment is personal to the owner, in the first instance;<sup>8</sup> and an essential part of the right to collect is notice to and default by the owner, especially under the borough law of April 3, 1851, P. L. 320.<sup>9</sup>

#### 7. Property liable to or exempt from claims.

"Section 5. Public property used for public purposes shall not be subject to tax claims, or municipal claims; and actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity shall not be subject to tax or municipal claims, except for the removal of nuisances, for sewer claims and sewer connections; or for the recurbing, paving, repaving or repairing the foot ways in front thereof. All other real estate, by whomsoever owned and for whatsoever purpose used, shall be subject to all tax claims and municipal claims herein provided for: *Provided*, however, that nothing in this act contained shall hinder or prevent any city, borough or township of the first class from providing that any municipal work may be done at the expense of the public generally, and be paid for out of the general city, borough or township funds."

A claim cannot be maintained which avers a trustee as registered owner, for a Roman Catholic congregation.<sup>9a</sup> This section is not unconstitutional because it exempts places of actual religious worship.<sup>9b</sup> A railroad right of way is not "real estate" under this act and is not subject to local assessment.<sup>9c</sup>

<sup>7</sup> For the various cases expounding the validity of charters and general laws, see Pepper & Lewis' Digest, vol. 12, col. 21090, *et seq.*; vol. 2, C. R. A., col. 3341, *et seq.*, and vol. 4, C. R. A., col. 1553, *et seq.* (See, also, par. 3, *supra*, and notes.)

<sup>7a</sup> Crafton Boro' v. Richards, 17 D. R. 835; Phila. v. De Haven, 41 Supr. 265; Barnesboro v. Speece, 40 Supr. C. 609.

<sup>8</sup> Meanor v. Goldsmith, 216 Pa. 489.

<sup>9</sup> Angle v. Stroudsburg Boro', 29 Supr. C. 601.

<sup>9a</sup> Pittsburg v. Phelan, 56 Pitts. L. J. 351.

<sup>9b</sup> Reynoldsville v. Church, 57 Pitts. L. J. 345.

<sup>9c</sup> Phila. v. R. Co., 41 Supr. C. 245.

**8. Previous notice to abutting owners of foot-way required.**

"Section 8. No claim shall be filed for curbing, recurbing, paving, repaving or repairing the foot way of any highway, unless the owner shall have neglected to do said work for such length of time as may be prescribed by ordinance, after notice so to do, served upon him or his agent, or the person in possession of the property, except when, in the case of curbing or recurbing or repaving the foot way, it shall form part of an improvement resulting also in the paving, macadamizing or otherwise improving the cart way of said highway; and if there be no agent or party in possession it may be posted on the most public part of the property."<sup>10</sup>

**9. Notice when use claimant files lien.**

"Section 9. Where claims are to be filed to use, the claimant, at least one month before the claim is filed, shall serve a written notice of his intention to file it unless the amount due is paid. Service of such notice may be made personally on the owner wherever found; but if he cannot be served in the county where the property is situated, such notice may be served on his agent or the party in possession of the property; and if there be no agent or party in possession it may be posted on the most public part of the property."

This notice must be given to the registered owner.<sup>10a</sup>

**10. Time and manner of filing — Scire facias and judgment.**

"Section 10 of the act of 1901, as amended by act of May 1, 1907, P. L. 130: Claims for taxes, water rates, lighting rates and sewer rates must be filed in the Court of Common Pleas of the county in which the property is situated, on or before the last day of the third calendar year after that in which the taxes or rates are first payable; and other municipal claims must be filed in said court, within six months from the time the work was done in front of the particular property, where the charge against the property is assessed or made at the time the work is authorized; within six months after the completion of the improvement, where the assessment is made by the municipality upon all the properties after the completion of the improvement; and within six months after confirmation by the court, where confirmation is required; the certificate of the surveyor, engineer or other officer supervising the improvement, filed in the proper office, being conclusive of the time of completion thereof, but he being personally liable to any one injured by any false statement therein.

A number of year's taxes or rates of different kinds, if payable to the same plaintiff may be included in the same claim. Upon each tax or municipal claim a writ of *scire facias*, in the form hereinafter set forth, may issue within five years from its filing, and verdict must be recovered or judgment entered on the *scire facias* within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery. After judgment is entered, it must be revived by writ of *scire facias* to revive the judgment; or by judgment thereon within each re-

<sup>10</sup> See notes 8 and 9, *supra*.

<sup>10a</sup> *Philadelphia v. Greenburg*, 16 D. R. 51.

curing period of five years. If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the times aforesaid, it shall be wholly lost: *Provided*, however, if a verdict be recovered before a jury after trial, or judgment be entered on such verdict, the lien shall continue for five years from such recovery or entry, though a new trial be granted or the judgment be reversed on appeal."

By act of April 27, 1909, P. L. 194, section 10, *supra*, is amended by adding thereto the following:

"And provided further that the claimant may, at his option, revive and continue the lien of any tax claim filed hereunder, or of any other claim after judgment shall have been once duly obtained upon the claim as provided in this section, or of any judgment or judgments of revival obtained thereon, by filing of record in the case a suggestion of non-payment and averment of default, at any time within five years of the filing of the claim, or of the issuing of any writ of *scire facias* thereon, or of the last judgment obtained thereon, or within five years of filing a prior suggestion of non-payment and averment of default.

The suggestion and averment shall be in the following form, under the caption of the claim:

'And now —, the claimant, by — —, his solicitor, suggests of record that the above claim is still due and owing to the claimant and avers that the owner is still in default for non-payment thereof. The prothonotary is hereby directed to enter this suggestion and averment on the mechanic's lien or the proper docket of the claim, and also to index it upon the judgment index and on the locality index of the court, for the purpose of continuing the lien of the claim.'

Such suggestion and averment must be signed by the solicitor or chief executive officer of the claimant. The prothonotary shall docket and index the suggestion and averment as directed therein; and for such services shall be entitled to one fee of one dollar, to be taxed and collected as other costs in the claim. The filing and indexing of such suggestion and averment within five years of filing the claim or the issuing of any writ of *scire facias* thereon, or of any judgment thereon, or of the filing of any prior suggestion and averment of default, shall have the same force and effect, for the purposes of continuing and preserving the lien of the claim, as though a writ of *scire facias* had been issued, or a judgment or judgment of revival had been obtained within such period: *Provided*, That no writ of *levari facias* shall be issued upon a claim, for purpose of exposing the property lien to sheriff's sale, except after a judgment shall have been duly obtained upon the claim, as provided in this section, and such judgment must have been obtained within five years of the issuance of the *levari facias*. Whenever the lien of a claim has been revived and continued by the filing and indexing of a suggestion and averment of default, the claimant may, at any time within five years therefrom, issue a writ of *scire facias* thereon, reciting all suggestions and averments of default filed since the filing of the claim, and shall proceed to recover verdict and judgment as hereinbefore provided, subject to the right of the owner to raise any defense arising since the last judgment."

Under section 21, article 15, act of May 23, 1889, P. L. 277, relating to cities of the third class, the claim may be filed within six months after the completion of the work although the assessment was made more than six months before the date of filing;<sup>11</sup> and this means the whole improvement.<sup>12</sup>

#### 11. What the claim shall set forth.

"Section 11. Said claim shall set forth:

1. The name of the county, city, borough, township, school district, road district or poor district by which filed.
2. The name of the owner of the property against which it is filed.
3. A description of the property against which it is filed.
4. The authority under, or by virtue of which the tax was levied or the work was done.
5. The time for which the tax was levied or the date on which the work was completed in front of the particular property against which the claim is filed; or the date of completion of the improvement, where the assessment is made after completion; or the date of confirmation by the court, where confirmation is required done.
6. If filed to the use of a contractor, the date of and parties to the contract for doing said work; and
7. In other than tax claims, the kind and character of the work done, for which the claim is filed, and if the work be such as to require previous notice to the owner to do it, when and how such notice was given.

Said claim must be signed by the solicitor or chief executive officer of the claimant; and in the case of a use-plaintiff, must be accompanied by an affidavit that the facts therein set forth are true to the best of his knowledge, information and belief."

If the owner has registered his title he must be made a party; but if not registered, it may be liened and sold by description and designation of owner unknown.<sup>13</sup>

This applies particularly to Philadelphia where by acts of March 14, 1865, P. L. 320, and March 29, 1867, P. L. 600, owners were required to register.<sup>14</sup> A good designation of a use plaintiff is as follows: The city of Allentown, now for the use of Barber Asphalt Paving Co., etc.<sup>15</sup> There is no authority to name an "estate" as owner.<sup>16</sup> The land descends immediately to the heirs on the death of the owner and the assessment and claim should be to them by individual names and not as heirs.<sup>17</sup> If the owner dies before the ordinance is passed authorizing the assessment, the proceeding being *in rem.*, the validity of the lien is not affected.<sup>18</sup> Where husband and wife were tenants by entireties a lien against the wife alone is void.<sup>19</sup>

<sup>11</sup> Scranton v. Clarke, 34 Supr. C. 128.

<sup>12</sup> Tarentum Boro' v. Moorhead, 26 Supr. C. 273.

<sup>13</sup> Phila. v. Unknown, 20 Supr. C. 203; Phila. v. Allen, 20 Supr. C. 209; Phila. v. Peyton, 25 Supr. C. 350.

<sup>14</sup> Phila. v. Unknown, *supra*; Phila. v. Smith, 29 Supr. C. 450.

<sup>15</sup> Allentown v. Light, 15 D. R. 619.

<sup>16</sup> Freeport Borough v. Miller, 34 Supr. C. 395.

<sup>17</sup> Hanover Boro' v. Ebert, 17 York, 146.

<sup>18</sup> Scranton v. Murray, 9 Lack. Jur. 251.

<sup>19</sup> Alles v. Lyon, 216 Pa. 604.

The true owner who has not registered his title cannot object because the lien is filed against the registered owner, although the latter had not the title.<sup>20</sup> But when the real owner is discovered and made a party his title is bound.<sup>21</sup> Registered owners are entitled to be made parties and if they happen to be the true owners and are not made parties the lien is in the air.<sup>22</sup> The same was held to be the case as to Pittsburg under the act of Feb'y 24, 1871, P. L. 126, in regard to registry.<sup>23</sup> After a series of revivals to which the true and registered owner was not made a party, he may defend against the *sci. fa.*, to revive which finally brings him in bunglingly as *terre-tenant*.<sup>24</sup>

### 12. Authority, time, place and manner.

The authority under which the work is done constitutes the acts of assembly and the ordinance or ordinances and this is sufficiently averred "by virtue of the provisions of sundry acts of assembly relative to" the subject matter and the ordinance giving its date and title,<sup>25</sup> and if required to be published the date of its publication. It need not set forth the ordinance in such case.<sup>26</sup> But in case of a claim for laying sidewalks enough of the ordinance should be set out to indicate whether the defendant was bound to do the work.<sup>27</sup> The location of the property should appear at least sufficiently to bring it within the county and jurisdiction.<sup>28</sup> The kind and character of the work and materials are sufficiently averred in case of an assessment for a sewer, when the claim gives its size, material, length in front of defendant's property, price per foot, length of house connections and price, the improvement being let in one contract.<sup>29</sup> The same is true in regard to a paving contract and it is not requisite to state what materials were used, unless objection be made before issue joined.<sup>30</sup>

### 13. Notice and averment of it.

Where notice is required, as in the case of sidewalks, a general averment is insufficient. It should state upon whom served, when and how; and made definite.<sup>31</sup> Where notice is required and neither the claim nor the *sci. fa.* shows that it was given the lien is void as to the remaindermen who had no notice to build the sidewalks

<sup>20</sup> Phila. v. Kehoe, 22 Supr. C. 320.

<sup>21</sup> Phila. v. Lukens, 22 Supr. C. 298. (See Wolf v. Phila., 105 Pa. 25.)

<sup>22</sup> Phila. v. Nell, 25 Supr. C. 347.

<sup>23</sup> Pittsburg v. Magee, 15 Supr. C. 264.

<sup>24</sup> Phila. v. Adams, 18 Supr. C. 639; 15 Supr. C. 483.

<sup>25</sup> Erie v. Willis, 26 Supr. C. 459; Glenolden Boro' v. Scott, 9 Del. Co. 514.

<sup>26</sup> Allentown v. Light, 15 D. R. 619.

<sup>27</sup> York v. Beitzel, 21 York, 100.

<sup>28</sup> Freeport Boro' v. Miller, 34 Supr. C. 395.

<sup>29</sup> Erie v. Willis, 26 Supr. C. 459.

<sup>30</sup> Allentown v. Ackerman, 37 Supr. C. 363; Phila. v. Meighan, 15 D. R. 10.

<sup>31</sup> Meadville v. Mahoney, 13 D. R. 472; Glenolden Boro' v. Scott, 9 Del. Co. 514; Phila. v. Steward, 31 Supr. C. 72; Carbondale v. Campbell, 7 Lack. Jur. 339.

and the sheriff's sale passed no title as to them.<sup>32</sup> This requisite of notice applies only under section 9 of the act, *supra*, where the claim is filed to use.<sup>33</sup>

#### 14. Claim against several properties — Striking off, etc.

Where the claim covers several lots owned by different persons, the judgment will not be opened after *sci. fa.* issued. The remedy is by petition for apportionment under the act of March 22, 1869, P. L. 477,<sup>34</sup> which may be made at any stage.<sup>35</sup> The claim should be signed by the solicitor or principal officer of the municipality, but if not so signed, the claim should be demurred to or a motion be made to strike it off. It is too late after motion for nonsuit or request for charge of court.<sup>36</sup>

#### 15. Form of claim for paving and curbing.

The City of York  
v.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Owner or reputed owner,  
or whoever may be the owner.

In the Court of Common Pleas of  
York County.  
No. \_\_\_\_\_. Tax and Municipal Lien  
Docket No. \_\_\_\_\_.

#### MUNICIPAL CLAIM FOR PAVING AND CURBING.

Under and by virtue of an Act of Assembly, entitled "An Act providing when, how, upon what property and to what extent, liens shall be allowed for taxes, and for municipal improvements, and for the removal of nuisances, etc.," approved June 4, 1901, and all other Acts of Assembly relating thereto, the City of York files this claim for \$—— against the hereinafter described property, with the improvements thereon, if any, and sets forth the following:

##### *Specifications of Lien.*

First — The name of the party claimant is The City of York.

Second — The name of the owner or reputed owner of the property against which this claim is filed is \_\_\_\_.

Third — The property against which said claim is filed is described as follows, to-wit:

All that certain lot or parcel of land situate in the \_\_\_\_ ward of The City of York, County of York and State of Pennsylvania, bounded

On the North by \_\_\_\_

On the East by \_\_\_\_

On the South by \_\_\_\_

On the West by \_\_\_\_

Being known as No. \_\_\_\_, and having a frontage along said highway of \_\_\_\_ feet, more or less, and a depth of \_\_\_\_ feet, more or less.

<sup>32</sup> Meanor v. Goldsmith, 216 Pa. 489.

<sup>33</sup> Allentown v. Light, 15 D. R. 619; Phila. v. Meighan, 15 D. R. 10.

<sup>34</sup> Phila. v. Unknown, 20 Supr. C. 203.

<sup>35</sup> York v. Beitzel, 21 York, 100; 41 Supr. C. 194.

<sup>36</sup> Allentown v. Ackerman, 37 Supr. C. 363.

Fourth—The work for which this claim is filed was done under and by virtue of the several Acts of Assembly governing cities of the third class, to-wit: The Act of May 23, 1889, P. L. 277; the Act of May 16, 1891, P. L. 75, and the several amendments and supplements to said Acts; and an ordinance of The City of York, No. —, File of the — Council, approved the — day of —, 19—, entitled "An Ordinance [Title and substance]."

Fifth—The improvement for which this claim is filed was completed on — day of —, 19—, as certified by the supervising engineer, filed in the office of the City Clerk.

Sixth—The kind and character of the work for which this claim is filed is the paving with —, on a concrete base, and curbing with — the cartway of — on the — side thereof in front of the above described property. All notices prescribed by law or ordinance were duly given to the above named owner by —.

The amount of the assessment for which this claim is filed is as follows:

For — feet frontage —	
Paving, at \$ — per foot,.....	\$ —
For — feet of —	
curbing, at \$ — per foot,.....	\$ —
	\$ —
Credit: By — installment paid,.....	\$ —
Penalty for non-payment, 5 per cent.,.....	\$ —
Interest on \$ — from —	\$ —
—, .....	\$ —
Total claim,.....	\$ —

The City of York,

By — —,  
Solicitor.

The Prothonotary is requested to enter above claim in the proper Tax and Municipal Lien Docket, and upon the Judgment and Locality Indexes.

To — —, Esq., Prothonotary.  
—, 19—.

John L. Rouse,  
City Solicitor.

16. Form of claim for paving footway.

The City of York	}	In the Court of Common Pleas of
v.		York County, Pa.
— —		Tax and Municipal Lien Docket No.
— —		—, Page —.
Owner or reputed owner.		Lien No. —.
		Claim for Paving Footway.

City of York, ss:

Under and by virtue of An Act of Assembly entitled "An act providing when, how, upon what property, and to what extent, liens shall be allowed for taxes, and other municipal improvements, and for the removal of nuisances, etc.," approved June 4, 1901, and all other Acts of Assembly, and ordinances of said city relat-



ing thereto, the City of York files this its claim for \$— against the hereinafter described property with the improvements thereon, if any, and sets forth the following:

*Specifications of Claim.*

First.— The name of the party claimant is the City of York.

Second.— The name of the owner or reputed owner of the property against which this claim is filed is ———.

Third.— The property against which this claim is filed is described as follows: All that certain lot or parcel of land situate in the ——— ward of the City of York, York County, Pennsylvania, bounded on the North by ———, on the East by ———, on the West by ———, and on the South by ———, being known as No. ——— Street, and having a frontage of ——— feet along said street, and a depth of ——— feet, more or less. The improvements thereon consist of ———.

Fourth.— The work for which this claim was filed was done under and by virtue of the several Acts of Assembly governing Cities of the Third Class, to-wit: The Act of May 23, 1889, P. L. 277; the Act of May 16, 1891, P. L. 75, and the several supplements to said acts; and an Ordinance of the City of York entitled "An ordinance relating to paving, curbing, repaving, recurbing and repairing sidewalks and gutters," approved September 15, 1891. ———

Fifth.— The work in front of the said property against which this claim is filed was completed on the ———, 19—, as certified by ———, Highway Commissioner, who was supervising said work; said certificate being filed with the City Clerk of City of York, on the ——— day of ———, 19—.

Sixth.— The kind and character of the work for which this claim is filed is as follows:

Seventh.— All notices required to be given to the above named owner were given by ———, of the City of York, Pa., on ———, 19—. Said notice was served by handing to said ———, on said day, in said city, a partly written and partly printed notice, a true and correct copy of which notice is hereto annexed, made part hereof and marked "Exhibit A." Said ———, failed and neglected to do the work for which this claim is filed, within the time mentioned in said ordinance and in said notice, to-wit: thirty days after said notice had been served.

Eighth.— The amount of the assessment for which this claim is filed is as follows:

For constructing footway or sidewalk.....	\$—
Penalty of 10%, per ordinance of Sept. 15, 1891...	\$—
Total Claim.....	\$—

THE CITY OF YORK.

By ———,  
City Solicitor.

Prothonotary.

You are requested to enter the above claim in the proper Tax and Municipal Lien Docket, and upon the judgment and locality indexes.

John L. Rouse,  
City Solicitor.

York, Pa., June 8, 1910.

**17. Property included in claim.**

"Section 12. The property described in tax claims shall include the whole property against which the tax is levied. The property described in municipal claims shall include the lot in front of, or upon which the work is done, of such depth as is usual in properties of the same kind or character in the particular neighborhood, but not including any part of a lot abutting at the rear thereof on another highway other than an alley. Where the lot as used, does abut at the rear thereof on another highway other than an alley, the lot shall be so apportioned as to give to both front and rear an appropriate depth, suitable, as far as may be, for the purposes thereof."

**18. Intervention and substitution.**

"Section 13. Any person having an interest in the property, whensoever acquired, may by agreement of the parties or by leave of the court, intervene as a party defendant and make defense thereto, with the same effect as if he had been originally named as a defendant in the claim filed. And the claimant may by writing filed at his costs, strike off the name of any defendant therein; and may substitute as a defendant, and issue a *scire facias* against any person who may have acquired an interest as owner after the right to file a claim accrued, or who is the personal representative of an owner who has died either before or after filing the claim, but such substitution shall always be without prejudice to any intervening rights."

**19. Claim against distinct properties as one estate, apportionment.**

"Section 14. In all cases where a tax or municipal claim is levied on or filed against separate and distinct properties as one estate, it shall and may be lawful for the proper public authority, either before or after filing a claim therefor, to apportion the same ratably upon the separate and distinct properties so assessed together. And the court in which the claim is filed, on proof that the properties were separate and distinct at the time the tax was levied or the work was done, shall, at any stage of the proceedings, apportion the charge against such properties. When apportioned, they shall be treated and considered in all respects as if separate and distinct claims had been filed; and payment and satisfaction of any one portion may be made without prejudice to the claim as against the rest."<sup>37</sup>

**20. Defense — Leave to pay into court — Decree on pleadings — Jury trial.**

"Section 15. Any defendant named in the claim, or any person allowed to intervene and defend thereagainst, may, at any stage of the proceedings, present his petition, under oath or affirmation, setting forth that he has a defense in whole or in part thereto, and of what it consists; and praying that a rule be granted upon the

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<sup>37</sup> York v. Beitzel, 21 York, 100.

claimant to file an affidavit of the amount claimed by him, and to show cause why the petitioner should not have leave to pay money into court; and in the case of a municipal claim, to enter security in lieu of the claim; whereupon a rule shall be granted as prayed for.

Upon the pleadings filed, or from the claim and the affidavit of defense, and without a petition where an affidavit of defense has been filed, the court shall determine how much of the claim is admitted or not sufficiently denied; and shall enter a decree that upon the payment by such petitioner to the claimant of the amount thus found to be due, with interest and costs, if anything be found to be due, or upon payment into court, if the claimant refuses to accept the same, and upon payment into court of a sum sufficient to cover the balance claimed, with interest and costs, or upon the entry of approved security in the case of a municipal claim, that such claim shall be wholly discharged as a lien against the property described therein, and shall be stricken from the judgment index. Thereafter, the material disputed facts, if any, shall be tried by a jury, without further pleadings, with the same effect as if a writ of *scire facias* had duly issued upon said claim, to recover the balance thereof; but the jury shall be sworn to try the issues between the claimant and the parties who paid the fund into court or entered security, and verdict, judgment and payment, or execution shall follow as in other cases.

The same course may be pursued, at the instance of any owner, where the claim has not in fact been filed, and if, in that event, the petitioner complies with the decree made, the money paid into court or security entered shall stand in lieu of the claim, and the latter shall not be filed, and if filed shall be stricken off, on motion."

#### 21. Notice to claimant to issue *sci. fa.*

"Section 16. Any party named as a defendant in the claim filed, or admitted to defend thereagainst, may file, as of course, and serve a notice upon the claimant or upon the counsel of record to issue a *scire facias* thereon, within fifteen days after notice so to do. If no *scire facias* be issued within fifteen days after the affidavit of service of notice is filed of record, the claim shall be stricken off by the court, upon motion. If a *scire facias* be issued in accordance with such notice, the claimant shall not be permitted to discontinue the same or suffer a nonsuit upon the trial thereof, but a compulsory nonsuit shall be entered by the court if the claimant does not appear, or withdraws, or for reason fails to maintain his claim."

#### 22. Form of *scire facias* sur tax or municipal lien.

By section 1 of the act of May 6, 1909, P. L. 452, section 17 of the act of 1901, *supra*, is amended so as to read as follows:

"Section 17. The claim shall be sued by writ of *scire facias* and the form thereof shall be substantially as follows:

The Commonwealth of Pennsylvania to [names of the parties defendant], Greeting:

Whereas, the [city, borough or other municipality, as the case may be] on the — day of —, A. D. 19—, filed its claim in our

Court of Common Pleas of — County, at No. —, — Term, 19—, M. L. D.<sup>37a</sup> for the sum of \$—, for [give the improvement, or that for which the claim is filed]. Against the following property, situate in [give location and description of the property] owned or reputed to be owned by you.

And whereas, we have been given to understand that said claim is still due and unpaid, and remains a lien against the said property; now, you are hereby notified to file your affidavit of defense to said claim, if defense you have thereto, in the office of the prothonotary of our said court, within fifteen days after the service of this writ upon you. If no affidavit of defense be filed within said time, judgment may be entered against you for the whole claim and the property described in the claim may be sold to recover the amount thereof.

Witness the Honorable —, President Judge of our said court, this — day of —, A. D. 19—.

[Seal]

—, Prothonotary.

The claimant when he files his præcipe for the writ of *scire facias*, may direct the prothonotary to add and insert the names of any persons whom the claimant may know to have an interest in the premises, and the *scire facias* shall be issued containing such additional names.

But the parties to the claim may agree upon an amicable *scire facias* upon such terms as may be agreed upon, with the same effect as if a *scire facias*, in the form aforesaid, had been duly issued, served and returned; or the defendants, or any of them, may waive the issue of a *scire facias*, and appear with like effect as if the *scire facias* had been issued and served.<sup>37</sup>

The præcipe gives the names of the parties to the record and suggests such as should be summoned with notice, and refers to the docket in which the lien is entered by number, term, etc. No affidavit is required as in case of mechanic's liens and mortgages, etc. If the præcipe named one not a party to the record prior to the above act, and the *sci. fa.* was not addressed to the sheriff, nor returnable to any return day, etc., it vitiated the judgment and it was stricken off to permit a *terre-tenant* to defend in his own interest.<sup>38</sup> A variance between the præcipe and the writ as to the return day is cured, if judgment be not taken until after the return day — the last date named.<sup>39</sup> Where the writ cannot be found it will be presumed to have conformed to the law as it was at the time of its issuance.<sup>40</sup>

### 23. Issuance of writ, etc.

The writ to revive must issue within five years after judgment on the claim, if based on the act of July 6, 1897, P. L. 420, applying to Philadelphia as to certain claims, otherwise it will be lost<sup>1</sup>

<sup>37a</sup> Municipal Lien Docket.

<sup>38</sup> *Scranton v. Gilgallon*, 4 *Lack. Jur.* 387.

<sup>39</sup> *Hanover Boro' v. Delone*, 21 *York*, 180.

<sup>40</sup> *Scranton v. Koehler*, 36 *Supr. C.* 95.

<sup>1</sup> *Phila. v. Seiple*, 31 *Supr. C.* 64.

and the writ will be quashed.<sup>2</sup> But that act was repealed by the act of 1901 and can only have application to claims filed prior to it.<sup>3</sup> If the writ is not issued within five years after filing the claim, the lien is wholly gone.<sup>4</sup> If defectively issued or served, and no alias is issued within the five years the same result follows.<sup>5</sup> But the amendment to section 10 of the act of 1901, *supra*, provides for suggestion and averment of nonpayment on the record, as a method of preserving the lien.

#### 24. Adding names to writ, etc.

Section 18 is amended by act of 1909, *supra*, to read as follows:

"The sheriff to whom the *scire facias* is given for service shall add to the writ, as parties defendant, all persons, other than those named therein, who may be found in possession of the property described or any part thereof, and in case no one is in possession, he shall post a true copy of the writ on the most public part of said property; and he shall add to the said writ the names of any persons, not already named therein, whom he may ascertain to have an interest in the property described or any part thereof; which writ shall then be further served as follows:

(a) By serving as in the case of a summons, such of those named in the writ, or added thereto, as may be found in the county in which the writ issued; and,

(b) Where the sheriff has information that those named in the writ, or added thereto, or any of them, may be found in any other county of this commonwealth, the said persons shall be served, as in case of a summons, by the sheriff of the county in which the said defendants or any of them may reside, he being deputized for that purpose by the sheriff of the county in which the writ issues; and

(c) In case any of those named in the writ, or added thereto, cannot be found, or their residences within this commonwealth are unknown, or in case they reside without the commonwealth, the said writ may be served by advertising a copy thereof, or a brief notice of the contents of the same, once a week for three successive weeks, in one newspaper of general circulation in the county, and in the legal periodical, if any, designated by the court for that purpose: *Provided*, however, that any defendant may accept service of said writ, in person or by counsel, with the same effect as if duly served therewith by the sheriff. Where the said writ, or the brief notice of the contents thereof, have been advertised as aforesaid, the same shall have the same effect as if the writ had been personally served; and all those named therein, as to whom publication has been made, shall file their affidavit of defense, as required by the said writ, within fifteen days after the date of the last weekly advertisement of the said writ. Service of any such writ may be made at any time within three months from the date on which it was issued, but it shall be served and returned at the earliest date possible, and the plaintiff may require its return at any time, whether or not it be actually served."

<sup>2</sup> Phila. v. Steward, 31 Supr. C. 72.

<sup>3</sup> Phila. v. Mason, 16 D. R. 753.

<sup>4</sup> Brennan v. Carlin Mfg. Co., 49 Pitts. L. J. 223.

<sup>5</sup> Phila. v. Cooper, 212 Pa. 306; Scranton v. Stokes, 28 Supr. C. 437.

### 25. Manner of service and return.

The return of service should show how the service was made; if not personally, it should show upon whom, by name, and why so served.<sup>6</sup> Under the act of June 10, 1881, P. L. 91, a return of *nihil habet* as to a registered owner is defective unless accompanied with an affidavit that he is a non-resident or could not be found, and that publication was duly made as required.<sup>7</sup> There can be no acceptance of service for a registered owner who is dead nor his administrator who is not concerned with the real estate, nor for "the estate," without naming and bringing in the heirs upon whom the estate devolved. The act of 1881, *supra*, must be followed.<sup>8</sup> But the variance it has been said may be waived.<sup>9</sup> The return may be amended so as to show inquiry of three persons of the neighborhood.<sup>10</sup>

### 26. Assessment of damages — Affidavit of defense — Replication.

"Section 19. If no affidavit of defense be filed within the time designated, judgment may be entered and damages assessed by the prothonotary by default, for want thereof. Such assessment shall include a five per cent. fee for collection to plaintiff's attorney, not exceeding, however, twenty dollars. If an affidavit of defense be filed, a rule may be taken for judgment for want of a sufficient affidavit of defense, or for so much of the claim as is insufficiently denied, with leave to proceed for the residue. The defendant may, by rule, require the plaintiff to reply, under oath or affirmation, to the statements set forth in the affidavit of defense, and after the replication has been filed, may move for judgment on the whole record."

It is a matter of defense that the registered owner is not made a party, to the *sci. fa.* to revive;<sup>10</sup> but a rule to strike off the judgment will be discharged where the registered owner had moved previously to open the judgment on the merits.<sup>11</sup> Judgment by default may be taken for want of an affidavit of defense, as in other actions.<sup>12</sup> An affidavit of defense will be adjudged sufficient<sup>13</sup> or insufficient,<sup>14</sup> in the same manner and according to the same rules as in other cases. The property owner may defend against failure to do the work according to contract or negligence in performing it, but cannot attack the improvidence of the letting of the contract itself.<sup>15</sup> He may, however, deny the existence of the ordi-

<sup>6</sup> Eppley v. Rhodes, 12 D. R. 741.

<sup>7</sup> Phila. v. Cooper, 212 Pa. 306, reversing 27 Supr. C. 552.

<sup>8</sup> Jones v. Beale, 217 Pa. 182; Phila. v. McMurray, 18 D. R. 91; Phila. v. Mason, 37 Supr. C. 478.

<sup>9</sup> Scranton v. Murray, 9 Lack. Jur. 251.

<sup>10</sup> Maloney v. Simpson, 226 Pa. 479.

<sup>11</sup> Phila. v. Adams, 18 Supr. C. 639.

<sup>12</sup> Phila. v. Adams, 15 Supr. C. 483.

<sup>13</sup> Meadville School Dist. v. Rieman, 31 C. C. 50.

<sup>14</sup> York v. Beitzel, 21 York, 100; 41 Supr. C. 194.

<sup>15</sup> Tarentum Boro' v. Moorhead, 26 Supr. C. 273; Phila. v. Coates, 18 Supr. C. 418.

<sup>16</sup> Phila. v. Pemberton, 208 Pa. 214; Jenkintown v. Kohler, 25 Montg. 56.

nance.<sup>15a</sup> Where a contract calls for the paving of a whole street, and a part is left unpaved, without any bad faith, an owner cannot set up this as a defense against the assessment.<sup>16</sup> In a defense against the use plaintiff the legal plaintiff fixes the status as a party, and the defendant cannot set up that the use plaintiff is a foreign corporation and has not complied with the law to give it a legal standing in court.<sup>17</sup> But defects in the work may be set up.<sup>18</sup> A life tenant is an owner and cannot defend against the *sci. fa.* on that ground.<sup>19</sup>

#### 27. Motion to open judgment.

On a motion to open a judgment on a *sci. fa.* the burden is on the defendant to make out a plain case for relief.<sup>20</sup>

A *terre-tenant* affected by the lien has the right to intervene and may have the judgment opened on showing a good defense.<sup>21</sup> Whether or not the defendant presents such a case as entitles him to equitable relief is within the sound discretion of the court.<sup>22</sup> If the judgment on the *sci. fa.* to revive be opened, the original judgment still stands<sup>23</sup> and it is doubtful whether the relief reaches back beyond that.<sup>24</sup> When the appellate court affirms an order opening the judgment it will not also order the striking off of the lien.<sup>24a</sup>

#### 28. Claim as evidence — Compulsory nonsuit — Verdict.

"Section 20. Tax claims shall be *prima facie* evidence of the facts averred therein in all cases; and the averments in both tax and municipal claims shall be conclusive evidence of the facts averred therein, except in the particulars in which those averments shall be specifically denied by the affidavit of defense, or any amendment thereof duly allowed. A compulsory nonsuit, upon trial, shall be equivalent to a verdict for the defendant, whether the plaintiff appeared or not. If plaintiff recovers a verdict, upon trial, in excess of the amount admitted by the defendant in his affidavit of defense or pleadings, he shall be entitled to an attorney's fee for collection equal to five per cent. of such excess, but not exceeding fifty dollars."

On the trial, if the *sci. fa.* cannot be found, it is too late when the case is closed, to raise the point that the writ is not in evidence, and to make objection as to its form or validity, owing to the confusion which has been naturally prevalent since the act of 1901, and its amendments.<sup>25</sup> The plaintiff, in chief, is not concerned with the item of defense as to an alleged failure of the city engineer

<sup>15a</sup> *Punxsutawney Boro' v. Carmalt*, 39 Supr. C. 650.

<sup>16</sup> *Wabash Ave.*, 26 Supr. C. 300.

<sup>17</sup> *Allentown v. Ackerman*, 37 Supr. C. 363.

<sup>18</sup> *Phila. v. Bilyeu*, 36 Supr. C. 562.

<sup>19</sup> *York v. Beitzel*, 21 York, 100; 41 Supr. C. 194.

<sup>20</sup> *Phila. v. Lukens*, 22 Supr. C. 298.

<sup>21</sup> *Olyphant Boro' v. Egreski*, 29 Supr. C. 116.

<sup>22</sup> *Phila. v. Unknown*, 20 Supr. C. 203; *Phila. v. Adams*, 15 Supr. C. 483; 18 Supr. C. 639; *Phila. v. Allen*, 20 Supr. C. 209.

<sup>23</sup> *Phila. v. Peyton*, 25 Supr. C. 350.

<sup>24</sup> *Phila. v. Lukens*, 22 Supr. C. 298.

<sup>24a</sup> *Phila. v. Mason*, 37 Supr. C. 478.

<sup>25</sup> *Scranton v. Koehler*, 36 Supr. C. 95.

to file a certificate of the time of completion and want of notice of the time and place of making the assessment.<sup>26</sup>

**29. Scire facias to revive.**

Section 21 provides the same form of *sci. fa.* to revive as is provided in section 40 of the Mechanic's Lien act of 1901, *supra*, *q. v.* but that has been changed as well as the form of *sci. fa. sur* municipal lien. See par. 22, *supra*.

**30. Service of sci. fa. to revive.**

"Section 22. Said writ of *scire facias* to revive shall be served, and the proceedings thereon shall be conducted, in the manner hereinbefore provided for the original *scire facias sur* claim, unless personal service was made upon all the defendants in the original proceeding; in which event, two returns of *nil habet* to the writs to revive shall be equivalent to personal service upon the defendants."

**31. Practice on revival.**

"Section 23. The practice and procedure following said *scire facias* to revive, so far as applicable, shall be the same as in the case of the original *scire facias* to collect the claim."

Against a *sci. fa.* to revive a *terre-tenant* need not be made a party, when the lien was a judgment against the registered owner at the time he acquired title.<sup>27</sup>

**32. Judgment de terris — Costs.**

"Section 24. All judgments for the plaintiff, whether on the original *scire facias* or on any *scire facias* to revive, shall be *de terris* only and shall be recovered out of the property bound by the lien, and not otherwise; but the costs whether as against the plaintiff, or the defendant actually defending against the claim, may be recovered by execution as in personal actions."

**33. Appointment of sequestrator — Habere facias possessionem.**

"Section 25. After the expiration of twenty days from the recovery of judgment, whether on the original *scire facias* or any *scire facias* to revive, except in cases where the property named is essential to the business of a quasi-public corporation, the court shall, upon the petition of the plaintiff, appoint a sequestrator of the rents, issues and profits of the property bound by the judgment, unless in the meantime an appeal be taken and approved security given to operate as a supersedeas. If the owners against whom the judgment is entered be in possession of the property sequestered, or the party in possession refuse to pay a fair rent, the court shall, upon petition filed and served, grant a rule, and, if it be made absolute, award a writ in the nature of a writ of *habere facias possessionem*, directed to the owner, commanding him to deliver such possession to the sequestrator within fifteen days thereafter,

<sup>26</sup> Allentown v. Ackerman, 37 Supr. C. 363.

<sup>27</sup> Phila. v. Nell, 31 Supr. C. 78.



unless such property be occupied by the owner and his family for a home, in which case he shall be entitled to retain possession for a period of three months from the time the petition was served upon him."

#### 34. Dockets for liens.

Section 26 as amended by act of April 3, 1903, P. L. 152:

"Every claim filed, *scire facias* issued, verdict recovered and judgment entered, in accordance with the provisions of this act, shall be docketed in appropriate dockets, and except as hereinafter provided, shall be entered on the judgment index of the court. When a claim is stricken off or satisfied, the name of a defendant stricken out, a *scire facias* discontinued or quashed, or a verdict or judgment stricken off or satisfied a note thereof shall be made on such docket or dockets."

Here follows the proviso noted, *supra*, par. 2.

The absurd requirement of section 26 of the act of 1901, that municipal and tax liens be entered in the Mechanics' Lien Docket led to some confusion<sup>27a</sup> but this was obviated by the amendment of April 3, 1903, P. L. 152, which provided that such liens be entered in appropriate dockets, and a municipal lien docket is now the appropriate docket for municipal liens and a tax lien docket for tax liens.<sup>27b</sup>

#### 35. Locality index — Searches — Fee.

"Section 27. It shall be the duty of the prothonotaries of the Courts of Common Pleas to keep a locality index, in which shall be entered all tax or municipal claims hereafter filed, and upon any written order therefor they shall give a certificate of search, showing all the claims filed against any property. For so doing they shall receive the sum of twenty-five cents, and five cents additional for each claim certified, and no more."

#### 36. Security for stay of proceedings.

"Section 28. At any time before the property is sold, approved security may be entered for a stay of proceedings until the expiration of one year after the date of filing the claim. The entry of such security by the owner, before the entry of judgment on the claim, shall be equivalent to an admission by him that the property is liable for the claim. After the stay has expired the claimant may proceed upon the claim and the bond given, separately or simultaneously."

#### 37. Form of *levari facias*.

The form of *levari facias* prescribed by section 29 is the same as for a mechanic's lien, section 44, *supra*, q. v. with this addition:

"Advertisement of such sale shall be made, and the deed to the purchaser shall be executed, acknowledged and delivered, as in other real estate sales by the sheriff."

<sup>27a</sup> *Erie v. Willis*, 26 Supr. C. 459.

<sup>27b</sup> *Hanover Boro' v. Delone*, 21 York, 180.

**38. Upset price of plaintiff.**

"Section 30. The plaintiff in any judgment recovered on a tax or municipal claim, may, upon paying the sheriff's costs, fix an upset price to be realized at any sale under such judgment, sufficient to pay his claim in full. No sale shall be made on a judgment recovered on a tax claim, except for a sum sufficient to pay all taxes in full, and the plaintiff in such judgment may purchase the property, at such sale for that sum, if no one bids a higher price."

**39. Judgment against quasi-public corporation.**

"Section 31. Where judgment is recovered upon any claim, the property named in which is essential to the business of a quasi-public corporation, the claimant shall have execution thereupon as in other cases of judgments against such corporations.

Upon the distribution of any fund realized by a sale of the franchises and the whole or any part of the assets of the corporation, the court shall determine the actual value of the property bound by the lien, and the claim shall be preferred with such other claims, to the extent of the value thus determined."<sup>270</sup>

**40. Judicial sales — Priority of liens — Practice.**

Section 32 of the act of 1901, *supra*, was amended by the act of May 28, 1907, P. L. 280, so as to read as follows:

The lien of a tax or municipal claim shall not be divested, by any judicial sale of the property liened, as respects so much thereof as the proceeds of such sale may be insufficient to discharge; nor shall a judicial sale of the property liened, under a judgment obtained on a tax or municipal claim discharge the lien of any other tax or municipal claim than that upon which such sale is had, except to the extent that the proceeds realized are sufficient for its payment after paying the costs and expenses of the sale and of the writ upon which it was made, and any other prior tax or municipal claims to which the fund may first be applicable.

On any such sale being made, all tax claims shall be paid out of the proceeds thereof first, the oldest tax having priority, and municipal claims shall be paid next, the oldest in point of lien having priority. Mortgages, ground rents and other charges on, or estates in the property, which were recorded or created where recording is not required, before any tax other than for the current year accrued, or before the actual doing of the work in front of or upon the particular property for which the municipal claim is filed, shall not be disturbed by such sale unless a prior lien is also discharged thereby: *Provided*, however, that upon petition of the plaintiff in any such tax or municipal claim, setting forth that more than five years have elapsed since the filing of his claim; that he has exposed the property to sheriff's sale thereunder and was unable to obtain a bid sufficient to pay his claim in full; and, if a municipal claimant, that he will bid sufficient to pay all tax claims in full; and upon the production of searches or a title insurance policy, showing the state of the record and the ownership of the property,

<sup>270</sup> A similar provision in the mechanic's lien law was declared unconstitutional. *Vulcanite Paving Co. v. Phila. R. T. Co.*, 220 Pa. 603.

and of all liens, claims, mortgages, ground-rents, or other charges on, or estates in the land, the court shall grant a rule upon all parties thus shown to be interested to appear and show cause why a decree should not be made, that said property be sold, freed and clear of their respective claims, liens, charges and estates. If upon hearing thereafter, the court is satisfied that personal service has been made of said rule upon the parties respondent, wherever found, and that the facts stated in the petition be true, it shall order and decree that said property be sold, freed and discharged of all tax and municipal claims, at a minimum bid sufficient to pay all tax claims in full, return thereof to be made to the court. And if, upon such return, it further appears that no sale was made, because no one was willing to bid a sum sufficient to pay the petitioner's claim in full, it shall further decree that said property be sold, clear of all such claims, liens, charges and estates, at a minimum bid sufficient to pay all tax claims in full. If at the last named sale no other person is willing to bid a sum sufficient to pay all tax claims in full, the property shall be knocked down to and title made to the treasurer of said county, for the benefit of the various tax claimants, in the order of priority hereinbefore set forth; and after the time for redemption has expired said property may, under direction of said claimants or by decree of the proper court, be sold either at public or private sale, freed and discharged of all claims, and the proceeds realized therefrom distributed in accordance with the priority of said claims: *Provided*, further, that any person interested may, at any time before the sale, pay the petitioner the whole of his claim, with interest and costs, whereupon the proceedings on said petition shall at once determine."

For the purpose of enabling the petitioner in any such proceeding to give the notice required, he may take the testimony of the defendant in the claim, or of any other person who he may have reason to believe has knowledge of the whereabouts of any of the parties respondent, either by deposition, commission or letters rogatory."

This section does not apply to other sales than on tax or municipal liens, as to discharge. Prior to act of May 28, 1907, P. L. 280, there was no law preserving municipal liens when the land was sold under a mortgage.<sup>28</sup>

Without service of a *sci. fa.* there can be no judgment and the title of a purchaser may be attacked on this ground, in ejectment.<sup>29</sup> For defects amounting to want of jurisdiction on the face of the record, a purchaser's title may be avoided,<sup>30</sup> and no question of collateral attack arises.<sup>31</sup> The want of notice to do the work and of service as in case of lien for a sidewalk, are jurisdictional defects of which the purchaser is himself bound to inquire and take notice.<sup>32</sup>

<sup>28</sup> *Bellevue Boro' v. Umstead*, 38 Supr. C. 116.

<sup>29</sup> *Eppley v. Rhodes*, 12 D. R. 741.

<sup>30</sup> *Jones v. Beale*, 217 Pa. 182.

<sup>31</sup> *Alles v. Lyon*, 216 Pa. 604.

<sup>32</sup> *Meanor v. Goldsmith*, 216 Pa. 489; *Kimmig v. Morris*, 23 Montg. Co. 179. (See *Lorch's Est.*, 55 Pitts. L. J. 145.)

**41. Redemption of property within a year — Practice and priority.**

"Section 33. The owner of any property sold under a tax or municipal claim, or his assignees, or any party whose lien or estate has been discharged thereby, may redeem the same at any time within one year from the date of the acknowledgment of the sheriff's deed therefor, upon payment of the amount bid at such sale; the cost of drawing, acknowledging and recording the sheriff's deed; the amount of all taxes and municipal claims, whether or not entered as liens, if actually paid; the principal and interest of estates and encumbrances, not discharged by the sale and actually paid; the insurance upon the property, and other charges and necessary expenses on the property, actually paid, less rents or other income therefrom, and a sum equal to interest at the rate of ten per centum per annum thereon, from the time of such payments. If both owner and creditor desire to redeem, the owner shall have the right so to do only in case he pays the creditors claim in full.

If more than one creditor desires to redeem, the one who was lowest in lien at the time of sale shall have the prior right, upon payment in full of the claim of the one higher in lien. Within the year, one who was lower in lien may redeem for one higher in lien who has already redeemed, and the owner may redeem from him; and so on throughout, in each case by paying the claim of the one whose right was higher; and one higher in lien may redeem from one lower in lien unless his claim is paid; but in each case the right must be exercised within the year. Any person entitled to redeem may present his petition to the proper court, setting forth the facts, and his readiness to pay the redemption money; whereupon the court shall grant a rule to show cause why the purchaser should not reconvey to him the premises sold; and if, upon hearing, the court shall be satisfied of the facts, it shall make the rule absolute, and upon payment being made or tendered, shall enforce it by attachment."

This section is constitutional.<sup>33</sup> The owner need not tender the money on filing his petition, since it remains for the court to fix the amount, if a reconveyance is ordered.<sup>34</sup> The right to redeem land sold for taxes under act of April 19, 1883, P. L. 9, is not a mere personal privilege but an interest in the land and passes to a trustee of a dissolved corporation.<sup>35</sup>

**42. Assignment of claim or judgment.**

"Section 34. Any claim filed or to be filed, under the provisions of this act, and any judgment recovered thereon, may be assigned or transferred to a third party, either absolutely or as collateral security and such assignee shall have all the rights of the original holder thereof. Where the claim has been paid in full by one of several defendants therein, whether originally named as such or allowed to intervene and defend, it shall be satisfied of record as to him, and marked to his use as against the other defendants, *pro*

<sup>33</sup> *Pittsburg v. Kennedy*, 12 D. R. 247.

<sup>34</sup> *Hicks v. Griswold*, 2 Lack. L. N. 129.

<sup>35</sup> *Phila. v. Unknown*, 30 Supr. C. 516.

*rata*, according to their respective interests in the property bound by the claim."

#### 43. Amendments — Enlargement of time — Practice.

Section 35 of this act is in the same words as section 51 of the mechanic's lien act, *supra*, *q. v.*, except the amendment as to parties. Also section 36 in regard to practice is the same as section 52, *supra*, mechanic's liens. Also section 37, providing for service of notices, etc., is the same as section 53, *supra*.

The court may amend the record by adding the names of other owners,<sup>36</sup> but not the registered owner, when notice of intention to file is necessary and no notice was served upon him.<sup>37</sup> Saving intervening rights, amendments are permitted, but not as to the kind and character of work, after the time for filing has expired,<sup>38</sup> or to substitute a different property after such time.<sup>39</sup>

#### 44. Security.

Section 38, providing for the manner of taking security is the same as section 50 of the mechanic's lien law, *supra*.

#### 45. Use plaintiff — Satisfaction.

"Section 39. In cases where there is a use-plaintiff, if the claim shall be paid, or otherwise satisfied or discharged, at any time before or after filing, it shall be the duty of the use-plaintiff or his legal representatives, at the request of the owner or of any other person interested, by a statement in writing showing how the claim was paid, satisfied or discharged, and on the payment of costs, if any be due, to enter satisfaction on the record of such claim. In such cases, a refusal to satisfy the claim for a period of sixty days after notice so to do, served upon the use-plaintiff or his agent or attorney, shall subject such use-plaintiff to a suit, as for penalty, at the hands of the party aggrieved, in such sum as the jury shall determine to be just, but not exceeding the amount of the claim."

#### 46. Appeals.

"Section 40. From any definitive judgment, order or decree, entered by the Court of Common Pleas under any of the provisions of this act, or from the refusal to open a judgment entered by default, an appeal may be taken by the party aggrieved to the Supreme or Superior Court, as in other cases."

The refusal to give judgment on the whole record when an affidavit of defense and replication have been filed is not a "definitive judgment, order or decree," from which an appeal lies.<sup>40</sup>

#### 47. Borough liens for paving, curbing, etc.

Section 1 of the act of May 3, 1909, P. L. 383, provides:

"That whenever, heretofore, the council of any incorporated bor-

<sup>36</sup> Phila. v. Kehoe, 22 Supr. C. 320.

<sup>37</sup> Phila. v. Greenburg, 16 D. R. 51.

<sup>38</sup> Freeport Boro' v. Miller, 34 Supr. C. 395; Meadville v. Mahoney, 13 D. R. 472.

<sup>39</sup> Carbondale v. Campbell, 7 Lack. Jur. 339.

<sup>40</sup> Phila. v. Pemberton, 206 Pa. 73.

ough of this state has required by ordinance, and caused to be paved, curbed or macadamized, with brick, stone or other suitable material, any public street or thoroughfare, or part thereof, or is now causing such paving, curbing or macadamizing, pursuant to such ordinance, but owing to some defect in the petition or other proceeding necessary under existing law to give jurisdiction to such council, or for any other reason, the cost of such improvement or a portion thereof cannot be legally assessed upon the property bounding or abutting upon the street or part thereof improved, as was contemplated by the act or acts of the general assembly under which the improvement was attempted to be made—now, by this act, such improvements are made valid and binding; and the council of such incorporated borough may cause the property bounding or abutting upon the street or part thereof upon which the improvement has been made, or is now being made, to be assessed with such a portion of the cost of such improvement as is contemplated by the law under which the improvement was made, or is now being made; such assessment shall be a lien upon the property assessed. The lien shall date from the completion of the improvement for which the assessment is made, and shall remain a lien until fully paid and satisfied: *Provided*, That a writ of *scire facias* is issued to revive the same during every period of five years after the lien is filed, as hereinafter provided.”

**48. Filing of lien — Requisites, etc.**

“Section 2. The council of any incorporated borough of this state, entitled to a lien under this act, shall file a lien therefor in the office of the prothonotary of the county within which the property lies, within six months after the completion of the work where the improvement is now in progress, or within six months after the approval of this act where the improvement is now completed, and the same shall be entered upon record as other municipal claims. Such lien shall state the name of the party claimant, which shall be the corporate name of the borough making the improvement; the name of the owner or reputed owner of the property assessed, a reasonable description of the property assessed; the amount or sum claimed to be due, which shall include interest on the assessment from the completion of the improvement; for what improvement the claim is made, the date of its completion, the date of the assessment for which the lien is filed. Such lien, when so filed, shall be *prima facie* evidence of all the matters therein set forth, and of the right of the borough to recover the amount therein claimed to be due, together with interest from the date of filing the lien, costs, and an attorney’s commission of five per centum for collecting.”

**49. Writ of scire facias — Service — Publication.**

“Section 3. The lien, when so filed, shall be proceeded upon for collection by writ of *scire facias*. The said writ shall be made returnable to the monthly or other return day in the respective courts; and shall be served upon the owner or reputed owner personally or by leaving a copy thereof, duly attested, with an adult member of his family, or of the family in which he resides, at least ten days before the return day thereof. If the owner of the property cannot be found, or has no residence within the county in which the prop-

erty lies, the sheriff shall thereupon return the said writ *nihil*; and thereupon, an alias *scire facias* may issue which shall be served by notice posted upon the premises, stating the substance of the writ, at least ten days prior to the return day and also by advertisement in at least two newspapers published in the county in which the premises are located, once a week for three successive weeks. Such posting and publication shall be equivalent to a service."

#### 50. Judgment.

"Section 4. If the writ shall have been served, and no appearance entered on or before the return day thereof, the plaintiff therein shall be entitled to judgment, after the return day thereof, for the debt, interest, costs and attorney's commission. If an appearance be entered, the plaintiff shall also be entitled to judgment, unless a sufficient affidavit of defense be filed within fifteen days after the return day. If such affidavit be filed the cause shall be proceeded with, in accordance with the rules of law and the practice of the courts."

#### 51. *Levari facias* — Distribution.

"Section 5. When final judgment shall have been entered upon such lien, the plaintiff therein may have a writ of *levari facias*; and upon the same the sheriff shall cause the said property to be advertised for sale, in at least two newspapers of the proper county, once a week for three weeks, before the day of sale; and shall also give notice, by at least ten hand-bills posted in conspicuous places, one of which shall be posted upon the property, of the time and place of sale; and thereupon shall proceed to sell the same. The place of sale shall be the sheriff's office. The proceeds of sale shall be distributed according to law."

#### 52. "Owner or reputed owner" defined — Opening judgment.

"Section 6. The term 'owner or reputed owner,' as used in this act shall mean any person or persons in open, peaceable and notorious possession of property. Remaindermen, or other persons interested in expectancy, not having been heard, and aggrieved by such final judgment, upon petition presented in the proper court, may have the judgment opened, at any time before the sale of the property, and they allowed to defend, when, in the judgment of the court, such opening is necessary to secure justice to all parties. Sale of the property shall preclude all persons from setting up anything contrary to the record."

#### 53. Appeals.

"Section 7. Nothing in this act shall be taken to restrict the right of either plaintiff or defendant, in proceeding under it, to appeal as in other cases."

#### 54. Petition of owner to compel proceedings.

"Section 8. Any person owning property against which a lien is filed under this act, may, at any time, present a petition to the proper court, praying that the claimant in such lien be compelled to proceed for the collection thereof; and thereupon the court shall make such order as the justice of the case may require."

## CHAPTER XLVIII.

### SCIRE FACIAS SUR RECOGNIZANCES.

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36. *Sci. fa. sur* recognizance in Orphans' Court — jurisdiction and parties.
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38. Judgment and satisfaction.
39. Certificate by prothonotary.

#### 1. Nature of recognizance.

A recognizance may be to appear or to do a thing required by statute to be done. A recognizance can only be taken by a judge, magistrate or other officer authorized to take it and when taken in open court need not be signed by the recognizor, the prothonotary or clerk making a brief memorandum upon the record, upon which an action may be maintained when forfeiture is duly declared provided it shows the amount and condition and that the party was bound to the commonwealth.<sup>1</sup>

#### 2. Form of, to appear.

The usual form of entry of a recognizance to appear is as follows:  
Now, June 27, 1909, Max Orell is held in five hundred dollars (\$500), to appear at the next — of the court of — to be holden at — in the county of — on — the — day of — 1909, to answer a charge of — to abide the judgment of said court and not to depart the same without license." If the recognizance binds

<sup>1</sup> Comth. v. Emery, 2 Binney, 431; Pierson v. Comth., 3 Grant, 314.



one to do an impossible thing, as to appear at a court, when there is none, it is void.<sup>2</sup>

### 3. Recognizance for good behavior.

A recognizance for good behavior is a different thing from a recognizance in surety of the peace which is taken for an appearance at the next sessions and to keep the peace meanwhile. The origin of surety for good behavior towards the king and all his subjects and particularly the person complaining is found in an order of the King's Council of Henry III, and has come down to this day where the Common Law is in force. Under the statute of 34th Edward III, it is demandable out of court by justices of the peace "of all those that are not of good fame, etc."<sup>3</sup> The chief justice and the justices of the Supreme Court of Pennsylvania are justices of the peace *ex-officio* and have a power to take recognizance of good behavior and such recognizance taken towards the commonwealth and all the liege people is good. Under our constitution, following the power of the King's Bench, the judges are conservators of the peace and may not only bind persons to good behavior as part of a sentence after conviction, but also prior to conviction.<sup>4</sup> Some of the matters for which surety for good behavior may be taken are scandal and acts against good morals, threats to injure one in his person, his house, his family, his lands, goods or animals. The English form was "sufficient surety and mainprize of their good behavior towards the king and his people."<sup>5</sup> Here the following form is a sufficient compliance: "Towards the commonwealth of Pennsylvania and all the liege people thereof."<sup>6</sup> Even after acquittal of a prisoner the judge presiding may order surety for good behavior in such sum and for such time as the public safety may seem to require.<sup>7</sup>

### 4. Recognizance in Orphans' Court.

A recognizance in the Orphans' Court is a lien on the lands taken at the appraisalment from its date and in a *scire facias* upon it no declaration need be filed.<sup>8</sup> But the proceedings to enforce it are taken in the Common Pleas by anomaly, because the form of action is "debt," now *assumpsit*.<sup>9</sup>

### 5. Sci. fa. sur recognizance of bail on capias.

Although sureties are not necessary to a recognizance, it is customary and the law requires in certain cases that surety be given commonly called "bail." In the case of special bail, as under a *capias*, where still issuable, since the act of 1842, which is fully

<sup>2</sup> Comth. v. Bolton, 1 S. & R. 327.

<sup>3</sup> Note by Tilghman, C. J., to Comth. v. Davies, 1 Binney, 98.

<sup>4</sup> Respublica v. Cobbett, 3 Yeates, 93, act of May 22, 1722. The recognizance in this case was taken by Chief Justice McKean, and sustained.

<sup>5</sup> 4 Burns' Justice, 270.

<sup>6</sup> Respublica v. Cobbett, 3 Yeates, 93.

<sup>7</sup> Respublica v. Donagan, 2 Yeates, 437.

<sup>8</sup> Kean v. Franklin, 5 S. & R. 147.

<sup>9</sup> Allen v. Reasor, 16 S. & R. 14.

treated in Vol. I, p. 407, suit may be brought on the bail bond. If the bail is taken by the prothonotary a minute of it is taken which is reduced to form later.<sup>10</sup> It must, however, be taken for a sum certain indicating the condition<sup>11</sup> and be of record, taken and acknowledged by an officer having authority to take it, as a judge, justice, prothonotary or clerk of court.<sup>12</sup>

6. Form on *capias*.

A sufficient form is like the following:<sup>13</sup>

John Moore	}	Court of Common Pleas of Cumberland County.
v.		No. 28, August Term, 1824.
James A. Mitchell.		<i>Capias</i> , etc. Bail \$200.

Robert McBride held in \$200 *cogn. coram* Edward Leonard for John P. Helfenstein, prothonotary, 5th May, 1824. C. C. and special bail entered. (Sh'ff. \$2.12.)

7. *Præcipe*.

The writ is sued out on *præcipe* which may be as follows:

Lee Hanna	}	In the Court of Common Pleas of Lackawanna
v.		County.
John Stone and		No. —, — Term, 1910.
Ben Gill.		

Issue *sci. fa. sur* recognizance to No. — — Term, 1909, *prout patet per recordum*, returnable next return day.

C. A. Van Wormer,  
Plaintiff's attorney,  
June 21, 1910.

To W. M. Bunnell, Esq., Prothonotary.

8. Form of writ.

Sullivan County, ss.

The Commonwealth of Pennsylvania.

To the Sheriff of said county, Greeting:

*Whereas*, On the — day of —, A. D. 19—, before — —, Esq., Prothonotary of said county, Logan Grim, of said county, came in his proper person and acknowledged himself to be indebted to the Commonwealth of Pennsylvania in the sum of — dollars lawful money, which said sum for himself and his heirs he willed and granted to be made of his goods and chattels, lands and tenements and to be levied to the use and behoof of the said Commonwealth of Pennsylvania, upon this condition:

*That whereas*, One Gross Votz was arrested under a *capias ad respondendum* duly issued out of the Court of Common Pleas of said county at the suit of Evelyn Jones to No. —, — Term, 19—, upon a charge of breach of promise of marriage and therefore was required and did give bail in the sum of one thousand dollars to appear at the next ensuing term of said court to be holden at the

<sup>10</sup> Moore v. McBride, 1 P. & W. 148. (See English forms in this case.)

<sup>11</sup> Fletcher v. Ticknor, 1 Phila. 527; Williamson v. Mitchell, 1 P. & W. 9.

<sup>12</sup> Nice v. Bowman, 6 Watts, 26; Ayres v. Sweigart, 6 Watts, 191.

<sup>13</sup> Moore v. McBride, *supra*, in which find the practice in the King's Bench and C. of C. P.

county seat of said county on the — day of —, A. D. 19—, and make defense to said charge and abide the decision and judgment of said court, in which recognizance the said Logan Grim was surety,

*And whereas,* The said Gross Votz then and there made default and did not appear, but on the contrary absconded and his said recognizance became wholly forfeited, and the said Logan Grim, surety as foresaid, became liable to the Commonwealth of Pennsylvania in the sum of one thousand dollars; and because we are willing that those things which in our said court are rightly done, should be demanded by due execution;—

*We command you, etc.*

[See form of *sci. fa. sur* recognizance, *infra*, par. 23.]

The writ is served in the same manner as a summons.

### 9. Pleadings.

To the *sci. fa.* bail may plead *nul tiel record* which puts in issue the record only. If he wishes to plead a variance between the writ and the original record, he should plead with notice of special matter.<sup>14</sup> He may also plead payment, release or surrender of the principal;<sup>15</sup> or discharge by a court of competent authority although the reasons be erroneous.<sup>16</sup> But the record itself cannot be impeached.<sup>17</sup> If the judgment against the principal be reversed it may be pleaded in bar.<sup>18</sup>

The fact that no *ca. sa.* was issued against the principal must be pleaded, or no evidence can be admitted on this point.<sup>19</sup> *Nul tiel record* applies to a record that is void,<sup>20</sup> but mere irregularities cannot be taken advantage of by pleading.<sup>21</sup> The death or surrender of the principal before the return of *ca. sa.* may be pleaded in discharge,<sup>22</sup> but not after the bail has become fixed.<sup>23</sup> Death before the forfeiture of the recognizance must be pleaded.<sup>24</sup> But death before the writ issued or after the return of the *ca. sa.* is not a good plea.<sup>25</sup>

Where the death of the principal before the return of the *ca. sa.* is pleaded, the replication must set forth the writ and aver that plaintiff was alive on its return and conclude with a verification.

### 10. Judgment.

The plaintiff recovers no damages in this form and the judgment will be for the amount of the original judgment,<sup>26</sup> and that the

<sup>14</sup> *Cooper v. Gray*, 10 Watts, 440.

<sup>15</sup> 2 Saunders on Pleading, 72 t.

<sup>16</sup> *Lopeman v. Henderson*, 4 Pa. 231.

<sup>17</sup> *Green v. Ovington*, 16 Johnson (N. Y.), 55.

<sup>18</sup> *Short v. Hooker*, 40 Howard's Pr. 420.

<sup>19</sup> *Brotherline v. Mallory*, 8 Watts, 132.

<sup>20</sup> *Cholmley v. Veal*, 6 Modern, 304.

<sup>21</sup> *Gillespie v. White*, 16 Johnson, 117.

<sup>22</sup> 2 Saunders on Pleading, 72 t.

<sup>23</sup> *Gauntley v. Wheeler*, 4 Lansing (N. Y.), 491.

<sup>24</sup> *State v. Crane*, 2 Harrison (N. J.), 191.

<sup>25</sup> *Weddall v. Manu captors of Jocar*s, 10 Modern, 267; *Glyn v. Yates*, 1 Strange, 511.

<sup>26</sup> *Knox v. Costello*, 3 Burrows, 1791.

plaintiff have execution against the bail for said amount,<sup>27</sup> and costs of suit under statute of 8 and 9 William III, section 3, ch. 11.<sup>28</sup> The bail is liable only as upon a contract and is therefore entitled to exemptions and stay of execution.<sup>29</sup>

#### 11. *Sci. fa. sur recognizance* for appeal from a magistrate.

The form and nature of bail for appeal before a justice have been discussed in Vol. I, p. 235, also 210. As seen, *supra*, if the record is in the Common Pleas when the right of action accrues the *sci. fa.* will issue out of the Common Pleas; but if the record is before the justice the writ issues from his office and upon his docket.<sup>30</sup>

Where an appeal has been taken by a defendant and on motion of the plaintiff and rule the appeal is dismissed, for failure to pay the costs before the justice, the bail is liable, especially where such appeal superseded an execution and operated to defeat the plaintiff's claim against the defendant.<sup>31</sup>

The form of the recognizance need not be in the very words of the statute,<sup>32</sup> a substantial compliance being all that is requisite,<sup>33</sup> although stated briefly,<sup>34</sup> when the condition specifies the measure of liability.<sup>35</sup> But it must show on its face for what purpose it is given, as whether for an appeal or a stay of execution.<sup>36</sup>

#### 12. The writ from the magistrate.

If an appeal be dismissed for any reason the record remains before the magistrate and he will issue the *sci. fa.* thereon.<sup>37</sup> This writ will recite the action in which the recognizance was taken and the magistrate's authority to take it<sup>38</sup> and the right of the plaintiff to have execution.<sup>39</sup> The service will be the same as in case of a summons;<sup>40</sup> also the further proceedings upon it,<sup>41</sup> no formal pleadings being required before a justice of the peace.

#### 13. Form of writ.

The form of the writ is similar to that in the Common Pleas, *supra*, par. 8, referring to the title and number of the suit and

<sup>27</sup> Anon, 2 Haywood (N. C.), 378.

<sup>28</sup> Constable v. Colden, 2 Johnson, 480.

<sup>29</sup> Wolfe v. Nesbit, 4 W. & S. 313. This only applies in a civil suit. On a recognizance in the criminal courts the act of 1849 does not apply. (Comth. v. Savage, 30 Supr. C. 346.)

<sup>30</sup> Troubat & Haly's Pr., section 1918, note; Smith v. Wilds, 2 Browne, 190.

<sup>31</sup> Winchester v. Rich, 40 Supr. C. 46.

<sup>32</sup> Witman v. Ely, 4 S. & R. 260.

<sup>33</sup> Seidenstriker v. Buffum, 14 Pa. 158.

<sup>34</sup> Murray v. Hazlett, 19 Pa. 356; Ross v. Dysart, 24 Pa. 395; Rhey v. Baird, 51 Pa. 85.

<sup>35</sup> Hardy v. Watts, 22 Pa. 33; Harney v. Beach, 38 Pa. 500.

<sup>36</sup> Meeker v. Brackney, 35 Pa. 276.

<sup>37</sup> Mair's Est., 34 Leg. Int. 20.

<sup>38</sup> Barr v. Hall, 3 Watts, 298.

<sup>39</sup> Williamson v. Mitchell, 1 P. & W. 9.

<sup>40</sup> Buchanan v. Specht, 1 Phila. 252.

<sup>41</sup> Section 33, act of June 13, 1836, P. L. 578.

the date as upon the docket of the justice or other magistrate, and showing that it has become forfeited.

#### 14. Pleadings in the Common Pleas.

The usual pleas in case the *sci. fa.* issues out of the Common Pleas are *nul tiel record* or payment with notice of special matter. The courts will however not expect too much precision from the magistrates and look rather to substance than to form.<sup>42</sup> But there must have at least been a record and a recognizance taken before the magistrate<sup>43</sup> and no reference will be made to the docket—but the transcript and recognizance on file in the Common Pleas will alone be inspected.<sup>44</sup> If other plaintiffs are added after appeal and the suit is against them as well, the variance has been held to be fatal.<sup>45</sup>

The question will be tried by the record and not by a jury.<sup>46</sup> Under the plea of payment advantage cannot be taken of any want of form or substance of the recognizance.<sup>47</sup> The recognizance in certiorari to a magistrate also remains in the Common Pleas, which is authorized to enter final judgment, and the like proceedings will be had in such case and process issue upon the judgment.<sup>48</sup> If the writ be *non-prossed*, however, the case would be different, as the record is then remitted;<sup>49</sup> or where the writ is quashed for want of security under the Philadelphia landlord and tenant act of March 24, 1865, P. L. 750.<sup>50</sup>

The defendant cannot question the validity of his recognizance when he has had the benefit of it, by offering evidence he offered on the plea of *nul tiel record*.<sup>51</sup>

#### 15. *Sci. fa.* on bail in error.

In the case of bail in error the *sci. fa.* issues upon the recognizance and the judgment in the Common Pleas as one record and must also state that the judgment was affirmed in order to fix the liability of the bail.<sup>52</sup> It must be sued upon in the Common Pleas although the recognizance was entered in the appellate court.<sup>53</sup>

Under section 7 of the act of 1836 a *non pros.* for failure of the bail to justify did not fix their liability.<sup>54</sup> But a *non pros.* by agreement without fraud or collusion fixes the liability, but fraud and collusion must be specially pleaded.<sup>55</sup> Generally the liability is

<sup>42</sup> Ingham v. Tracy, 5 Watts, 333.

<sup>43</sup> Kirk v. Aechternacht, 1 Phila. 426.

<sup>44</sup> Bell v. Murphy, 6 W. & S. 50.

<sup>45</sup> Fullerton v. Campbell, 25 Pa. 345.

<sup>46</sup> Oliver v. Foster, 3 Clark, 388.

<sup>47</sup> Abbott v. Lyon, 4 W. & S. 38.

<sup>48</sup> Robbins v. Whitman, 1 Dallas, 410; Essler v. Johnson, 25 Pa. 350.

<sup>49</sup> Welker v. Welker, 3 P. & W. 21.

<sup>50</sup> Hutchinson v. Van Scriver, 6 Phila. 39. (See also Clapp v. Sennoff, 7 Phila. 214.)

<sup>51</sup> Patton v. Miller, 13 S. & R. 254.

<sup>52</sup> Tidde's Pr. 1012; Saunder's Pleading, 72 b.

<sup>53</sup> Smith v. Ramsay, 6 S. & R. 573.

<sup>54</sup> Tilden v. Worrell, 30 Pa. 272.

<sup>55</sup> Share v. Hunt, 9 S. & R. 404.

fixed by discontinuance, *non pros.* or affirmance, and it is not necessary to issue an execution before proceeding against the bail.<sup>56</sup>

#### 16. Sci. fa. on bail for stay.

At the *cesset* of the time for which stay of execution was had, the plaintiff may pursue either principal or sureties or both, but he can have but one satisfaction.<sup>57</sup> He may have his action at law on the bond or proceed by *sci. fa.* against the surety; but he must recite the record accurately or it will be bad on plea of *nul tiel record*.<sup>1</sup> Security entered after the time required to enter it, may be treated as a nullity—but if the plaintiff pursues the recognizance, he waives the irregularity,<sup>2</sup> for such it is, only, and the plaintiff is benefited by it, although he issues an execution, which is irregular, but not void as to subsequent executions. Only the defendant can take advantage of the irregularity.<sup>3</sup> Premature issue of the writ must be pleaded under notice of special matter;<sup>4</sup> but advantage can now be taken by affidavit of defense to such matters.

An affidavit of defense is sufficient which avers a levy and satisfaction of debt, interest and costs, in the original judgment.<sup>5</sup> The surety is not in a position to object to the manner of taking the recognizance before the justice of the peace or to contradict it,<sup>6</sup> nor can he claim discharge because of reasonable indulgence by the plaintiff to the principal without consideration which is *nudum pactum*;<sup>7</sup> or stay before levy, on order of the plaintiff's attorney;<sup>8</sup> nor attachment of the judgment in the hands of the principal, on the ground that it was void.<sup>9</sup>

The *sci. fa.* is an action which may be arbitrated under the compulsory law<sup>10</sup> and is tried as any other action, but the surety may not have a stay of execution against the judgment obtained in it.<sup>11</sup> On the trial evidence will not be heard of counter-security by the bail from the defendant in the judgment.<sup>12</sup>

<sup>56</sup> Smith v. Ramsay, 6 S. & R. 573.

<sup>57</sup> Patterson v. Swan, 9 S. & R. 16. The doctrine of election holds only where the remedies are inconsistent with each other, not where they are concurrent. (S. C.)

<sup>1</sup> Kirk v. Aechternacht, 1 Phila. 426.

<sup>2</sup> Roup v. Waldhouer, 12 S. & R. 24.

<sup>3</sup> Milliken v. Brown, 10 S. & R. 188; Stewart v. Stocker, 13 S. & R. 199; Wilkinson's Ap., 65 Pa. 189.

<sup>4</sup> Cooper v. Gray, 10 Watts, 440. (As to the defendant the maxim: "*Consensus tollit errorum*" controls. Wilkinson's Ap., *supra*. Issue of *fi. fa.*, during stay makes the plaintiff and prothonotary each liable in trespass. Milliken v. Brown, *supra*.)

<sup>5</sup> Christy v. Bohlen, 5 Pa. 38.

<sup>6</sup> Clark v. McCamman, 7 W. & S. 469; Withers v. Livezey, 1 W. & S. 433.

<sup>7</sup> Todd v. Blair, cited in United States v. Simpson, 3 P. & W. 440.

<sup>8</sup> Morrison v. Hartman, 14 Pa. 55.

<sup>9</sup> Calhoun v. Logan, 22 Pa. 46.

<sup>10</sup> Pettit v. Wingate, 25 Pa. 74.

<sup>11</sup> Edwards v. Hocker, 1 Phila. 92; section 28, act April 25, 1850, P. L. 574.

<sup>12</sup> Withers v. Livezey, 1 W. & S. 433.

### 17. Sci. fa. sur recognizance in criminal cases.

It is unnecessary to discuss here when and how a prisoner may be discharged on bail in a criminal case, as that is a part of criminal procedure, and this work is not concerned with it, except so far as proceedings upon the recognizance are required.<sup>13</sup> It may be inquired briefly what is a recognizance. It has been held it need not be in writing, nor need the recognizors sign the record.<sup>14</sup>

The surety is not released from the fact that the principal did not sign the recognizance,<sup>14a</sup> nor because it mentions the "present term" instead of next term.<sup>14b</sup>

A married woman cannot give a recognizance for her husband.<sup>14c</sup>

But in Philadelphia, by act of March 30, 1821, 7 Sm. L. 426, the magistrate shall set down accurately in a docket for that purpose the name, place of abode, describing it particularly, and the occupation or business of the recognizor or surety; and if such recognizor or surety shall not be a house-holder, the name and place of abode, and the occupation or business of the person with whom such recognizor or surety may reside; and to make a full return thereof to the proper court. This would be good practice generally. The usual manner of taking a recognizance of bail is this: The defendant produces his bail and the recognizance is stated orally to the recognizors by the magistrate.

### 18. Form of recognizance.

Following is an approved form.

"You, Lee Hanna, principal, and you, Vinton Vare and Jose House, sureties, and each of you acknowledge yourselves to be indebted to the commonwealth of Pennsylvania in the sum of one hundred dollars, severally, to be levied of your several and respective goods and chattels, lands and tenements, to the use of the commonwealth; upon this condition that if the said Lee Hanna shall appear personally at the next court of — —, to be held at Lock Haven for the county of Clinton, then and there to answer such matters and things as shall be objected to him, on behalf of the commonwealth, for an assault and battery, etc. [or whatever charge is alleged] on John T. Reed, and not to depart said court without leave, then this recognizance to be void, otherwise to be in full force and virtue. Are you content?"

If it is also a recognizance to keep the peace the following is inserted after the charge:

"And shall, in the meantime, keep the peace and be of good behaviour, towards all the citizens of the commonwealth, and, especially, towards John T. Reed, etc."

If it is a recognizance to appear as a witness the condition is as follows:

"Then and there to testify on behalf of the commonwealth, against a certain Lee Hanna, etc."

<sup>13</sup> See Sadler on Criminal Procedure in Pennsylvania, p. 188, *et seq.*

<sup>14</sup> Comth. v. McHenry, 13 Phila. 451.

<sup>14a</sup> Comth. v. Lamar, 32 Supr. C. 200.

<sup>14b</sup> Comth. v. Lumadne, 15 D. R. 707.

<sup>14c</sup> Comth. v. Matyiewicz, 17 C. C. 154.

Whether it be taken at length as above or only briefly noted, it is a matter of record and need not be signed though it is customary to add: "taken and acknowledged before me this \_\_\_\_ day of \_\_\_\_, A. D. \_\_\_\_  
\_\_\_\_\_, Justice of the Peace.  
[Seal.]

immediately after the signatures.

#### 19. Bail — Where it may be taken.

Bail in a criminal matter may be taken in every case except where the prisoner is charged with murder in the first degree, the penalty whereof is death.<sup>1</sup> In the course of a preliminary hearing, when it is necessary to adjourn, the magistrate may require bail for an appearance at each adjournment;<sup>2</sup> or having committed the defendant may subsequently take a recognizance for his appearance and release him to bail.<sup>3</sup> If the defendant is arrested in another county he has the right to enter recognizance before the nearest justice of the peace to appear at the next sessions of the court in the county where the offense is triable, but the Court of Quarter Sessions of that county cannot commit him in default.<sup>4</sup>

Prior to act of March 18, 1909, P. L. 42, justices took bail in surety of the peace cases to the next sessions and not longer,<sup>5</sup> but this act confers power on them to hear and dispose of the cause and either bind over to the next sessions or dismiss and impose the costs, summarily and without the right of appeal. The provision allowing them to impose the costs upon an innocent party and commit him in default, is clearly unconstitutional. A justice of the peace, at the common law may require persons to enter into bond for good behaviour,<sup>6</sup> which is not returnable to any court, but remains with him.

#### 20. Practice on forfeiture.

"According to strict practice, a party bound for his appearance to answer before a court of criminal jurisdiction, ought to be called on the first day of the term, and if he fail to appear, a forfeiture of the recognizance is entered of record; if he appear, he is committed in discharge of his recognizance and new bail must be entered for his appearance *de die in diem*."<sup>7</sup> But this practice is now rarely followed because the condition of his recognizance now is that he appear at the next term of court and depart not therefrom without leave, which means a formal discharge by the court entered upon the record. In a recent case where the defendant appeared and the grand jury ignored the bill, the defendant left without being

<sup>1</sup> Comth. v. Keeper of the Prison, 2 Ashmead, 227; Comth. v. Lemley, 2 Pitts. 362; Comth. v. Lowry, 14 Leg. Int. 332.

<sup>2</sup> Comth. v. Ross, 6 S. & R. 427.

<sup>3</sup> Moore v. Comth., 6 W. & S. 314; Case of Aldermen, 2 Parsons, 458.

<sup>4</sup> Comth. v. Jailer, 1 Grant, 218; act Feb'y 23, 1870, P. L. 227, as to Crawford county.

<sup>5</sup> Case of Aldermen, 2 Parsons, 458.

<sup>6</sup> Resp. v. Cobbet, 3 Yeates, 93; Comth. v. Duane, 1 Binney, 98 n.

<sup>7</sup> Troubat v. Haly's Pr., section 2046. It may be done on the first day of the term when it is known that the principal has absconded. (Comth. v. Lamar, 32 Supr. C. 200.)



discharged. The district attorney moved leave to submit a new bill to another grand jury, which was given and the case continued. The defendant and his bail were called three times, in open court, as is the custom, and not answering, the recognizance was declared forfeited. In the suit upon the recognizance the surety company was held liable.<sup>8</sup> It is not usual, however, to forfeit a recognizance until the cause is called for trial, or in case it be made a *remanet*, on the last day of the term, the forfeiture is respited to the next term, and the bail remain liable.<sup>9</sup> But he must be called at that term.<sup>10a</sup> If the recognizance be several each of the cognizors should be called upon three times to bring forth the body of the principal whom he undertook to have there this day, or forfeit his recognizance.<sup>10b</sup> The principal is called first in like manner to appear and answer or his recognizance will be forfeited. But if the recognizance be joint, the failure of the principal to answer when called by the crier, is a breach of the condition.<sup>10</sup> If the defendant absconds during the hearing, his recognizance to appear at the hearing is forfeited.<sup>11</sup> Even if the bill was found at the preceding term, the recognizance may be forfeited on failure to appear.<sup>12</sup> Unless the case was duly returned to the clerk of the court by the magistrate there can be no forfeiture.<sup>13</sup> A forfeiture cannot be entered *nunc pro tunc*, without proof that the defendant was called and failed to answer and that thereupon forfeiture was ordered.<sup>14</sup> Forfeiture is a judicial act and conclusive that the condition was broken.<sup>15</sup> The default as well as the order of forfeiture should appear on the record and this fact should be averred in the suit on the *act. fa.* which should show all the prerequisites. If the defendant appears and stands trial and is acquitted, although ordered to pay the costs, the recognizance is not broken.<sup>16</sup> The forfeiture having been duly made may be entered of record *nunc pro tunc*.<sup>16a</sup>

## 21. Action upon forfeited recognizance.

The proceeding to collect upon a forfeited recognizance is either by suit upon it or by *scire facias*.<sup>17</sup> The act of April 4, 1837, P. L.

<sup>8</sup> Comth. v. Harvey, 36 Supr. C. 235; affirmed, 222 Pa. 214. (See also Magie's Ap., 2 Cent. R. 363.)

<sup>9</sup> Mishler v. Comth., 62 Pa. 55. The respite is an order that the forfeiture shall not be estreated during the time fixed. (S. C.)

<sup>10a</sup> Comth. v. Somers, 14 C. C. 159.

<sup>10b</sup> Mishler v. Comth., *supra*. The forfeiture is conclusive that each had been duly called. Comth. v. Zeidler, 2 Lack. L. N. 356; Comth. v. Burkholder, 3 D. R. 563.

<sup>10</sup> Mishler v. Comth., 62 Pa. 55.

<sup>11</sup> Comth. v. Ross, 6 S. & R. 427.

<sup>12</sup> Comth. v. McAnany, 3 Brewster, 292.

<sup>13</sup> Comth. v. Randall, 8 Phila. 373. A transcript to the dist. att'y is not a return.

<sup>14</sup> Comth. v. Bauer, 9 Phila. 589; Rhoads v. Comth., 15 Pa. 272.

<sup>15</sup> Pierson v. Comth., 3 Grant, 314; Fox v. Comth., 1 W. N. C. 243, 81 \* Pa. 511; Comth. v. Bailey, 25 Lanc. L. R. 134; Comth. v. Gray, 26 Supr. C. 110.

<sup>16</sup> Keefhaver v. Comth., 2 P. & W. 240.

<sup>16a</sup> Rhoads v. Comth., 15 Pa. 272.

<sup>17</sup> Bodine v. Comth., 24 Pa. 69.

378, gave the Court of Quarter Sessions, in Philadelphia, jurisdiction, which by act of 1863, P. L. 451, was extended to Allegheny County, and by act of 1865, P. L. 220, to Erie County. See also act of April 16, 1866, P. L. 906.

A suit upon a recognizance forfeited in the Quarter Sessions is properly brought in that court, and it will be presumed that when forfeited, the recognizance was properly before the court at the time when the forfeiture was proclaimed. The failure of the clerk to enter the forfeiture on that date will not relieve the recognizors from liability. Neither is the recognizance avoided by expressing in the title "the Court of Oyer and Terminer and Quarter Sessions of the Peace." For any irregularity in the proceeding the proper remedy is a rule to show cause why the forfeiture should not be remitted. An affidavit of defense may be required and a judgment entered for want of one in Philadelphia and elsewhere.<sup>18</sup> The forfeiture is not such a judgment as passes from the control of the court at the end of the term and the court may in its discretion remit on motion and for cause shown.<sup>19</sup>

In Philadelphia the jurisdiction of the Quarter Sessions seems to be exclusive, so that even a recognizance to appear before a justice may be sued upon in the Quarter Sessions.<sup>20</sup>

An action will lie whether or not the recognizance is estreated into the county commissioners' office.<sup>20a</sup>

## 22. Procedure.

It is the duty of the district attorney to file a præcipe forthwith demanding the proper writ in the name of the commonwealth as plaintiff and the cognizors as defendant, with the clerk of the Quarter Sessions, if suit be brought in that court, or the prothonotary, if suit be brought in the Common Pleas, in pursuance of the statute of Westminster I, the officers must perform their duties without fee, unless there be a recovery.<sup>21</sup>

## 23. Form of scire facias.

*Sci. fa. sur* recognizance of bail in Quarter Sessions.  
Lackawanna County, ss.:

### THE COMMONWEALTH OF PENNSYLVANIA.

To the Sheriff of said County, Greeting:

*Whereas*, — on the — day of —, 19—, before — of —, Lackawanna County, came in his proper person, and, agreeably to the Act of Assembly of the Commonwealth of Pennsylvania in such case made and provided, acknowledged to owe and to be indebted to the Commonwealth of Pennsylvania in the sum of —

<sup>18</sup> Comth. v. Meeser, 19 Supr. C. 1, citing Fox v. Comth., 81 \* Pa. 511; Comth. v. Bird, 144 Pa. 194; Comth. v. Gray, 26 Supr. C. 110; Comth. v. Burkholder, 3 D. R. 563.

<sup>19</sup> Comth. v. Real Est., Etc., Co., 22 Supr. C. 235.

<sup>20</sup> Section 4, act April 22, 1846, P. L. 477; Comth. v. Duffy, 11 Phila. 378.

<sup>20a</sup> Comth. v. Hart, 5 D. R. 109.

<sup>21</sup> Act of 1846, *supra*, as to Phila. embraces this common law principle.

Dollars, lawful money, which said sum for himself and his heirs he willed and granted to be made of his goods and chattels, lands and tenements, and levied to the use and behoof of the said Commonwealth of Pennsylvania, upon this condition: That whereas one ——— was arrested and brought before the said ——— and after hearing was required to give bail in the sum of ——— Dollars, for ——— appearance at the next term of the Court of Quarter Sessions of the Peace for said county, and the Court of Oyer and Terminer and General Jail Delivery for said county, to-wit: ——— Sessions, 190—, then to answer the charges that should be brought against him. If the said ——— should appear at the next term of the Court of Quarter Sessions as aforesaid, the obligation by the said ——— should be void and of no effect, otherwise to remain of full force and virtue. *And whereas*, on the ——— day of ———, 190—, an indictment was presented to the Grand Jury of the said County of Lackawanna and a true bill found therein, charging the said ——— of the crime of ———, and it appears of record at No. ——— Sessions, 190—, of said court that ———, defendant, did not appear as required by his said recognizance, and that thereupon the said recognizance of the said ———, defendant, and of the said ———, his bail was duly forfeited by the said court, whereby the said ——— bail became liable to the Commonwealth of Pennsylvania in the sum of ——— Dollars. And because we are willing that those things, which in our said court are rightly done, should be demanded by due execution.

*We command you*, that by good and lawful men of your bailiwick, you make known to the said ——— that he be and appear before our Judges at Scranton, at a County Court of Common Pleas for the County of Lackawanna, there to be held the ——— Monday of ——— next, to show if anything he knows or hath to say, why the said sum of ——— Dollars, by him in form aforesaid acknowledged, should not be made of his goods and chattels, lands and tenements, and levied to the use of the said plaintiff, according to the force and effect of the said recognizance, if to him it shall seem expedient; and have you then there the names of those by whom you shall so make it known to him and this writ.

*Witness* the Hon. H. M. Edwards, President Judge of our said court, at Scranton, the ——— day of ———, 190—.

———, Prothonotary.  
Per ———.

#### 24. Pleadings.

On a *sci. fa.* the record of the recognizance is a sufficient statement and the only defense is to traverse the forfeiture or set up its remission;<sup>22</sup> for, as already stated, the record of forfeiture is conclusive evidence of the fact.<sup>23</sup> A material variance between the writ and recognizance itself may be shown under the plea of *nul tiel record*;<sup>24</sup> but under this plea the defendant cannot show that he

<sup>22</sup> Comth. v. Nowland, 10 S. & R. 355; Foulke v. Comth., 7 W. N. C. 174, commenting on Scully v. Kirkpatrick, 79 Pa. 324.

<sup>23</sup> Shriver v. Comth., 2 Rawle, 206; Mishler v. Comth., 62 Pa. 55.

<sup>24</sup> Thompson v. Comth., 7 Pitts. L. J. 140.

is not the person named in it; he must plead that in abatement or specially in his affidavit of defense.<sup>25</sup> Where the recognizance was verbally acknowledged and the return is for a larger amount it was held the court might amend the record to comport with the fact, and give judgment for the actual amount acknowledged to be due.<sup>26</sup>

As a suit upon a forfeited recognizance comes within the affidavit of defense law judgment may be taken for want of an affidavit of defense, where a copy showing the amount due is filed as required by the rule of court.<sup>27</sup> There is, in such case, no need to refer to the clerk for assessment of damages,<sup>28</sup> but judgment follows as in other cases, and an appeal also.

#### 25. Practice on petition to remit or respite.

The courts having jurisdiction of the cause may moderate or remit a forfeiture to meet the dictates of justice and discretion, which power in Philadelphia is vested exclusively in the Quarter Sessions.<sup>29</sup> Unless for valid cause shown the court will not remit a forfeiture without the consent of the district attorney.<sup>30</sup> A petition to remit should be accompanied with depositions unless the district attorney accepts service and admits the truth of the petition.<sup>30a</sup>

Where the defendant absconds and does not return until the witnesses for the commonwealth have disappeared the court will not remit,<sup>31</sup> and from the decision hereon in the Quarter Sessions, it was held that no appeal lies.<sup>32</sup>

"Where there is a regular and formal forfeiture of a recognizance the liability of the recognizers is absolutely fixed thereby and relief therefrom should be sought by petition to the court to respite the recognizance for cause to be shown under the act of Dec. 9, 1783, 2 Sm. L. 84 (*Foulke v. Comth.*, 90 Pa. 257). In a suit upon a recognizance the entry of a forfeiture stands for proof of all the steps necessary to complete the forfeiture, upon the principle: "*omnia præsumuntur rite esse acta*"; hence it must be taken for verity that the defendant and his bail were duly called and did not appear or answer."<sup>33</sup>

The prosecutor has no standing to appeal from an order of the Quarter Sessions remitting a forfeiture in its discretion.<sup>34</sup>

<sup>25</sup> *Comth. v. Kanenheimer*, 25 Leg. Int. 124.

<sup>26</sup> *Comth. v. McHenry*, 13 Phila. 451.

<sup>27</sup> *Comth. v. McAnany*, 3 Brewster, 292; *Taylor v. Comth.*, 1 Chester Co. 263.

<sup>28</sup> *Harres v. Comth.*, 35 Pa. 416; *P. & L. Dig.*, vol. 4, col. 5748.

<sup>29</sup> Section 2, act April 4, 1837, P. L. 378; section 2, act Dec. 9, 1783; 2 Sm. L. 84.

<sup>30</sup> *Comth. v. Flucker*, 11 Phila. 405.

<sup>30a</sup> *Comth. v. Stowers*, 3 Lehigh County, 54.

<sup>31</sup> *Comth. v. McAnany*, 3 Brewster, 292; *Comth. v. Dougherty*, 8 Phila. 367.

<sup>32</sup> *Bross v. Comth.*, 71 Pa. 262, criticizing *Comth. v. Rhoads*, 9 Pa. 488; *Harres v. Comth.*, 35 Pa. 416; *Comth. v. Flomenhaft*, 3 Supr. C. 566.

<sup>33</sup> *Comth. v. Flomenhaft*, 3 Supr. C. 566, citing *Fox v. Comth.*, 81 Pa. 511; *Comth. v. Basendorf*, 153 Pa. 459.

<sup>34</sup> *Comth. v. Real Estate, Etc., Co.*, 22 Supr. C. 235.

Upon a recognizance for good behavior there can be no remission of forfeiture.<sup>35</sup>

Courts take judicial notice that justices and aldermen are public officers.<sup>36</sup> The discretion of the court in refusing to remit will not be reviewed.<sup>36a</sup>

#### 26. Exemption not allowed in criminal cases.

*Exemption* is not allowed against judgment on a recognizance of bail in the criminal courts. A recognizance being a debt of record entered into before some court, judge or magistrate having authority to take the same,<sup>37</sup> it does not come within the act of April 9, 1849, P. L. 533.<sup>38</sup>

#### 27. Distribution of proceeds.

Under the act of July 30, 1842, P. L. 455 (section 26), and also section 6 of the act of April 22, 1846, P. L. 477, applicable to Philadelphia, the proceeds of a recognizance were required to be brought into court for distribution:

1. Payment of costs of prosecution, including those of the committing magistrate and the fees and compensation of officers in arresting the defendant and the costs of obtaining judgment on the recognizance.

2. To satisfy the damages sustained by the prosecutor by reason of the commission of the offense, with interest from the date of the commission.

3. The residue to the county or state treasury as provided by the act of assembly.<sup>39</sup>

But by various enactments county law libraries were given the proceeds of forfeitures wholly or in part, reference to which must be had and by act of March 25, 1903, P. L. 53, amending act of May 11, 1901, "one-half of all fines and forfeitures, to which the counties in this commonwealth are by existing laws entitled, is hereby directed to be paid by the county treasurer to the committee hereinafter provided for the purchase and support of a law library to be kept in or near the courthouse of said county, for the use of the citizens thereof."<sup>40</sup>

It was held under these acts that a wife who has prosecuted her husband for adultery has no claim on distribution.<sup>41</sup> The decree of distribution is final.<sup>42</sup>

<sup>35</sup> Comth. v. Davies, 1 Binney, 97.

<sup>36</sup> Fox v. Comth., 81 \* Pa. 511.

<sup>36a</sup> Comth. v. Cohen, 22 Supr. C. 55. (See 1 C. R. A., P. & L. Dig., col. 1567.)

<sup>37</sup> Comth. v. Emery, 2 Binney, 431; 2 Bl. Com. 341.

<sup>38</sup> Comth. v. Savage, 30 Supr. C. 364; P. & L. Dig., vol. 4, col. 5751.

<sup>39</sup> Comth. v. Saltzman, 2 Lehigh Co. 349; Comth. v. Robison, 15 D. R. 536; Comth. v. Sheehan, 15 D. R. 143 (Phila.); Comth. v. Dietrich, 2 Lehigh Co. 170.

<sup>40</sup> Comth. v. Glenn, 11 D. R. 643; Mayne v. Fidelity, Etc., Co., 8 D. R. 711.

<sup>41</sup> Comth. v. Blocher, 4 Lanc. Bar, Dec. 7, 1872.

<sup>42</sup> Comth. v. Justice, 34 Pa. 165.

### 28. Sheriff's and coroner's recognizance and bond.

Section 62 of the act of April 15, 1834, P. L. 547, provides that before a sheriff shall be commissioned or execute any of the duties of his office, he shall enter into a recognizance and become bound in a bond, with at least two sufficient sureties in the sums and manner hereinafter mentioned. The amount of the bond and recognizance in counties of less than two hundred and fifty thousand population is regulated by the act of April 21, 1876, P. L. 46. In Philadelphia by section 33 of the act of 1834, *supra*, it was fixed at \$80,000. The bond and recognizance are distinct securities with different remedies, which are cumulative.<sup>1</sup>

By section 66 of the act of 1834, *supra*, the coroner shall give bond and recognizance in the same manner as the sheriff, but in one-fourth of the amount.

By section 69 of the same act the Court of Common Pleas shall approve of the bond and recognizance, and by section 68, they shall then be recorded in the office for the recording of deeds, when it becomes a record and cannot be contradicted by parol, except for fraud or false personation.<sup>2</sup>

### 29. Forms and form of action.

Section 64 of the act of 1834, *supra*, provides the form of a sheriff's recognizance and section 65 of the bond. Upon these obligations the sureties are jointly and severally liable<sup>3</sup> for the default of the sheriff and to make up any deficiency, to the amount of the penalty therein. The sureties are not relieved by recovery on one of these securities.<sup>4</sup> The liability is direct and the remedy may be pursued on them without first fixing the liability of the sheriff in another action.<sup>5</sup> The action for the penalty on the official bond is in the form of assumpsit and not tort, though it be for suffering an escape.<sup>6</sup> Upon the recognizance no affidavit of defense is necessary and judgment will not be given for want of one.<sup>7</sup>

### 30. Lien of the recognizance.

The lien of the recognizance binds from the date of its entry all the lands of the sheriff and his sureties which they then have, but not after-acquired lands,<sup>8</sup> and the prothonotary must enter it on the judgment docket and index, on certificate from the recorder. This lien, however, is secondary to a prior mortgage and will be discharged by a sale under it,<sup>9</sup> but not by a sale under a subsequent incumbrance.<sup>10</sup> This lien, under act of April 3, 1860, P. L. 650,

<sup>1</sup> Morris' Est., 4 Pa. 162; Comth. v. Lelar, 13 Pa. 22; Comth. v. Montgomery, 31 Pa. 519; Comth. v. Miles, 33 C. C. 613.

<sup>2</sup> McMicken v. Comth., 58 Pa. 213.

<sup>3</sup> Beeson v. Comth., 13 S. & R. 249.

<sup>4</sup> Comth. v. Montgomery, 31 Pa. 519.

<sup>5</sup> Smith v. Comth., 59 Pa. 320.

<sup>6</sup> Smith v. Comth., *supra*.

<sup>7</sup> Comth. v. Miles, 33 C. C. 613, reviewing affidavit of defense cases and rules. Comth. v. Milnor, 23 Supr. C. 1.

<sup>8</sup> Fricker's Ap., 1 Watts, 393.

<sup>9</sup> Spang v. Comth., 12 Pa. 358.

<sup>10</sup> McKenzie's Appn., 3 Pa. 156.

continues for ten years, except in Philadelphia, where, under act of April 13, 1868, P. L. 948, it is five years. The bond only becomes a lien from the time of judgment upon it.

### 31. *Scire facias sur recognizance.*

Under the provisions of section 4 of the act of March 28, 1803, 4 Sm. L. 48, a *scire facias* or action may be brought on the recognizance whenever the commonwealth or an individual shall be aggrieved by the misconduct of the sheriff. As against the sureties the suit must be brought within five years from the date of the recognizance and not the date of its approval.<sup>11</sup> It is provided by said section that "if it shall be proved what damage hath been sustained, and a verdict and judgment shall be thereupon given, execution shall issue for so much only as shall be found by the said verdict and judgment, with costs, which suits may be instituted and the like proceedings be thereupon had, as often as damage shall be as aforesaid sustained." Every one who is damaged may sue out a *scire facias* to his use and recover his damages,<sup>12</sup> under this section, which is still in force.<sup>13</sup> The legal plaintiff must be named<sup>14</sup> and it should show for whose use the suit is brought, though this is not imperative.<sup>15</sup> It should also show in what respect the plaintiff was damaged<sup>16</sup> and to what extent.

The proof must show the actual damage sustained from the misconduct of the sheriff,<sup>17</sup> for the sureties cannot be held liable to any greater measure.<sup>18</sup> Section 71 of the act, *supra*, makes a certified copy of the recognizance evidence and the approval of the sureties may be presumed.<sup>19</sup>

The plaintiff need not prove the commission of the sheriff unless it is denied by the pleading.<sup>20</sup> A *terre-tenant* purchasing after the date of the recognizance may avail himself of a defense which the sheriff neglected to claim in a personal action against him.<sup>21</sup>

The party suing is given judgment, not for the penalty but the amount of damages he has proved.<sup>22</sup>

Suit upon the bond as a separate action was formerly in debt, but now *assumpsit*, and is treated under this head *supra*.<sup>23</sup>

<sup>11</sup> *Wilson v. Comth.*, 7 W. & S. 181. (See act April 13, 1868, P. L. 948, as to Phila.)

<sup>12</sup> *Withrow v. Comth.*, 10 S. & R. 231.

<sup>13</sup> *Smith v. Comth.*, 59 Pa. 320.

<sup>14</sup> *Brownfield v. Comth.*, 13 S. & R. 265. (See also 236.)

<sup>15</sup> *Beale v. Comth.*, 7 Watts, 183.

<sup>16</sup> *Withrow v. Comth.*, *supra*.

<sup>17</sup> *Comth. v. McCoy*, 8 Watts, 153; *Comth. v. Allen*, 30 Pa. 49; *Comth. v. Lelar*, 5 Clark, 167, 13 Pa. 22.

<sup>18</sup> *Comth. v. Contner*, 21 Pa. 266.

<sup>19</sup> *Young v. Comth.*, 6 Binney, 88.

<sup>20</sup> *Brownfield v. Comth.*, 13 S. & R. 236.

<sup>21</sup> *Comth. v. Duncan*, 8 Penna. 93.

<sup>22</sup> *Wolverton v. Comth.*, 7 S. & R. 273; *Campbell v. Comth.*, 8 S. & R. 414; *McMicken v. Comth.*, 58 Pa. 213.

<sup>23</sup> Act June 14, 1836, P. L. 639.

**32. Sci. fa. for subsequent breaches.**

Under the act of June 14, 1836, P. L. 639, a second suit will not lie on the sheriff's official bond for a breach thereof pending a former one, but the plaintiff must follow the statute.<sup>24</sup> The plea of a pending action in this case is not in abatement but in bar of the right.<sup>25</sup>

The one who first brings suit on the bond may exhaust the penalty if he proves a claim large enough,<sup>26</sup> except as to the commonwealth, which takes priority.<sup>27</sup> If there is any surplus it goes to subsequent suitors.<sup>28</sup>

For subsequent breaches to the suit upon the bond, the party aggrieved must file a suggestion of his cause of action upon the record and he will then be entitled to a writ of *scire facias* upon the judgment, wherein he must set forth the subsequent breach or breaches, which has the same character as a new suit with respect to the statute of limitations<sup>29</sup> and the judgment has the same effect as in a personal action.

**33. Form of suggestion.**

A rather elaborate form of suggestion upon the record may be found at page 84, Smith's Forms. The title of the case remains that of the original judgment and the premises of the suggestion state the recovery of a judgment, and the process placed in the hands of the sheriff and the manner in which the sheriff's liability was fixed, after which comes the suggestion: "And thereupon the said Carus Clemons gives the court here to understand and be informed, that by reason of the premises he is interested in said judgment for the Commonwealth against the said Lydus Wolf, having sustained damages, and therefore prays that a writ of *scire facias* may be issued out of said court directed to ———, the coroner of Luzerne County, setting forth the aforesaid breach of the condition of the said bond mentioned in the above stated action, commanding the said coroner to summon the said Lydus Wolf to show cause why execution should not be had and awarded upon the above stated judgment, for the damages which he, the said Carus Clemons, has sustained by reason of the above stated breach of said bond.

J. M. Fritz,  
Attorney for Carus Clemons.

*Præcipe for Writ.*

Issue *scire facias* upon the above-stated judgment setting forth the above-stated breach of condition, returnable next return day.

J. M. Fritz,  
Attorney for Carus Clemons.  
July 18, 1910.

To ———, Esq.  
Prothonotary.

<sup>24</sup> Comth. v. Straub, 35 Pa. 137.

<sup>25</sup> Comth. v. Cope, 45 Pa. 161.

<sup>26</sup> Dallas v. Chaloner, 3 Dallas, 500; Christman v. Comth., 17 S. & R. 381.

<sup>27</sup> Comth. v. Wolbert, 6 Binney, 292.

<sup>28</sup> McKean v. Shannon, 1 Binney, 370.

<sup>29</sup> Comth. v. Rainey, 4 W. & S. 186.



**34. Liability of sureties.**

The sureties on the bond are not liable beyond the penalty, as in other bonds.<sup>30</sup> In general they are liable to the extent of their principal limited by the amount in the bond<sup>31</sup> only for breaches of his official duty<sup>32</sup> and not his personal matters.<sup>33</sup> Their bond holds them for a trespass in a wrongful levy<sup>34</sup> or a neglect to levy and sell before the return day;<sup>35</sup> an escape,<sup>36</sup> or failure to commit;<sup>37</sup> permitting goods levied upon to be eloiigned,<sup>38</sup> and the amount of an execution levied and paid to the sheriff after the return day.<sup>39</sup>

On the bond the sureties may defend on the ground of a material alteration after execution without their knowledge or assent,<sup>40</sup> or a variance between the bond and the law, imposing a greater liability than the law allows.<sup>41</sup>

If the penalty is greater than the law allows, the defense is only good as to the excess.<sup>42</sup> A bond approved by the proper person is valid, although the judge approving affixes the appellation of the wrong court.<sup>43</sup>

The signing and delivery of a bond in blank is an authorization to fill in the names of the obligors who have signed.<sup>44</sup>

**35. Trial upon the bond.**

In a suit upon the bond the trial is conducted as in personal actions and a rule may be taken to compel arbitration.<sup>1</sup> The damages may be recovered up to the time of trial, upon a cause of action for a breach originally assigned.<sup>2</sup> Costs are given to the successful party in each issue.

In Philadelphia, after five years and showing that all parties to a suit have been satisfied, the sureties are entitled to have satisfaction entered upon the record.<sup>3</sup>

**SCI. FA. SUR RECOGNIZANCE IN THE ORPHANS' COURT.****36. Jurisdiction and parties.**

By an anomaly of the law a *sci. fa.* upon a recognizance in the

<sup>30</sup> Comth. v. Forney, 3 W. & S. 353, distinguishing Boyd v. Boyd, 1 Watts, 365.

<sup>31</sup> McCaraher v. Comth., 5 W. & S. 21; Ziegler v. Comth., 12 Pa. 227; Wayne v. Commercial Bank, 52 Pa. 343.

<sup>32</sup> Comth. v. Swope, 45 Pa. 535.

<sup>33</sup> Comth. v. Hoffman, 74 Pa. 105.

<sup>34</sup> Carmack v. Comth., 5 Binney, 184.

<sup>35</sup> Dorrance v. Comth., 13 Pa. 160; Linton v. Comth., 46 Pa. 294.

<sup>36</sup> Wolverton v. Comth., 7 S. & R. 273; Smith v. Comth., 59 Pa. 320.

<sup>37</sup> Snyder v. Comth., 1 P. & W. 94.

<sup>38</sup> Mitchell v. Comth., 37 Pa. 187.

<sup>39</sup> Beale v. Comth., 7 Watts, 183.

<sup>40</sup> Smith v. U. S., 2 Wallace, 219.

<sup>41</sup> Comth. v. Laub, 1 W. & S. 261; Shunk v. Miller, 5 Pa. 250; Power v. Graydon, 53 Pa. 198.

<sup>42</sup> McCaraher v. Comth., 5 W. & S. 21.

<sup>43</sup> Comth. v. Laub, 1 W. & S. 261.

<sup>44</sup> Hultz v. Comth., 3 Grant, 61.

<sup>1</sup> Gordon v. Comth., 10 Watts, 443.

<sup>2</sup> Karch v. Comth., 3 Pa. 269.

<sup>3</sup> Act April 11, 1862, P. L. 437.

Orphans' Court is not in that court, because it has no jurisdiction of actions at law, and the courts hold that a *sci. fa.* is an original writ in this case, though based on a record.<sup>1</sup> The forum is therefore the Common Pleas. Any party in interest may maintain an action upon it, in the name of the Commonwealth, to his use<sup>2</sup> and judgment will be given for the amount of the interest of the party suing.<sup>3</sup> And, therefore, a recovery by one heir in a suit for his own use, is no bar to a suit by another,<sup>4</sup> or his legal representative.<sup>5</sup>

The cognizor may be made a defendant nathless his having aliened and taken the benefit of the insolvents' act.<sup>6</sup> Should he die pending action his legal representatives must be brought in, before the same can proceed against the *terre-tenant*.<sup>7</sup>

### 37. Procedure on *sci. fa.*

This action is begun like any other, by *præcipe*, which should give the parties, and refer to the book and page of the record, the date and the condition broken, whereupon the writ is issuable. The writ will follow the *præcipe* and the recognizance and be served in the same manner as a summons. The pleadings follow those in any other *sci. fa.* or action; and an affidavit of defense is required, likewise.

The defendant cannot raise the question as to the right of the use plaintiff to the money, it seems, that being a question to be determined on the distribution.<sup>8</sup>

The recognizance is not liable to defalcation for any matter between the parties prior to it,<sup>9</sup> though an incumbrance by the common ancestor may be set up.<sup>10</sup> An heir who has accepted at the valuation is estopped from excepting to the regularity of the proceedings, when sued on his recognizance;<sup>11</sup> nor can an heir set off a deficiency in the quantity of land although it was confirmed at a certain sum per acre.<sup>12</sup> But it is a good defense that the plaintiff received the price of another purpart sold by the Orphans' Court.<sup>13</sup> The surety may defend on the ground that his principal took no title.<sup>14</sup>

Where several parcels are taken at the appraisement, a release of one of them, does not release the recognizance as to the remainder.<sup>15</sup>

<sup>1</sup> Schenley v. Comth., 36 Pa. 54; Ebbs v. Comth., 11 Pa. 374; Allen v. Reesor, 16 S. & R. 10.

<sup>2</sup> Kidd v. Comth., 16 Pa. 426.

<sup>3</sup> Stewart v. Martin, 2 Watts, 200.

<sup>4</sup> Good v. Good, 7 Watts, 195.

<sup>5</sup> Pauley v. Pauley, 7 Watts, 159.

<sup>6</sup> Kean v. Franklin, 5 S. & R. 147.

<sup>7</sup> Reigart v. Ellmaker, 6 S. & R. 44.

<sup>8</sup> Comth. v. Lightner, 9 W. & S. 117.

<sup>9</sup> Beatty v. Smith, 4 Yeates, 102.

<sup>10</sup> Seaton v. Barry, 4 W. & S. 183; Goepp's Ap., 15 Pa. 421; Wishart v. Downey, 15 S. & R. 77.

<sup>11</sup> Comth. v. Haffey, 6 Pa. 348.

<sup>12</sup> Nichols v. Rummel, 3 P. & W. 195.

<sup>13</sup> Kidd v. Comth., 16 Pa. 426.

<sup>14</sup> Davis v. Houston, 2 Yeates, 289.

<sup>15</sup> Reigart v. Ellmaker, 14 S. & R. 121; Crawford v. Crawford, 2 Watts, 339.

### 38. Judgment and satisfaction.

Separate judgments should be entered against the cognizor and the *terre-tenant* as each defends separately, one against liability, the other against the lien. The issue against the *terre-tenant* is collateral to that against the cognizor. The judgment against the latter is that the plaintiff have execution of the lands in the hands of the *terre-tenant* for the sum found against him.<sup>16</sup> When the amount found due is paid the plaintiff he is required to enter satisfaction.

Section 50 of the act of March 29, 1832, P. L. 206, is as follows:

"Where a recognizance hath heretofore been, or shall hereafter be taken in any Orphans' Court, on the acceptance of the real estate of a decedent at the valuation or appraisement thereof, as herein provided for, and the same or any part thereof, shall be satisfied or paid to the person or persons interested therein, his, her or their agent or attorneys, any such persons so having received satisfaction of the amount coming to him, shall enter an acknowledgment thereof upon the record of such court, which shall be satisfaction and discharge of the said recognizance, to the amount acknowledged to be paid; and the recognizance shall cease to be a lien on the real estate of the conusor to a greater amount than the principal and interest actually remaining due."

### 39. Certificate by prothonotary.

The act of April 3, 1860, P. L. 630, provides that the prothonotary shall certify such action to the clerk of the court where such recognizance is. (See *Mortgages, supra.*)

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<sup>16</sup> Kean v. Ellmaker, 7 S. & R. 1. The recognizance is a legal lien on the land appraised from the date of its execution (*Share v. Anderson*, 7 S. & R. 43), but no lien on other lands (*Allen v. Reesor*, 16 S. & R. 10).

## CHAPTER XLIX.

### OTHER FORMS OF SCI. FA.

1. *Sci. fa.* to substitute or bring in additional parties.
2. Form of writ.
3. *Sci. fa.* on judgment on penal bond.
4. Purpose of *sci. fa.*
5. Assignment of breaches.
6. Verdict and judgment.
7. Issuance of writ and procedure.
8. Form.
9. *Sci. fa.* on transcripts from the Orphans' Court.
10. Form of certificate.
11. *Sci. fa.* on the lien.
12. Satisfaction.
13. *Sci. fa. quare restitutionem non.*
14. *Sci. fa. ad computandum et rehabendum terram.*
15. *Sci. fa. sur* land patent.
16. *Sci. fa. sur* Charter.
17. *Sci. fa. sur* judgment, etc.
18. *Sci. fa.* on a judgment before a magistrate.
19. Form of *sci. fa. quare executionem non.*
20. *Sci. fa.* by justice of the peace to bring in parties.

#### 1. Scire facias to substitute or bring in additional parties.

The practice of bringing in additional parties to an action or proceeding in court by a *scire facias* is derived from the English courts. In Pennsylvania, however, upon the death of a party the legal representatives may be substituted on mere suggestion on the record which is done by the attorney, by paper filed or the prothonotary at his instance. But where it is necessary to compel them to become parties *sci. fa.* is still resorted to, under the act of Feb'y 24, 1834, P. L. 77. Section 26 is as follows:

"The executors or administrators of any person who, at the time of his decease was a party, plaintiff, petitioner or defendant, in any action or legal proceeding depending in any court of this commonwealth, shall have full power, if the cause of action doth by law survive to them, to become party thereto, and prosecute or defend such suit or proceeding to final judgment or decree, as fully as such decedent might have done if he had lived; and if such plaintiff or petitioner die after judgment or decree in his favor, his executors or administrators may proceed to execution thereupon, as such plaintiff or petitioner might have done if he had lived."

"Section 27. The court in which any action or legal proceeding may be depending as aforesaid, shall have power to require, by a writ of *scire facias*, such executors or administrators, within twenty days after the service thereof, to become party to such action or proceeding, or to show cause, at the next succeeding term, why they should not be made party thereto, by judgment of the court, and further proceedings be had in such action or proceeding; but in every such case, the executors or administrators who shall become party as aforesaid, shall be entitled to the continuance of such action or proceeding during one term."

If *terre-tenants* desire to continue an action on the death of the

party under whom they hold, they must have an administrator appointed in the proper Orphans' Court.<sup>1</sup> The mere lapse of years will not prevent issuing a *sci. fa.* to an executor to become a party to a pending action.<sup>2</sup>

Under the act of April 6, 1859, P. L. 384, where the legal representatives are non-residents of the county, service of the *sci. fa.* may be made by the sheriff of the county in which they reside, and if they are not residents of the state by publication for such time and in such manner as the court may designate in its order, upon application.<sup>2a</sup>

If the plaintiff in a judgment dies it is irregular, though not void, to proceed without substitution of the legal representative,<sup>3</sup> and this may be made *nunc pro tunc* even after levy.<sup>4</sup>

Section 33 of the act of 1834, *supra*, provides:

"No execution for the levy or sale of any real or personal estate of any decedent, shall be issued upon any judgment obtained against him in his lifetime, unless his personal representatives have been first warned, by a writ of *scire facias*, to show cause against the issuing thereof, notwithstanding the *teste* of such execution may bear date antecedently to his death."

*Form of Suggestion of Death of Defendant and Præcipe for sci. fa.*

Marr Rogers	}	In the Court of Common Pleas of Wayne County.
v.		
Caleb Parr.		No. ——. — Term, 1910.

*Assumpsit.*

May 10, 1910, the plaintiff suggests the death of said Caleb Parr, defendant, and that Noah Kahl is his administrator.

M. A. Simons, P. Q.

Issue *scire facias* to said Noah Kahl, administrator of Caleb Parr, deceased, to become a party to this action or show cause to the contrary.

M. A. Simons, P. Q.

To ———, Esq.,

Prothonotary.

May 10, 1910.

The purpose of this is to permit the legal representative to show cause against issuing the execution for matters arising after the judgment.<sup>5</sup> He may waive this right by writing filed in an amicable action, *nunc pro tunc*.<sup>6</sup>

The death of a co-plaintiff in partition does not abate the writ, after judgment *quod partitio fiat*, but the survivor cannot take out execution; he must first take out a writ of *sci. fa.* to show cause why a writ *de partitione faciendi* should not issue.<sup>7</sup> Where the legal representative voluntarily appears a *sci. fa.* is not necessary; but

<sup>1</sup> Franklin v. Ziegler, 10 Lancaster Bar, 1.

<sup>2</sup> Thouron v. Farmers', Etc., Bank, 4 Pitts. L. J. 676.

<sup>2a</sup> Act 1834, *supra*, section 32.

<sup>3</sup> Day v. Sharp, 4 Wharton, 339.

<sup>4</sup> Darlington v. Speakman, 9 W. & S. 182.

<sup>5</sup> Wallace v. Holmes, 40 Pa. 427.

<sup>6</sup> Diese v. Fackler, 58 Pa. 109, commenting on Cadmus v. Jackson, 52 Pa. 295.

<sup>7</sup> Frohock v. Gustine, 8 Watts, 121.

only where he does not,<sup>8</sup> and when there is a vacancy in the administration an administrator *de bonis non* may be substituted.<sup>9</sup>

## 2. Form of writ.

The *scire facias* where one of the defendants has died, must recite the judgment and aver that although judgment was thereupon given, yet execution of the same remains to be made, etc., and that the said [naming the defendant] is dead; and therefore the writ commands the sheriff in the usual form of a *sci. fa.* to make known, etc., to the executors or administrators of the deceased [the heirs and *terre-tenants* if any] and also to — —, the surviving defendant.<sup>10</sup>

The same practice obtains where there is an assignment for the benefit of creditors to make the trustee a party to the record,<sup>11</sup> but in case of a plaintiff's bankruptcy the practice is to take a rule to show cause why the case should not be marked to the use of the trustee.<sup>12</sup> The order upon such *sci. fa.* is merely interlocutory and non-appealable, but the question, if any material one be raised by it, can be reviewed on the appeal from the definitive judgment.<sup>13</sup> If the administrator does not appear to the *sci. fa.* judgment in default may be taken for want of an appearance,<sup>14</sup> on motion in open court.

## 3. Sci. fa. on cautionary judgment on penal bond.

Section 2 of the act of June 14, 1836, P. L. 638, which is substantially a re-enactment of section 8, ch. 11, 8th and 9th William III,<sup>15</sup> provides:

"In case of any subsequent breach of such covenant or agreement, it shall be lawful for the plaintiff in such judgment, by a writ of *scire facias* thereon, setting forth such breaches, to assess against the defendant, his heirs, executors, administrators or assigns, such further damages as he shall have sustained by reason of such subsequent breach, and thereupon, he shall have judgment and execution for such damages, with costs of suit, and for no more, and the plaintiff may proceed in like manner, as often as a breach shall occur subsequently to any such proceeding."

## 4. Purpose of the sci. fa.

The object of the *scire facias* is to avoid the necessity of proceeding in equity,<sup>16</sup> where such remedy alone would be adequate. It

<sup>8</sup> *Pier v. Oakes*, 5 Luz. L. R. 25; *Dingman v. Ansink*, 77 Pa. 114; act Mar. 22, 1861, P. L. 186.

<sup>9</sup> *Lea v. Hopkins*, 7 Pa. 385, acts of March 24, 1818 (section 7), 6 Sm. L. 132; April 9, 1849 (section 13), P. L. 527.

<sup>10</sup> *McCabe v. U. S.*, 4 Watts, 325.

<sup>11</sup> Act June 16, 1836, P. L. 735, sections 22-30.

<sup>12</sup> *Cottrell v. Mann*, 1 W. N. C. 157; *Merrill v. Tamany*, 3 Pa. 433, as to a partner.

<sup>13</sup> *Bossler v. Johns*, 2 P. & W. 331; *Mitchell v. Kintzer*, 5 Pa. 216.

<sup>14</sup> *Wallace v. Holmes*, 40 Pa. 427.

<sup>15</sup> *Roberts' Dig.*, p. 142.

<sup>16</sup> *Reynolds v. Lowry*, 6 Pa. 465; *Longstreth v. Gray*, 1 Watts, 60.

does not apply to a judgment confessed under a warrant of attorney, upon a bond conditioned for the payment of money, either in installments or upon a contingency;<sup>17</sup> for the equitable powers of the court are ample to control the remedy in such cases.<sup>18</sup> Judgment may be entered for the penalty and an execution issued for each note as it falls due,<sup>19</sup> which execution is under control of the court.

Where the warrant of attorney provides that upon breach of condition the plaintiff may file a suggestion of such breach and issue execution, no *sci. fa.* is necessary;<sup>20</sup> also where it provides for execution upon breach of condition.<sup>21</sup>

This form of *sci. fa.* is used where the action is begun by summons on the bond;<sup>22</sup> or where the condition is the performance of some collateral act and not for the payment of money;<sup>23</sup> and where the right to have payment depends upon the establishment of a matter *en pais*, such as dissolution of partnership;<sup>24</sup> or on a replevin bond,<sup>25</sup> or inn-keepers' bond,<sup>26</sup> and, generally, such cases as require the defendant to have a day in court.<sup>27</sup>

### 5. Assignment of breaches.

Under this act the plaintiff must assign upon the record in his declaration or statement all breaches committed at and before suing out the *sci. fa.* and he may assign as many as he pleases;<sup>28</sup> but if he assigns more than one he must assert a distinct claim for each of them.<sup>29</sup>

### 6. Verdict and judgment.

If judgment be taken it will be for the whole penalty, but execution can be had only for the amount of damages assessed by the jury and costs of suit.<sup>30</sup> If the judgment be by default the assessment of the damages is by writ of inquiry<sup>31</sup> and the verdict must find the actual damages, not the penalty.<sup>32</sup> The same method is pursued where judgment is for plaintiff on demurrer or *nil dicit*.<sup>33</sup> *Sci. fa.* may issue upon each successive breach. One who did not become a party to the writ under par. 3 of section 6, is not barred

<sup>17</sup> *Skidmore v. Bradford*, 4 Pa. 296; *Chambers v. Harger*, 18 Pa. 15; *McCann v. Farley*, 26 Pa. 173; *Weikel v. Long*, 55 Pa. 238.

<sup>18</sup> *Bank of Chester v. Ralston*, 7 Pa. 482; *Harger v. Comrs. of Washington*, 12 Pa. 251.

<sup>19</sup> *Hopkins v. Deaves*, 2 Browne, 93; *Douredoure v. Krumbhaar*, 1 Miles, 264; *Sparks v. Garrigues*, 1 Binney, 152.

<sup>20</sup> *Reynolds v. Lowry*, 6 Pa. 465.

<sup>21</sup> *Jones v. Dilworth*, 63 Pa. 447.

<sup>22</sup> *Longstreth v. Gray*, 1 Watts, 60.

<sup>23</sup> *Adams v. Bush*, 5 Watts, 289.

<sup>24</sup> *Montelius v. Montelius*, Brightly, 79.

<sup>25</sup> *Diller v. Wetzler*, 10 Lanc. Bar, 5.

<sup>26</sup> *Comth. v. Specht*, 23 Pitts. L. J. 67.

<sup>27</sup> *Mággill v. Higgins*, 2 Pitts. 107; *Skidmore v. Bradford*, 4 Pa. 296.

<sup>28</sup> *Kerr v. Meredith*, 4 Yeates, 283.

<sup>29</sup> *Comth. v. Pray*, 1 Phila. 58.

<sup>30</sup> *Duffy v. Lytle*, 5 Watts, 120.

<sup>31</sup> *Vaughn v. Ferris*, 2 W. & S. 46.

<sup>32</sup> *Thornton v. Bonham*, 2 Pa. 102.

<sup>33</sup> *O'Neal v. O'Neal*, 4 W. & S. 132.

by the judgment and has a right to the *sci. fa.* after condition broken after the judgment.<sup>33a</sup>

#### 7. Issuance of writ and procedure.

This writ issues upon præcipe citing the judgment whereon it is issued, the parties, or if dead, their legal representatives, by suggestion.

The writ should recite all the proceedings in the former action requisite to show that a judgment validly exists, and suggest the breaches, or additional breaches.<sup>34</sup> Where the condition of the bond is one of indemnity only, it was held under the old pleading that the defendant may plead "*non damnificatus*," though as the action now is "*assumpsit*," the plea of *non assumpsit* with notice, etc., would seem to cover it. If the condition be to discharge or acquit the plaintiff, the defendant must set up the special matter and show how the plaintiff was discharged or acquitted of his liability.<sup>35</sup> The judgment consists of an award of execution for the damages found and the costs.<sup>36</sup>

#### 8. Form of suggestion.

Cyrus Jeffries	}	In the Court of Common Pleas of Centre County.
v.		No. ———— Term, 19—
Cyrus Burkert.	}	Judgment Docket H. P. 60.

And now, July 18, 1910, the above named Cyrus Jeffries by his attorney John J. Bower, according to the form of the act of assembly in such case made and provided, gives the same court here to understand and be informed, that the writ in the action in which the above stated judgment was recovered against the said Cyrus Burkert was issued on the — day of —, A. D. 19—, and that said action was brought upon and for certain breaches by the said Cyrus Burkert of the condition of the bond mentioned in the statement in the said action, before the issuing of the said writ. And the said Cyrus Jeffries, for other and further breaches of the said condition of the said bond, gives the court to understand, that after the recovery of said judgment, to-wit: on the — day of —, A. D. 19—, at the county aforesaid, the said Cyrus Burkert, according to the true intent and meaning of the agreement in said statement mentioned, was bound to deliver to said Cyrus Jeffries, on the — day of —, A. D. 19—. [Here stated the condition to be performed and aver that it was broken.]

And he further avers and gives the court to understand that by reason of the said last mentioned breach he the said Cyrus Jeffries has sustained damages in the sum of — dollars, and therefore he prays that a writ of *scire facias* be issued upon the above judgment, directed to the sheriff of Centre County, setting forth the said further breach of said bond and commanding the said sheriff to summon the said Cyrus Burkert to show cause why execution should not issue upon the above stated judgment for the damages which

<sup>33a</sup> Monroe County v. Eilenberger, 34 Supr. C. 28.

<sup>34</sup> Troubat & Haly's Pr., section 2071.

<sup>35</sup> Neville v. Williams, 7 Watts, 421.

<sup>36</sup> 1 Saunders on Pleading, 58 E.



said Cyrus Jeffries has sustained, by reason of the further breach of the condition of said bond.

John J. Bower, P. Q.

*Præcipe.*

Issue *scire facias* upon the above stated judgment, setting forth the above additional breach of condition, returnable next return day.

John J. Bower, P. Q.

To ———, Esq.,

Prothonotary.

July 18, 1910.

**9. Scire facias upon transcripts from the Orphans' Court.**

By authority of section 29 of the act of March 29, 1832, P. L. 190, amended by act of April 27, 1909, P. L. 202, it is provided:

"It shall be the duty of the prothonotary of the Courts of Common Pleas of the respective counties to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts or extracts of the amount appearing to be due from or in the hands of any executor, administrator, guardian or other accountant, on the settlement of their respective accounts in the Orphans' Court, which transcripts or extracts so filed, shall constitute judgments against such executor, administrator, guardian or other accountant, from the time of such entry until payment, distribution or satisfaction; and execution and attachment execution, actions of debt or *scire facias* may be instituted thereon, by any person or persons interested, for the recovery of so much as may be due to them respectively: *Provided*, however, that the liens thereby created shall cease at the expiration of five years from the time of entry aforesaid, unless revived by *scire facias* in the manner by law directed in the cases of judgments in the courts of common law: And *provided further*, That in case of an appeal from the Orphans' Court, the liens shall be for no more than for the amount finally found due and decreed in the Supreme Court, and it shall be the duty of the prothonotary of the Common Pleas, on such decree of the Supreme Court being certified to him, to enter on his docket the amount so found due and decreed by the Supreme Court, and if such amount be greater than that decreed by the Orphans' Court, the judgment for such excess shall take effect only from the time of entering the decree of the Supreme Court; but if the amount be reduced by the final decree of the Supreme Court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly, and such final decree, upon appeal being certified and filed in the said Court of Common Pleas, the said term of five years shall be counted from the time of such entry, etc."

A surcharge of a legatee as executor does not need to be certified to the Common Pleas under this act.<sup>1</sup>

**10. Form of certificate.**

Following is a form of certificate under this act:

[Seal] Erie County, ss: I, Wilson King, clerk of the Orphans' Court in and for the County of Erie, do certify that by the account

<sup>1</sup> Landmesser's Est., 13 Supr. C. 467.

of —, administrator of —, deceased, late of —, which was finally settled and confirmed on the — day of —, A. D. 19—, by the court aforesaid, there appears to be due by and in the hands of the said —, administrator aforesaid of the estate of —, deceased, the sum of — dollars, out of which sum the court have directed the expenses of auditing said account, amounting to the sum of \$21 to be paid.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Erie, — — —.

Wilson King,

Clerk of the Orphans' Court."

All that is required is an abstract of the account<sup>2</sup> and the transcript may be filed in different counties.<sup>3</sup> To be effective it must be filed during the lifetime of the accountant, since no *scire facias* can issue after his death.<sup>4</sup>

The account may be but a partial one; the filing constitutes a lien and also a judgment.<sup>5</sup> A transcript may be filed after some years delay, although exceptions were filed but not pressed, the delay being treated as a waiver.<sup>6</sup> The filing of a transcript does not oust the jurisdiction of the Orphans' Court upon the account itself;<sup>7</sup> but the Common Pleas has jurisdiction upon the *sci. fa.* to determine the credits or payments alleged to be made on behalf of the *cestui que trust* subsequent to the filing of the account.<sup>8</sup> The certificate must be filed at the instance of the *cestui que trust*.<sup>9</sup> The Orphans' Court has jurisdiction to determine the question of the liability of a non-resident executor, but not as to the liability of the sureties which must be determined in an action upon their bond.<sup>10</sup>

### 11. Scire facias upon the lien.

Any person to whom there is a sum due on the account may have a *scire facias* but in case the legal representative is dead, his administrator or executor must be made a party, since there can be no recovery against the heirs and *terre-tenant* alone. Being a proceeding *in rem*, if judgment is obtained it will bind only such lands as were bound by the lien when the transcript was filed.<sup>11</sup> An issue upon the *sci. fa.* may be arbitrated under the compulsory law.<sup>12</sup> The proceedings upon the *sci. fa.* are similar to practice on other writs of *scire facias*, generally.

<sup>1</sup> McCracken v. Graham, 14 Pa. 209.

<sup>2</sup> McCracken v. Graham, *supra*.

<sup>3</sup> Rowland v. Harbaugh, 5 Watts, 365.

<sup>4</sup> Hanson v. Bank of Penn Township, 7 Pa. 261.

<sup>5</sup> Ramsey's Ap., 4 Watts, 71; Royer v. Myers, 15 Pa. 87.

<sup>6</sup> Roshing v. Chandler, 3 Pa. 369.

<sup>7</sup> McNeal v. Halbrook, 25 Pa. 189.

<sup>8</sup> Royer v. Myers, 15 Pa. 87.

<sup>9</sup> Laverty's Est., 23 Pitts. L. J. 81.

<sup>10</sup> Maguire's Est., 4 W. N. C. 15.

<sup>11</sup> Rowland v. Harbaugh, 5 Watts, 365.

<sup>12</sup> Royer v. Myers, 15 Pa. 87.

**12. Satisfaction.**

Section 30 of the act of 1832, *supra*, provides:

"When the executor, administrator, guardian, or other accountant shall have fully paid and discharged the amount of such lien, the parties who have received payment shall acknowledge satisfaction thereof, to the extent of what they have received, on the record of of the Court of Common Pleas; and in case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all the cost, such party shall forfeit and pay to the party aggrieved, the sum of fifty dollars, absolutely, and any further sum not exceeding the amount by such person received, as shall be assessed by a jury on a trial at law; or the Orphans' Court, on due proof to them made, that the entire amount due from such executor, administrator, guardian or other accountant, according to the final settlement of the said account, has been fully paid and discharged, may make an order for their relief from such recorded lien which order being certified to the Court of Common Pleas, shall be entered on their records and shall enure and be received as a full satisfaction and discharge of such lien."

**13. Sci. fa. quare restitutionem non.**

In England upon reversal of a judgment of a lower court, a writ of *sci. fa. quare restitutionem non* is awarded, but as seen, in a former chapter, the practice here is to petition the court to order a writ of restitution.<sup>13</sup>

**14. Sci. fa. ad computandum et rehabendum terram.**

This writ may still be had where after execution of a *liberari facias* the defendant comes in and satisfies the debt, or shows *prima facie* satisfaction out of the rents, and he is entitled to have the land restored to him, by proceeding thus with a *sci. fa.* as above named.<sup>14</sup> Upon this writ the plaintiff must account for the rents, issues and profits, and if it appear that the debt, interest and costs are paid, he must restore the land to the defendant.<sup>15</sup> Upon hearing, the inquest extending the lands at a certain annual rental, is *prima facie* evidence, but not conclusive, because the parties may show the actual profits.<sup>16</sup> If the judgment be for the plaintiff in the *sci. fa.* the court will award a writ of restitution in consequence; but if there be one in possession claiming under an independent title he cannot eject him, but must be content to deliver legal seisin only, which will put the seizer to his action of ejectment to obtain actual possession.<sup>17</sup>

**15. Sci. fa. sur patent.**

There remains very little public domain in Pennsylvania subject

<sup>13</sup> See "Executions" and "Appeals."

<sup>14</sup> Schofield v. Harbeson, 9 Phila. 38; Carlisle v. Cunningham, 1 Dallas, 81.

<sup>15</sup> McKelvy v. DeWolfe, 20 Pa. 374.

<sup>16</sup> Wall v. Lloyd, 1 S. & R. 320; McKelvy v. De Wolfe, 20 Pa. 374. (See full discussion in this case by Woodward, J.)

<sup>17</sup> Comth. v. Straub, 35 Pa. 137.

to patent. So this form of *sci. fa.* has only historical interest. The only ground upon which it is issuable out of the Supreme Court is that the patent was obtained by fraud.<sup>18</sup> The practice may be seen by reference to *Comth. v. Boley*, 1 W. N. C. 303.

#### 16. *Sci. fa. sur charter.*

The practice upon forfeiture of a charter generally is by writ of *quo warranto* at the suit of the attorney general, for which see *Quo Warranto*, Vol. IV.

But there are still some charters in existence which were granted prior to the constitution of 1873, and in these are found special provisions for proceedings to forfeit, by *scire facias*.

Section 24 of the act of April 13, 1846, P. L. 312, provides a method of proceeding to forfeit the charter of the Pennsylvania Railroad Company as follows:

*First*, a committee appointed by the legislature shall examine its books and papers to ascertain whether the provisions of the charter have been abused or violated, and if so found, shall report to the governor, and direct that a *scire facias* be sued out of the Supreme Court in the name of the commonwealth and served on the president, treasurer or secretary at the office of the corporation, at least ten days before the commencement of the term of court, calling on the said corporation to shew cause why the charter hereby granted should not be declared forfeited, etc."

#### 17. *Sci. fa. sur judgment, etc.*

*Scire facias sur judgment* is fully treated under judgments, *supra*, in connection with *sci. fa. quare executionem non*; and *sci. fa. ad disprobandum debitum* is considered under Foreign Attachment, Vol. I, p. 697, par. 91. Which see.

#### 18. *Scire facias on a judgment before a magistrate.*

By virtue of the act of May 8, 1854, P. L. 581, an execution cannot issue on a judgment before a justice of the peace, alderman or magistrate, after five years from its rendition, unless it shall have been revived by amicable confession or by *scire facias*. If a transcript of it has been filed in the Common Pleas the magistrate has nothing further to do with it and the revival must be in the Common Pleas.<sup>19</sup> It must issue against all the defendants<sup>20</sup> pursuing the judgment. The plaintiff cannot discontinue one and maintain it against the others.

#### 19. Form of writ.

Lackawanna County, ss:

The Commonwealth of Pennsylvania to the constable of —, or to the next constable most convenient to the defendant, greeting:

Whereas on the — day of —, A. D. 1910, one Arthur Whiston obtained judgment before the subscriber, Alvin Vocht, a —, in and for — [ward or township or borough, as the case is] against

<sup>18</sup> *Mowry v. Whitney*, 14 Wallace, 434.

<sup>19</sup> *Brannan v. Kelley*, 8 S. & R. 479.

<sup>20</sup> *Grenell v. Sharp*, 4 Wharton, 344.

James Connell for the sum of eighty dollars debt and six dollars costs. And whereas execution of the said judgment still remains to be made, therefore you are hereby commanded to make known to the said James Connell that he be and appear before our said (alderman, etc.) at his office at No. 33 Chestnut Street, in the — ward of the city of — [or borough or township] on the — day of —, 1910, at ten o'clock in the forenoon, to show cause, if any thing he knows, or hath to say why the said Arthur Whiston should not have execution against him of the aforesaid debt and costs, according to the form of the said recovery. Witness our said —, at —, who hath hereunto set his hand and seal this — day of —, A. D. 1910.

Richard Rogers,

Alderman.

[Seal]

This is called a *sci. fa. quare executionem non*. An appeal lies from the judgment as in other cases<sup>21</sup> on recognizance.

**20. Scire facias to bring in parties before a magistrate.**

A justice of the peace has power to bring in and add parties as well as to enforce a recognizance of bail.<sup>22</sup>

Where the bail for stay of execution resides in another county the *scire facias* against the bail must issue by a justice having jurisdiction in the county where the bail resides.

<sup>21</sup> Guilkey v. Gillingham, 3 S. & R. 93.

<sup>22</sup> Berryhill v. Wells, 5 Binney, 56.

## CHAPTER L

### TORTS AT THE COMMON LAW.

1. Definition of tort.
2. Action for tort — when it will lie.
3. Public duty.
4. Negligence.
5. Duty to the government.
6. Right of individual harmed.
7. General rule.
8. Breach of private duty.
9. Torts to the person.
10. Assault and battery.
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12. Contributory negligence.
13. Relations of master and servant.
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15. Defenses by master.
16. Ratification by master.
17. Malpractice.
18. Torts against personal liberty.
19. Rule — no loss no cause.
20. Trespass on realty.
21. Two estates.
22. Trespass by cattle, etc.
23. Legal entry.
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25. Entry by legal process.
26. Ancient lights — prescription.
27. Land and water.
28. Rights in common to flowing water.
29. Rights to subterranean waters.
30. Personal liability.
31. Torts to personal property.
32. Possession sufficient to sue — finding.
33. Requisites in trespass — bailee.
34. Liability of innkeeper.
35. Common carrier as bailee.
36. Action by bailee or owner.
37. Deceit, fraud and misrepresentation.
38. Estoppel *in pais* as to fraud.

#### 1. Definition.

"As right signifieth law, so tort, crooked or wrong, signifieth injury."<sup>1</sup> "Tort is wrong independent of contract." It arises from the violation of legal duty not imposed by the contractual relation.

#### 2. When action will lie.

Broom says: "An action of tort will lie for a direct injury to the person or property; for the wrongful taking or conversion of goods; for consequential damages: the right of action for a tort being founded, (1) on the invasion of some legal right; or, (2) on the violation of some duty towards the public productive of damage to the plaintiff; or (3) on the infraction of some private duty or obligation productive likewise of damage to the complainant."

#### 3. Public duty.

When action is brought for the violation of a public duty it is necessary to show the duty, its breach and the damages, in order to recover. Such duty may consist of refraining from doing an act, as well as doing some act; so we have nonfeasance or misfea-

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<sup>1</sup> 2 Inst. 56.

sance and malfeasance, as varieties of violation of duty to the public.

#### 4. Negligence.

Where a duty rests upon one to perform a certain act and by non-performance another is injured—that is negligence. It has been said: "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place or person."<sup>2</sup> Hence negligence is not presumed, in the first instance,<sup>3</sup> but a presumption may arise from the proof of an accident where a common carrier of persons or property is concerned.<sup>4</sup> But negligence alone, without harm, creates no cause of action. Sometimes a question arises as to whether there is sufficient appreciable injury to enable a jury to assess the damages, the maxim: "*De minimis non curat lex*," being in the judicial mind.

Then there are cases in which the facts as they appear are so plain that the phrase "*res ipsa loquitur*" is applied.

#### 5. Duty to the government.

The same is true of a duty to the public, such as to keep the streets and highways unobstructed. If, e. g., A. hires B. to excavate the streets in a city and B. leaves a pile of stones on the street, over which C. in the dark, stumbles and receives injuries, A. is liable to C. for damages. In such a case Lord Campbell, Ch. J. said: "It is simply a case of persons employing another to do an unlawful act, and a damage to the plaintiff from the doing of such unlawful act."<sup>5</sup> This was a case of public nuisance. In like manner an owner of private property along a public foot way may excavate so near it as to create a nuisance and raise the duty to the public, of fencing it.<sup>6</sup>

#### 6. Right of individual harmed.

So, whether it be a duty charged by statute, or the common law, or arising from the circumstances of the case the right of an individual to recover in tort is based upon his showing particular harm to himself from the breach of duty.

It is not essential that a statute prescribing a public duty shall affix a penalty for nonfeasance, in order that one damaged by such nonfeasance may have an action. The maxim is "*Ubi jus, ubi remedium*." In such case, he has the usual remedy—which now is trespass, formerly case. He need not knock at the door of equity. Nor will the imposition of a penalty, exclude his remedy for damages, specially suffered.<sup>7</sup>

<sup>2</sup> Degg v. R. Co., 1 H. & N. 781 (English).

<sup>3</sup> Huey v. Gahlenbeck, 121 Pa. 238; Hazel v. R. Co., 132 Pa. 96.

<sup>4</sup> Fearn v. Ferry Co., 143 Pa. 122; Fleming v. R. Co., 158 Pa. 130.

<sup>5</sup> Ellis v. Co., 2 E. & B. 767 (75 E. C. L. R.); Koch v. Williamsport, 195 Pa. 488.

<sup>6</sup> Barnes v. Ward, 9 C. B. 392 (67 E. C. L. R.)

<sup>7</sup> Couch v. Steel, 3 E. & B. 402 (77 E. C. L. R.)

### 7. General rule.

The general proposition may here be stated: "If the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures."<sup>8</sup>

### 8. Breach of private duty.

An action *ex delicto* may also be brought for violation of some private duty or obligation, in consequence of which a person suffers damage. The line of distinction here is sometimes very indistinct between contract and tort. Some cases have been held to be suable in either form. The Queen's Bench of England has decided that "privity is not requisite to support an action *ex delicto*,"<sup>9</sup> where fraud is specifically alleged. But not every one who is injured by a violation of duty, may have an action. It must have an element of tort, as where the injury results from deceit, fraud or misrepresentation. There must be some *nexus logicus* between the wrong and the harm that brings the actor and the sufferer near each other in the metes of justice. Hence the doctrine that the injury is too remote to warrant judgment of the law.

### 9. Torts to the person.

Personal security is a corner stone of civil liberty. Bodily harm, whether done directly by assault, or indirectly by a wanton or negligent act; noxious or malicious acts resulting in injury to the health of a person or to his annoyance; and assaults against one's personal liberty are all torts and actionable in the form of trespass. It is not necessary either that the act be unlawful, for a man may do a lawful act in an unlawful manner, or he may do that which he has a right to do, so negligently that he injure another. The test is whether by exercising due care and caution, he could have avoided the consequence. Said Lord Cranworth: "When one person in managing his own affairs, causes, however innocently, damages to another, it is obviously only just that he should be the party to suffer."<sup>10</sup> So trespass may lie for a mere mischance,<sup>11</sup> and the formation of an intention to do harm is not essential.<sup>12</sup>

The *animus* is only important as a measure of damages, where punitive compensation is allowed.

### 10. Assault and battery.

So jealous of the person, is the law, that the least touching in a rude, violent and angry manner is a battery; and even a threat made to strike, when within striking distance, is an assault. This is actionable in trespass *vi et armis*, in which the pleas were "not

<sup>8</sup> Lord Brougham in *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 289.

<sup>9</sup> *Gerhard v. Bates*, 2 E. & B. 476 (75 E. C. L. R.); *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337.

<sup>10</sup> *Rylands v. Fletcher*, L. R. 3 H. L. 341; *Gibbon v. Pepper*, Salkeld, 637; *Lambert v. Bessey*, T. Raymond, 422.

<sup>11</sup> *Weaver v. Ward*, Hobart, 134.

<sup>12</sup> *Cross v. Andrews*, Cro. Eliz. 622.



guilty" and "*son assault demesne*," which is equivalent to self-defense.

There are cases in which an assault and battery is not actionable, such as a parent or teacher chastising an unruly and disobedient child; an owner ejecting a disorderly or trespassing person from his house or premises; a captain of a vessel conveying passengers, using force to preserve order on board; a church officer in ejecting disorderly persons from the church, for indecent behavior. In each of these cases not more force than is necessary under the circumstances, may be used. The charge laid is that A. unlawfully and with force and arms assaulted, beat, wounded and ill-treated B., etc.

#### 11. Indirect injuries to the person.

A person who knowingly keeps a ferocious dog or other animal which does harm to other persons is liable for damages done by such animal.

The rule as to consequential damages is that every person who does a wrong is responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct.<sup>18</sup>

#### 12. Contributory negligence, etc.

Injuries to the person where that person is himself to blame or in default are not the subject of damages. From this springs the doctrine of contributory negligence which piles up compulsory non-suits in our courts. Then there is the doctrine of imputable negligence, and of inevitable accident and *vis major* — where no one is liable; also *damnum sine injuria*.

#### 13. Master and servant.

An employer who selects employees unskilled and careless to do his work is responsible for the injuries resulting by reason of their want of skill or care. The principle is expressed by *respondeat superior*, and it applies to domestic servants, who have the care of horses, carriages, etc., in such service, as well as those the master appoints to do any work or superintend any business, in which such vice-principals must necessarily employ other servants to assist. The master is liable throughout for injuries done in such employment. This is true whether it be a vessel, a railroad, a mine, a factory or any other enterprise.

#### 14. Co-employees.

As to injuries to co-employees from their employment a different rule has been established and followed, which was changed by acts of 1907 in the U. S. and in Pennsylvania.

#### 15. Defenses by master.

The maxim: "*Qui facit per alium facit per se*," makes the master liable for all the negligent acts of the servant in the course of his employment. Against an action the master may defend that

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<sup>18</sup> Pollock, C. B., in *Rigby v. Hewitt*, 5 Excheq. 243.

the act was not done in the course of his employment but was the independent venture of the servant; or that the act was not negligent, but, on the other hand, the plaintiff himself by his own lack of due care caused the injury.

#### 16. Ratification by master.

The liability of the servant for a wrongful act is not excused by the commands of his master. Neither is the master excused from his liability for an act done by his servant independently, if the trespass was committed for his use and benefit and is subsequently ratified by him. The ratification relates back to the origin of the trespass, and he is estopped from denying his responsibility.<sup>14</sup>

This doctrine also applies to principal and agent and landlord and bailiff.

#### 17. Malpractice.

Malpractice may result from ignorance and lack of skill as well as plain neglect. The measure of duty which a physician or surgeon brings to his patient is a fair, reasonable and competent degree of skill, which implies knowledge of the human system, the ills flesh is heir to, the remedies and the alleviatives. He is employed and paid to know what ails the patient, and to apply the best remedies known to be suited to mend the hurt and preserve life and heal the sick. It will be for the jury to say whether the injury complained of was occasioned by the want of such skill in the physician who may be sued in trespass for professional negligence.<sup>15</sup>

#### 18. Torts against personal liberty — Rule.

Torts affecting one's personal liberty are malicious arrest and false imprisonment. To put in force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in person or in property, there is that conjunction of injury and loss which will be actionable.<sup>16</sup>

Spite suits are all under ban. But malice may be either actual or implied. So if A. intentionally does a wrongful act to B., it is done with legal malice and if loss is occasioned thereby, it is actionable. No loss, no ground for action is the rule.

#### 19. No loss, no cause.

The loss which is sued for must be a direct and natural, not a remote and indirect consequence of the alleged wrongful act. So an act may be done with malice and yet if there be no damage from it, it is not actionable.

If the plaintiff show absence of probable cause or reason for the arrest, whether on final or mesne process, and damages, he is entitled to recover. The malice which the law imputes abides in a

<sup>14</sup> *Hull v. Pickersgill*, 1 B. & B. 282 (5 E. C. L. R.); *Wilson v. Tuman*, 6 M. & Gr. 236 (46 E. C. L. R.).

<sup>15</sup> *Tindal, Ch. J., Lamphier v. Phipos*, 8 Car. & P. 475 (34 E. C. L. R.).

<sup>16</sup> *Lord Campbell, Ch. J., in Churchill v. Siggers*, 3 E. & B. 937 (77 E. C. L. R.).

willful violation of law to the prejudice or damage of another. Actual malice aggravates the offense but is not necessary to the remedy.

#### 20. Trespass on realty.

For wrongful entry upon the land of another the action was formerly termed trespass *quare clausum fregit*, since the writ commanded the defendant to appear and show cause *quare clausum quarrentis fregit*, wherefore he broke the close of the plaintiff. The close here mentioned is the boundary line, whether enclosed with a fence or not. The fact that the close is broken implies harm and no special damages need be proven to support a verdict. The person in possession, whether owner or tenant, must be plaintiff. So, even the lessor himself may be a trespasser, unless he reserves the right of entry or is given license. However, one wrongfully in possession cannot be trespassed against by the rightful owner. The possession which will sustain an action must be exclusive. But if the one in possession of the surface permits the subsoil to be permanently injured by another, the reversioner may have his action against the wrong-doer.<sup>17</sup>

#### 21. Two estates.

For the purposes of this action there may be and often are two estates—one the surface and the other the subsoil—mines, quarries, etc. These estates are entirely severable and when severed are assessable to their separate owners.

In this way the lower owner may become a trespasser against the upper owner by taking away his subjacent support; and in case of injury to the inferior estate the owner must show special damages.

#### 22. Trespass by cattle, etc.

A man is also answerable for trespass by his cattle or other domestic animals. One thus trespassed against has the old remedy called "damage feasant" if he can take the animal in the act, and he may hold the cattle in his possession until the damages are settled—or he may bring his suit against the owner. In regard to this, as well as every trespass, it is "hornbook law"<sup>18</sup> that every continuation of a trespass is a fresh trespass and a separate action may be had.

#### 23. Legal entry.

But one who enters upon the land of another under the law or a contract is no trespasser. For, if he have an easement, as a way, or a water right it carries with it the right to enter, and as long as he exercises this right reasonably, he is no trespasser. But by excessive and wanton acts he may become such.

#### 24. Right to enter inn or hotel.

A public house or inn gives leave or license to all to enter.

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<sup>17</sup> Cox v. Glue, 5 C. & B. 533 (57 E. C. L. R.).

<sup>18</sup> Alphabet law; so called because in early times, the alphabet, numerals and Lord's Prayer were printed on card or parchment, which was covered with transparent horn and framed.

Therefore he who enters is no trespasser—and so long as he behaves himself well he is lawfully there. But if he become offensive and misbehaves, he becomes an interloper, and may be ejected. If he abuses his license he becomes a trespasser *ab initio*.

One of the pleas in t. q. c. f. was "leave and license." It is still a defense. An inn-keeper owes only reasonable and proper accommodations to his guests for what they pay for. If they do not like the fare, they can go elsewhere.<sup>19</sup>

#### 25. Entry by legal process.

The law gives an officer the right to enter to serve legal process and in some extreme cases the authority to break into the castle. A landlord or his bailiff may enter upon the close of the tenant to distrain for rent in arrear and make demand for the rent. But if he distrains for more rent than is due, or proceeds vexatiously and illegally to exercise the leave of the law, he becomes a trespasser *ab initio*.<sup>20</sup>

#### 26. Ancient lights — Prescription.

From time immemorial in England it was a private nuisance to obstruct the ancient lights of an individual's house.<sup>21</sup> The statute of prescription, 2d and 3d William IV, ch. 71, settled that the enjoyment of light for twenty years, uninterruptedly, made the right absolute and indefeasible. The same period is fixed in that law for easements of way, water course, use of water and other easements as to presumption in favor of the right; but after the lapse of forty years these two are indefeasible.

An immemorial right of way is not necessarily lost by mere non-user for twenty years.<sup>22</sup>

#### 27. Land and water.

Of injuries to land many are occasioned by water. It may be premised that a man's land—or rather the estate in it, extends above as well as below; and if some of it be covered with water, it is still his land and he must describe the close as the land covered with water.<sup>23</sup> Whether his estate be injured above or below, he shall have his action. It is as much a nuisance to discharge water on my neighbor's land from a roof<sup>24</sup> as to cause the water to back on his land,<sup>25</sup> or to collect water and overflow his land.<sup>26</sup>

#### 28. Rights in common to flowing water.

There are some rights in common to a stream of flowing water on whose banks reside various persons, who, because they reside on

<sup>19</sup> See *Six Carpenters' Case*, where refusal to pay for drinks was held to be no trespass.

<sup>20</sup> *Richards v. McGrath*, 100 Pa. 402.

<sup>21</sup> 3 Blackstone's Com. 216.

<sup>22</sup> *Ward v. Ward*, 7 Exch. 838.

<sup>23</sup> 2 Blackstone, 18.

<sup>24</sup> *Penruddock's Case*, 5 Rep. 100.

<sup>25</sup> 3 Blackstone, 218; *Harrison v. R. Co.*, 3 H. & C. 231.

<sup>26</sup> *Rylands v. Fletcher*, L. R. 3, H. & L. 330.

its banks are called in law "riparian owners." The flowing water is not the absolute property of any one of them, but each has a *usufruct*, as the civil law termed it. Whilst the water is upon his soil he may use it for all necessary and reasonable purposes, but this he must do in such a manner as not to harm the owners either above or below.<sup>27</sup> He has the reasonable use of it for his family, his cattle, his mill or his factory. He must not back it upon the owner above, nor pollute it for or divert it from the owner below, nor cause it to overflow his lands by erecting dams or embankments. In any of these events the one damaged has an action of trespass.<sup>28</sup> A different rule applies to an artificial water course, which may also become a nuisance.

### 29. Subterranean waters.

As to subterranean waters which gather in the soil a different situation is presented, unless, indeed, it be a stream which sank at some spot and follows a known course beneath the surface to another place where it emerges.<sup>29</sup> So, when A. digs a well on his own land and gathers the percolating waters, it is his own tenement and he may exhaust it and sell it to others the same as anything else of his, notwithstanding, B., the owner of a mill in the vicinity, complains that by this means A. has diverted, abstracted and intercepted waters which were of sensible value to the working of his mill. It was held that the right to water so obtained was inherent with the land,<sup>30</sup> and this judgment was affirmed by the House of Lords.

### 30. Personal liability.

The rule is that every one is liable for his own torts to the person or personalty. Even a lunatic or an infant is liable for trespass, battery and slander.<sup>31</sup> But in Pennsylvania a husband is still liable for his wife's torts.

The rule as to responsibility for servants and employees in the line of their service and employment is *respondeat superior*, as above stated.

### 31. Torts to personal property.

Torts to personalty may be either in possession or under bailment; and, as to that in possession, by the wrongful taking or by damage and abuse; as to that out of possession, either by the bailee himself or by a stranger. For the first the remedies are either replevin or trespass. Trover and conversion is a convenient form (within the jurisdiction of a justice of the peace), where the possession was legally obtained but a wrong wrought to the owner, by conversion.

<sup>27</sup> Sampson v. Hoddinott, 1 C. B. N. S. 611 (87 E. C. L. R.).

<sup>28</sup> Laing v. Whaley, 3 H. & N. 675; Hodgkinson v. Ennor, 4 B. & S. 229; 116 E. C. L. R.

<sup>29</sup> Pollock, C. B., in Dudden v. Clutton Union, 1 H. & N. 630.

<sup>30</sup> Chasemore v. Richards, 7 H. L. Ca. 349; Acton v. Blundell, 12 M. & W. 324; Reg. v. Bd. of Works, 3 B. & S. 710 (113 E. C. L. R.).

<sup>31</sup> Broom on the Common Law, 589.

**32. Possession, sufficient to sue — Case of finding.**

Mere possession is sufficient to maintain trespass against a wrongdoer; for possession is title as against all but the owner.<sup>32</sup>

This is illustrated by the case of A., who found a jewel, took it to B., a jeweler, to learn its value and B. kept it, refusing to return it. A. brought trover and conversion, recovering the jewel, because, as against all but the true owner his title was good.<sup>33</sup>

Where a defendant came lawfully in possession but wrongfully detained it, it is necessary to aver demand and refusal to give it up. This should be borne in mind where an action in trespass is brought now for what was formerly trover and conversion.

The wrongful detention of goods, was trover, while the wrongful taking and carrying away trespass *de bonis asportatis*. A mere non-feasance did not amount to a trespass.

Where A. sells goods which he had wrongfully taken the owner may waive the tort and sue A. for money had and received to his use, or on his account, but he must aver this so, in his complaint.

**33. Requisites in trespass — Bailee.**

As to property in the hands of a bailee, one who has it in trust, as a tailor, pawnbroker, mechanic, etc., if the bailee appropriates it to his own use, he is guilty of larceny under the statute. If they are taken by a stranger either the bailee or the owner may maintain trespass. The bailee is liable to the bailor for negligence; but if it is a *mandate* or deposit, exclusively for the benefit of the bailor, it must be gross negligence, or he is not liable. If it be for the exclusive benefit of the bailee or "*commodatum*," a loan, a higher degree of skill and care is exacted.

**34. Liability of inn-keeper.**

An inn-keeper is an insurer of the property of his guest while under his roof and protection.<sup>34</sup>

The rule at common law is: "The goods of the guest remain under the charge of the inn-keeper and the protection of the inn, so as to make the inn-keeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances."<sup>35</sup>

An inn-keeper is responsible for the loss of goods only when they were received by him in that character. As to valuables, money, etc., notice to guests to leave them in the safe is customary, and if guests see fit to retain the care and custody of their valuables despite such notice and lose them, they are themselves negligent.

How far a boarding housekeeper is charged with care is mooted.

<sup>32</sup> Lord, Ch. J., Campbell in *Jeffries v. R. Co.*, 5 E. & B. 805 (85 E. C. L. R.).

<sup>33</sup> *Armory v. Delamirie*, 1 Smith's Leading Cases, 315 (6th ed.).

<sup>34</sup> *Houser v. Tully*, 62 Pa. 92; *Walsh v. Porterfield*, 87 Pa. 376; *Shultz v. Wall*, 134 Pa. 262.

<sup>35</sup> *Cashill v. Wright*, 6 E. & B. 891 (88 E. C. L.).

### 35. Common carrier as bailee.

At the common law a common carrier who transports goods from place to place for hire is a bailee for the time being. He insures their safe delivery, and nothing excuses him for their loss save the act of God or the common enemy; this is the doctrine of the common law.

But he may by his contract restrict his liability. However, he cannot by prescribing a limited liability enforce it, unless he can prove that such rule or regulation was assented to or came to the knowledge of the party who entrusted him with his goods. But where there is a special limitation in the contract or bill of lading, it will be enforced.<sup>36</sup> Notwithstanding, such carrier will be liable for gross negligence or wilful misfeasance.

When it carries baggage for a passenger it is also liable for the loss of it to the extent of the limitation in the contract.

### 36. Action by bailee or owner.

Goods thus in bailment, if eloigned, may be sued for either by the bailee or the owner. So a factor, auctioneer, carrier, storage man, warehouse man, trustee, pawnee, licensee or mechanic may also maintain trover (trespass) for the specific goods taken and carried away, or trespass for injuries to the same.

### 37. Deceit, fraud and misrepresentation.

There is still another class of torts affecting relative rights of a person; such as false statements and representations leading to the injury of one's person or his property. Fraud without damage or damage without fraud may not be actionable, but fraud with damage is. A mere lie is not actionable. It must be coupled with a transaction in such a way to lead one to act to his damage.

### 38. Estoppel in pais as to fraud.

As to fraud and misrepresentation the doctrine of estoppel *in pais* is important. Estoppel by matter of deed or record need not to be pleaded, but estoppel *in pais* must, where there is opportunity.

The rule of estoppel *in pais* is thus laid down in England:

"Where one, by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>37</sup> The cases turn on the word "wilfully"—meaning a tortious intent.

<sup>36</sup> *Elkins v. Co.*, 81 \* Pa. 322. (See brief of appellee and *Grogan v. Co.*, 114 Pa. 523; *Weiller v. R. Co.*, 134 Pa. 310.

<sup>37</sup> *Pickard v. Sears*, 6 Ad. & E. 474 (33 E. C. L. R.); *Nickells v. Atherstone*, 10 Q. B. 949 (59 E. C. L. R.); *White v. Greenish*, 11 C. B. N. S. 229 (103 E. C. L. R.).

## CHAPTER II.

### TRESPASS IN GENERAL.

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|--|--|
| 1. What the action now covers.                             | 5. Trespass by hunting on cultivated ground. |
| 2. Trespass <i>vi et armis</i> .                           | 6. Trespass on private fish ponds.           |
| 3. Trespass <i>quare clausum fregit</i> .                  | 7. Trespass <i>de bonis asportatis</i> .     |
| 4. Trespass on streams where fish are propagated — notice. |  |

#### I. What "trespass" now covers.

Section 2 of the act of May 25, 1887, P. L. 271, provides:

"That so far as relates to procedure, the distinctions heretofore existing between actions *ex delicto* be abolished, and that all damages heretofore recoverable in trespass, trover or trespass on the case, shall hereafter be sued for and recovered in one form of action, to be called 'an action of trespass.'"

This sentence of the law wipes out tomes of legal controversy, but as stated, it relates only to "procedure," or practice, and there still remain actions *ex delicto* not embraced in trespass—viz.: ejectment, replevin and detinue, which is a cross between contract and tort.

Chief Justice Sharswood once said: "The reason of the law is the life of the law and *apices juris non sunt jura*;"<sup>1</sup> so whilst in practice we must term trover and conversion "trespass" and trespass *quare clausum querentis fregit*, "trespass" and all the other forms of action *ex delicto* at common law, which were based on reason, for distinctions of name and form, "trespass," we must still inquire into the nature of the harm for which we seek a remedy under the broad shield of "trespass."

In Vol. I,<sup>2</sup> the character of both trespass and trover and the distinctions between the two forms are fully gone into, because the act of 1887 failed to reach the justice's courts with its reformatory tentacles and the respectable old action of trover and conversion still lies in those venerable courts, so to speak.

The forms of trespass here treated are *vi et armis*, which is either against the person or personal property, and trespass *quare clausum querentis fregit*, against realty, and indirect trespass, formerly case. As there is no longer any distinction of form in practice, each particular kind of trespass will be designated by its character, as it should be in the præcipe by the plaintiff's attorney; as, for example: Trespass for deceit, trespass for nuisance, trespass for mesne profits, trespass for waste committed, etc.

<sup>1</sup> Dies v. Fackler, 5 Pa. 109.

<sup>2</sup> Vol. 1, Johnson's Penna. Practice, p. 228-9-30.



Forms of statement and pleadings will be given with each distinct kind as designated.

## 2. Trespass vi et armis.

At the risk of criticism, it may be humbly suggested that there are still reasons why the distinctive tags of the old "Law Latinists" should be understood, so that we may know when the action lies, by whom and against whom and for what harm that is a wrong redressible in law. We have seen in Vol. I,<sup>3</sup> that there are harms without legal remedies. The scholastic phrase is *damnum absque injuria*, to which have been added *damnum fatalæ* and *injuria sine damno*, all of which by legal contortion send the harmed individual out of court remediless. These all come out of the nest called "trespass," direct or indirect.

Trespass *vi et armis*<sup>4</sup> was the form for direct or immediate injury to the person or to the personal or real property of another, with force express or implied, whether wilful or unintentional, committed by the defendant or by some one else at his command or procurement.<sup>5</sup> It also lay for such direct injuries as were done for the use or benefit of the defendant, by another, when, after having been done, he assented thereto and accepted the fruits of the wrong.<sup>6</sup> At the common law it lay for an assault and battery committed on the plaintiff, his wife or his servant, "*per quod consortium vel servitium amisit*." On the same principle a parent could maintain it for a wrong to the person of his minor child, by showing deprivation of its service, as in case of seduction.<sup>7</sup>

It was also held to lie for false arrest and imprisonment under process illegal or irregular on its face, as where it charges no offense;<sup>8</sup> or for abuse of legal process<sup>9</sup> by which the one executing it becomes a trespasser *ab initio*,<sup>10</sup> and in such cases the plaintiff, or prosecutor, the officer or bailiff or attorney and at times the magistrate were held liable.<sup>11</sup>

Such abuse of process, it has been held, is service of process on Sunday, which is forbidden by law;<sup>12</sup> or executing a writ beyond the officer's bailiwick or after the return day.<sup>13</sup> Formerly, if the process was regular on its face, the action was on the case as for malfeasance.<sup>14</sup> It was held in one case that the want of jurisdiction must appear on the face of the process.<sup>15</sup>

<sup>3</sup> Vol. 1, p. 298, par. 9.

<sup>4</sup> With force and arms.

<sup>5</sup> Frantz v. Lenhart, 56 Pa. 365.

<sup>6</sup> Van Brunt v. Schenck, 13 Johnson (N. Y.), 416.

<sup>7</sup> Hoover v. Heim, 7 Watts, 62.

<sup>8</sup> Williams v. Jones, 6 Phila. 541.

<sup>9</sup> Allison v. Rheam, 3 S. & R. 139; Berry v. Hamill, 12 S. & R. 210.

<sup>10</sup> Richards v. McGrath, 100 Pa. 402; Brisben v. Wilson, 60 Pa. 452; Kerr v. Sharp, 14 S. & R. 399.

<sup>11</sup> Maher v. Ashmead, 30 Pa. 344; Baird v. Householder, 32 Pa. 168; Kramer v. Lott, 50 Pa. 495.

<sup>12</sup> Mayfield v. White, 1 Browne, 241; section 4, act of 1705, 1 Sm. L. 25, vol. 1, Johnson's Pr., p. 402, par. 21.

<sup>13</sup> Sheerer v. Lautzerheiser, 6 Watts, 543.

<sup>14</sup> Barnett v. Reed, 51 Pa. 190.

<sup>15</sup> Billings v. Russell, 23 Pa. 189; Fallcreek, Etc., Co. v. Smith, 71 Pa. 230.

It will lie for an injury done by driving a horse and vehicle on the road, though the horse became unmanageable, if the driver lost control by his own fault<sup>16</sup> and if the action be against the master of the horse for a collision the burden is upon him to show that he was not at fault.<sup>17</sup>

The same principle applies to the driver of an automobile, a new and highly dangerous vehicle, upon the highways, with even greater strictness; so that if the chauffeur, or driver, operate the machine for the owner's family it will be presumed it was with his consent and in his service, and the burden is on him to show the contrary.<sup>18</sup>

The master will be liable even when running contrary to his instructions, if the servant is on his master's business.<sup>18a</sup> But where the chauffeur takes out the car as a sporting vehicle for his friends without the knowledge and consent of his master the latter is not liable for his tort.<sup>18b</sup> However, for the protection of human life from a licensed machine, the legislature should lay down a different rule.

Under section 8 of the act of April 14, 1851 (P. L. 1852, p. 710), owners of dogs were made responsible in this form, as follows:

"The owner or owners of any dog or dogs shall be liable for all damages done or caused to be done by any and every such dog or dogs, in an action of trespass *vi et armis*, in the name of the person or persons injured, to be sued for and recovered before any court or justice of the peace having jurisdiction of the amount so claimed."

Suit may be brought by owner of sheep killed by dogs against all the owners of the guilty dogs in one action, and no *scienter* need be averred as to the disposition of the dogs.<sup>23</sup>

A magistrate had no jurisdiction of such action as it was in the form of case.<sup>24</sup> This act is not repealed by the act of May 25, 1893, P. L. 136, which, though not very clear in title, is sufficiently so to hang the dogs that tear sheep.<sup>25</sup>

### 3. Trespass quare clausum fregit.

This form of trespass was and is local in its nature and must be brought in the county where the land lies and to support it the plaintiff must have had either the actual possession or the right to the immediate possession of the land, flowing from the right of property at the time the act was committed.<sup>19</sup> This action lies for injuries to real property, as land or houses by one who has an ex-

<sup>16</sup> Kennedy v. Way, Brightly, 186.

<sup>17</sup> Strohl v. Levan, 39 Pa. 177.

<sup>18</sup> Moon v. Mathews, 227 Pa. 488. It is a question for the jury whether he was acting within the scope of his employment. Guinney v. Hand, 153 Pa. 404; Simmons v. Penna. R. Co., 199 Pa. 232.

<sup>18a</sup> McClung v. Dearborn, 134 Pa. 396; P. & R. R. Co. v. Brannen, 17 W. N. C. 227; Ahern v. Melvin, 21 Supr. C. 462; Shaw v. Reed, 9 W. & S. 72.

<sup>18b</sup> Lotz v. Hanlon, 217 Pa. 339; Sarver v. Mitchell, 35 Supr. C. 69.

<sup>23</sup> Kerr v. O'Conner, 63 Pa. 341.

<sup>24</sup> Heinke v. Kohler, 2 Phila. 44.

<sup>25</sup> March v. Smith, 11 York, 42.

<sup>19</sup> Lewis v. Carsaw, 15 Pa. 31; King v. Baker, 25 Pa. 186; Weitzel v. Marr, 46 Pa. 463; Rifener v. Bowman, 53 Pa. 313.

clusive interest, though not the proprietor of the soil, as a tenant who is entitled to the herbage or growing crops, or profits arising from the property,<sup>20</sup> and this is so, even after his removal, if he is entitled to the away-going crops and an injury is done to them, the landlord himself being liable for trespass against his right to the emblements.<sup>21</sup> The landlord being out of possession cannot maintain this action.<sup>22</sup>

But a tenant at sufferance cannot bring trespass against his landlord for expelling him from the land, without unnecessary violence or injury to his property.<sup>23</sup>

The plaintiff in trespass may recover on his possession against one who can show no title.<sup>24</sup> Every entry upon the premises of another without permission or under a void license is in law a trespass,<sup>25</sup> and this applies to unenclosed and wild lands after notice since the act of April 14, 1905, P. L. 169, which is as follows:

"From and after the passage of this act it shall be unlawful for any person willfully to enter upon any land, within the limits of this commonwealth, where the owner or owners of said land has caused to be prominently posted upon said land printed notices that the said land is private property, and warning all persons from trespassing thereon, under the penalties provided in this act."

The second section provides for a penalty not exceeding ten dollars on summary conviction before a magistrate.

This act has been sustained as to strangers visiting employees of a coal company by a private way;<sup>25a</sup> also as to a citizen exercising his right under the 23d section of the act of May 29, 1901, P. L. 302, to wade and fish the Lackawaxen River, a state highway, by act of March 26, 1814, 6 Sm. L. 187.<sup>25b</sup>

Whatever interest the plaintiff has, he should be in actual possession at the time the alleged trespass is committed, since constructive possession does not apply to real property;<sup>26</sup> except in wild or mountain lands.<sup>27</sup> Actual possession where the title is but equitable is sufficient to maintain the action.<sup>28</sup> In case of timber trespass under section 3 of the act of March 29, 1824, 8 Sm. L. 283, however, the action can be maintained only by the owner of the soil,<sup>29</sup> whether the land be seated or unseated;<sup>30</sup> and in such case the damages may be trebled by the jury or by the court<sup>31</sup> when the jury have failed to do so.<sup>32</sup>

<sup>20</sup> *Stultz v. Dickey*, 5 Binney, 285.

<sup>21</sup> *Forsythe v. Price*, 8 Watts, 282.

<sup>22</sup> *Stewart v. Doughty*, 9 Johnson, 113; *Torrence v. Irwin*, 2 Yeates, 210; *Greber v. Kleckner*, 2 Pa. 289.

<sup>23</sup> *Overdeer v. Lewis*, 1 W. & S. 90; *Adams v. Adams*, 7 Phila. 160.

<sup>24</sup> *Bigelow v. Lehr*, 4 Watts, 377.

<sup>25</sup> *Hobbs v. Geiss*, 13 S. & R. 418.

<sup>25a</sup> *Comth. v. Lapempti*, 16 D. R. 403.

<sup>25b</sup> *Comth. v. Foster*, 16 D. R. 571, affirmed 36 Supr. C. 433.

<sup>26</sup> *Addleman v. Way*, 4 Yeates, 218; *Shenk v. Mundorf*, 2 Browne, 106; *Zell v. Ream*, 31 Pa. 304.

<sup>27</sup> *Bechtel v. Rhoads*, 3 S. & R. 333; *Baker v. King*, 18 Pa. 138.

<sup>28</sup> *McCurdy v. Potts*, 2 Dallas, 98.

<sup>29</sup> *Tammany v. Whittaker*, 4 Watts, 221.

<sup>30</sup> *Houston v. Sims*, 12 Pa. 195.

<sup>31</sup> *Welsh v. Anthony*, 16 Pa. 254.

<sup>32</sup> *Hughes v. Stevens*, 36 Pa. 320.

In trespass for injuries to unseated lands a recital in the treasurer's deed of a fact is evidence against the grantor and all persons claiming under him, but not one claiming prior thereto.<sup>32a</sup> However, when both parties claim from the same grantor, title out of the commonwealth will be presumed.<sup>32b</sup> Section 6 of the act of April 27, 1855, P. L. 369, is that as between private litigants, title will be presumed to be out of the commonwealth, after thirty years.

In respect to the easement of a highway it has been held that the property is in the owner of the soil and not the easement, and that the owner may maintain trespass against one who pastures his cattle on the same or does any injury, saving only the right of passage and repair incidental to the easement.<sup>33</sup>

In grading up a lot a man must do it in such manner as to work no injury to the wall of his adjoiner, or he will be liable in trespass.<sup>34</sup> Where a search warrant is issued for stolen goods and they are not found in the house entered under it, although there was reason to suspect they were in it, trespass will lie.<sup>35</sup>

A right to enter on land and cut timber carries with it a limited right of possession and where one having such right of entry cuts other timber by mistake or otherwise, it was held trespass *q. c. f.* would not lie by the successor in title to the land.<sup>36</sup> If, however, all the timber included in the contract had been removed or the right of entry was ended, it would have been different. Continuous trespasses can be embraced in one suit.<sup>37</sup>

#### 4. Trespass on streams where fish are propagated, notice.

Section 21 of the act of May 29, 1901, P. L. 309, provides:

"That from and after the passage of this act, it shall be unlawful to trespass, with intent to fish, in or upon the waters of any fish hatchery, operated by the Fish Commissioners, or by any corporation, person or persons, not for profit; and it shall be unlawful to trespass, with intent to fish, in any waters, or from the banks thereof, not made public by grant or usage, or not declared public by legislative enactment, or not being public by common law, used in any way for the propagation of game or food fish, not for profit, by any corporation, person or persons, or owned or occupied by them, without permission being first given by such corporation, person or persons: *Provided*, Such corporation, person or persons, engaged in the artificial propagation of fish, not for profit, shall erect and operate, in or near the banks of said waters owned or controlled by them, a fish hatchery for the propagation of fish for the stocking of waters so controlled: *Provided*, That no screens or dams shall be erected or maintained upon such waters, to prevent the free passage of fish: *And provided further*, That all water so

<sup>32a</sup> Penrose v. Griffith, 4 Binney, 231.

<sup>32b</sup> McGrew v. Harmon, 164 Pa. 115; Hamsher v. Kline, 57 Pa. 397; Trexler v. Africa, 42 Supr. C. 542; 33 Supr. C. 395; 27 Supr. C. 385.

<sup>33</sup> Lewis v. Jones, 1 Pa. 336; Chambers v. Furry, 1 Yeates, 167; Hasson v. Oil Creek, Etc., R. Co., 8 Phila. 556.

<sup>34</sup> Hutchinson v. Schimmelfeder, 40 Pa. 396.

<sup>35</sup> Hobbs v. Geise, 13 S. & R. 419.

<sup>36</sup> Boults v. Mitchell, 15 Pa. 371; Kissecker v. Monn, 36 Pa. 313.

<sup>37</sup> Trout v. Kennedy, 47 Pa. 387.

used, owned or occupied shall be indicated plainly by written or printed notices, posted conspicuously near or on the banks thereof; and if a roadway, pathway, railway, or other form of crossing shall pass over waters held, owned or so used, it shall be unlawful for any person, without permission by such owner, to fish in the said waters from such crossing, or any of its parts or projections; and any domestic water fowls trespassing upon such preserves may be destroyed without any liability to the owner or owners thereof, provided five days' notice has been given said owner or owners. Any person violating any of the provisions of this section, shall, on conviction thereof as provided in section 38 of this act, be subject to a fine of twenty-five dollars." (Section 38 provides for summary conviction before a justice of the peace.)

#### 5. Hunting, etc., on cultivated land.

Section 1 of the act of July 9, 1901, P. L. 612, provides:

"That on and after the passage of this act, any person or persons trespassing on any cultivated land in this commonwealth, for the purpose of hunting and trapping and taking therefrom any game birds or game animals, after public notice by the owner, lessee or occupant thereof, such notice to be posted on and adjacent to such cultivated lands, shall be guilty of wilful trespass, and in addition to the damages recoverable by law, shall be liable to the owner, lessee or occupant in a penalty not exceeding five dollars for each and every such offense."

Sections 2 and 3 provide the mode of suing for and recovering the penalty in a *qui tam* suit before a justice.

#### 6. Trespass de bonis asportatis.

This was the form of action for injuring or carrying away the goods of another, either from his actual or constructive possession, i. e., the right of property with the right to reduce it to actual possession.<sup>1</sup> In the case of personal property, this form of trespass may be maintained by one having the bare possession as against all but the owner himself.<sup>2</sup> The defendant cannot, as in trover, set up a paramount title in some one else.<sup>3</sup>

By section 3 of the act of 1772, 1 Sm. L. 370, a landlord who distrains his tenant's goods when there is no rent in arrear is liable in trespass and damages to double the value of the goods distrained;<sup>4</sup> and if, having the right to distrain, he makes an excessive and vexatious distress, or proceeds unlawfully, he becomes a trespasser *ab initio*.<sup>5</sup>

If he enter the house of a third person to search for goods of his tenant alleged to have been fraudulently or clandestinely removed

<sup>1</sup> North v. Turner, 9 S. & R. 244; Erisman v. Walters, 26 Pa. 467; Weitzel v. Marr, 46 Pa. 463; Waldron v. Haupt, 52 Pa. 408.

<sup>2</sup> Entriken v. Brown, 32 Pa. 364.

<sup>3</sup> Townsend v. Kerns, 2 Watts, 180.

<sup>4</sup> Fretton v. Karcher, 77 Pa. 423; Rees v. Emerick, 6 S. & R. 286. He may sue at common law for greater damages (Latter case).

<sup>5</sup> Brisben v. Wilson, 60 Pa. 452; Richards v. McGrath, 100 Pa. 402.

and finds none, he is liable in trespass,<sup>6</sup> unless he had license to enter. It will not lie by one joint owner of a chattel against another joint owner, except for destruction or actual ouster.<sup>7</sup> An executory contract by one of two joint owners of a chattel is no evidence to disprove their joint title and their right to a joint recovery.<sup>8</sup>

Where the sheriff, having levied on goods, left them with strangers who gave him a receipt in the form of a forthcoming bond, he could not maintain trespass, when the defendant carried them into another county, before the day of re-delivery.<sup>9</sup> While the writ is technically a lien upon the goods from the time it comes into the hands of the sheriff, in order to maintain trespass he must reduce them to possession by a levy.<sup>10</sup>

Under the old practice an amendment might be made omitting the *quare clausum fregit*.<sup>11</sup>

Where goods are delivered by mistake to the prospective vendee before the sale is actually consummated, the vender has a constructive possession as against the sheriff who seizes them at the forwarding house under a foreign attachment.<sup>12</sup>

The purchaser of goods at a sheriff's sale who leaves them in possession of defendant and who purchased them with the defendant's money has no title on which he can found an action for trespass against the sheriff for a subsequent levy and sale.<sup>13</sup>

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<sup>6</sup> Hobbs v. Geiss, 13 S. & R. 417.

<sup>7</sup> McGill v. Ash, 7 Pa. 397.

<sup>8</sup> Talmadge v. Scudder, 38 Pa. 517.

<sup>9</sup> Lewis v. Carsaw, 15 Pa. 31.

<sup>10</sup> Cluly v. Lockhart, 59 Pa. 376.

<sup>11</sup> Mechanics' Ins. Co. v. Spang, 5 Pa. 113.

<sup>12</sup> Lelar v. Brown, 15 Pa. 216.

<sup>13</sup> Walter v. Gernant, 13 Pa. 515.

## CHAPTER LII.

### TRESPASS FOR CONSPIRACY.

- |  |                         |
|--|-------------------------|
| 1. Definition of conspiracy.           | 5. Proof of conspiracy. |
| 2. Averments in the statement.         | 6. Measure of damages.  |
| 3. Knowledge and motive.               | 7. Form of statement.   |
| 4. Conspiracies in restraint of trade. |                         |

#### 1. Definition of conspiracy.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal and unlawful means.<sup>1</sup> It requires two or more persons to combine and confederate together in pursuit of the same object and the foundation of the action is the unlawful confederation.<sup>2</sup> If the charge be a conspiracy to cheat and defraud creditors, there must be a common purpose and fraudulent intent.<sup>3</sup> Where the conspiracy is to monopolize in restraint of trade, no overt act need be shown. The gist of the offence is in the confederation which produces the result.<sup>4</sup> Even though the contract be legal in form, if the object be unlawful, conspiracy is made out; and when the evidence shows that the parties were acting in furtherance of the common object charged the jury may infer an unlawful combination.<sup>5</sup> Under the act of congress of the United States, July 2, 1890, "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared illegal." A "sympathetic strike" is an actionable conspiracy in restraint of trade.<sup>6</sup> So is a boycott.<sup>7</sup> The action for conspiracy to defame, in order to be maintained, must be supported by evidence of a confederation between defendants or a combination between them and others to injure the plaintiff.<sup>8</sup> A conspiracy to defraud may be wrought by means of a written obligation given in good faith

<sup>1</sup> *Pettibone v. U. S.*, 148 U. S. 203. (See *Bierly on Police Power, State and Federal*, p. 88.)

<sup>2</sup> *Newall v. Jenkins*, 26 Pa. 159; *Gaunce v. Backhouse*, 37 Pa. 350; *Biever v. Herr*, 1 Pearson, 510.

<sup>3</sup> *Collins v. Cronin*, 117 Pa. 35.

<sup>4</sup> *People v. Sheldon*, 139 N. Y. 251; *Morris' Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

<sup>5</sup> *Comth. v. McClean*, 2 Parsons, 367.

<sup>6</sup> *Clune v. U. S.*, 159 U. S. 590; *U. S. v. Cassiday*, 67 Fed. R. 698.

<sup>7</sup> *Purvis v. Union of Carpenters*, 214 Pa. 348; *Erdman v. Mitchell*, 207 Pa. 79; *Patterson v. Building Trades Council*, 31 Supr. C. 112; *O'Neill v. Behanna*, 182 Pa. 236.

<sup>8</sup> *Green v. Kiefer*, 36 Supr. C. 587.

in the first instance by the obligor, when it is used for a wrongful purpose.<sup>9</sup>

## 2. Averments in the statement.

In the plaintiff's statement for conspiracy to defame by circulating false reports the exact words need not be given as in an action for slander. It is enough to give the substance. Nor is it imperative to aver that they were "falsely and maliciously" spoken, although this is the proper form.<sup>10</sup> Nor need the plaintiff lay special damages in this form, as is the case in slander when the language used to defame is not actionable *per se*; that is, where the words do not impute a crime.<sup>11</sup> The very gist of this action is damages, and therefore only general damages need be claimed.<sup>12</sup>

Where the conspiracy consists of malicious prosecution, the statement must aver that there was want of probable cause and that the prosecution was wanton, without cause or excuse, in short all the requisites to sustain a statement for malicious prosecution.<sup>13</sup> But it is not necessary to declare that the conspiracy was without probable cause where it is averred to have been wicked, false and malicious.<sup>14</sup>

## 3. Knowledge and motive.

Acts alleged to have been done in pursuance of a conspiracy must be averred to have been done with the knowledge of the conspirators and in furtherance of the conspiracy;<sup>15</sup> it matters not at what stage defendant became party to it.<sup>16</sup> Where the alleged conspiracy was an apparently mutual mistake, the action will not lie.<sup>17</sup>

Where officers act in their official capacity, as school directors, a teacher, who has been removed by them, to maintain the action must aver and prove an unlawful confederation and malicious intent to injure her;<sup>18</sup> and where her removal has resulted from charges made by other teachers and an investigation, she has no cause of action.<sup>19</sup> It is no bar to the action, however, where a teacher alleges conspiracy by a malicious remonstrance to the board to prevent his employment, charging his unfitness, that he afterwards obtained a situation at a higher salary. His right to action accrued when he lost his situation through the conspiracy, and the fact that he secured employment is admissible only in mitigation of the damages.<sup>20</sup> Although to sustain the charge of conspiracy two or more must be concerned, if the evidence shows that but one was guilty a verdict for damages against him alone will stand.<sup>21</sup>

<sup>9</sup> Weil v. Cohn, 4 Supr. C. 443.

<sup>10</sup> Haldeman v. Martin, 10 Pa. 369.

<sup>11</sup> Hood v. Palm, 8 Pa. 237.

<sup>12</sup> Skinner v. Gunton, 1 Saunders, 228; Hood v. Palm, *supra*; Swan v. Saddlemire, 8 Wendell, 676.

<sup>13</sup> Newall v. Jenkins, 5 Clark, 137.

<sup>14</sup> Griffith v. Ogle, 1 Binney, 172.

<sup>15</sup> Hinchman v. Richie, Brightly, 143.

<sup>16</sup> Freeman v. Stine, 34 Leg. Int. 96.

<sup>17</sup> Pollock v. Lowry, 198 Pa. 117.

<sup>18</sup> Burton v. Fulton, 49 Pa. 151.

<sup>19</sup> Miller v. Harvey, 215 Pa. 103.

<sup>20</sup> Vanarsdale v. Laverty, 69 Pa. 103, 65 Pa. 507.

<sup>21</sup> Laverty v. Vanarsdale, 65 Pa. 507.



Members of a church have a right to prefer charges against their pastor, in accordance with the church laws and discipline, and if that forum unfrocks him, he has no cause of action in the civil courts.<sup>22</sup>

A teacher who seeks damages for malicious and defamatory statements about him in his professional character, sufficiently avers the cause when he declares that they conspired to ruin him in his profession, by certain words, followed by inuendos.<sup>23</sup> One who was confined as a lunatic, cannot after the commission has been superseded regularly on his petition maintain conspiracy against the persons who petitioned for the commission.<sup>24</sup> Nor will conspiracy lie against people of a township who take concerted action to relieve the township of a person who is likely to become chargeable.<sup>25</sup>

#### 4. Conspiracies in restraint of trade.

President Taft, when U. S. Circuit Judge in Ohio, decided that under section 5440 of the Revised Statutes, it is a criminal conspiracy for two or more persons to combine to induce and procure the officers of a common carrier and its locomotive engineers to refuse to receive, handle and haul interstate freight from another like common carrier, in order to injure the latter.<sup>26</sup> A combination among connecting railroads for the facilitation of their business is not, *per se*, a conspiracy;<sup>27</sup> nor is a combination of employers illegal, whose purpose is to meet and resist a combination of their employees to raise wages, etc.;<sup>28</sup> nor does notice to dealers that the members will not patronize them if they sell to employers who concede the advance render their acts unlawful;<sup>29</sup> nor are the members guilty of conspiracy when one member breaks his contract to furnish materials unless the object of the combination was to further the breach.<sup>30</sup> In an action for conspiracy alleging that plaintiff was prevented from getting work, he must show that he was refused work in consequence or he will be nonsuited.<sup>31</sup>

The act of June 16, 1891, P. L. 300, which exempts members of a trade or labor union from "prosecution and punishment," for conspiracy, has no reference to civil remedies for conspiracy, whether by action at law or injunction.<sup>32</sup> A boycott of a man's business is in restraint of trade and actionable at common law.<sup>33</sup>

#### 5. Proof of conspiracy.

The measure is a preponderance of evidence and not to satisfy

<sup>22</sup> *Irvine v. Elliott*, 206 Pa. 152.

<sup>23</sup> *Wildee v. McKee*, 111 Pa. 335.

<sup>24</sup> *Johnston v. Given*, 14 W. N. C. 326.

<sup>25</sup> *Union Twp. Overseers v. Aurand*, 10 Watts, 134.

<sup>26</sup> *Toledo, Etc., R. Co. v. Penna. Co.*, 54 Fed. R. 730.

<sup>27</sup> *Munhall v. Penna. R. Co.*, 92 Pa. 150.

<sup>28</sup> *Cote v. Murphy*, 159 Pa. 420.

<sup>29</sup> *Cote v. Murphy*, *supra*.

<sup>30</sup> *Buchanan v. Kerr*, 159 Pa. 433.

<sup>31</sup> *Bradley v. Pierson*, 148 Pa. 502.

<sup>32</sup> *Purvis v. Local, No. 50, Etc.*, 214 Pa. 348; *Patterson v. Building Trades Council*, 12 Luz. L. R. 445; 31 Supr. C. 112.

<sup>33</sup> *Purvis v. Local, No. 500*, *supra*.

the jury beyond a reasonable doubt.<sup>34</sup> Mere suspicions are not enough.<sup>35</sup> It must support the allegations of unlawful confederacy and the injury to the plaintiff,<sup>36</sup> though the jury may find the intent from the facts in evidence.<sup>37</sup> Where one defendant is not connected by the evidence with the conspiracy it is error not to instruct the jury to acquit him.<sup>38</sup> Declarations of the conspirators are evidence against them if made during the conspiracy, but not after it has been dissolved. The conspiracy must first be proved.<sup>38a</sup> Where parties use terms which have no well-defined meaning it is admissible to show what construction they themselves placed upon them in prior contracts relating to the same subject matter. The commonwealth need not prove all the defendants guilty, especially where one asked for a severance. The market value of furniture is admissible where the contract is susceptible of two meanings.<sup>39</sup> When two or more persons pursue by their acts the same object, often by the same means, one party performing one part of an act and the other party another part, with a view to complete it and attain the same object, the act of each must necessarily be proved separately, and where there is a charge of conspiracy the acts of each, with regard to the subject matter of the charge, are always evidence against that particular defendant.<sup>40</sup> The unlawful combination must be proved by full satisfactory evidence, and when from circumstances, the court must say whether, if the evidence if believed, is sufficient to make out the charge.<sup>41</sup> Conspiracy to defraud an investor in stocks by fictitious quotations of value and false market may be made out by circumstances of the case.<sup>42</sup> Loss by the fraudulent conspiracy must be satisfactorily proved.<sup>43</sup> One co-conspirator will be presumed to act upon the information which the other conspirators possessed.<sup>44</sup>

#### 6. Measure of damages.

Where the conspiracy is the assignment of goods the measure of damages is the value of the goods.<sup>45</sup> In case of a collusive confession of judgment the measure is the amount of the debt prior to the judgment.<sup>46</sup> Upon the judgment a *capias* may issue.<sup>47</sup>

<sup>34</sup> *Biever v. Herr*, 1 Pearson, 510; *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. 30.

<sup>35</sup> *Merchants', Etc., Bank v. Tinker*, 158 Pa. 17.

<sup>36</sup> *Kirkpatrick v. Lex*, 49 Pa. 122; *Wagner v. Autenbach*, 170 Pa. 495.

<sup>37</sup> *Percival v. Harres*, 142 Pa. 369.

<sup>38</sup> *Benford v. Sanner*, 40 Pa. 9.

<sup>38a</sup> *Green v. Kiefer*, 36 Supr. C. 587.

<sup>39</sup> *Comth. v. Sanderson*, 40 Supr. C. 416; *Capitol Graft case*.

<sup>40</sup> *Comth. v. Snyder*, 40 Supr. C. 485; *Capitol Graft case*.

<sup>41</sup> *Ballantine v. Cummings*, 220 Pa. 621.

<sup>42</sup> *McElroy v. Harnack*, 213 Pa. 444.

<sup>43</sup> *Pittsburg v. Moreland*, 47 Pitts. L. J. 195.

<sup>44</sup> *McMasters v. Ryan*, 1 Pitts. 204.

<sup>45</sup> *Penrod v. Mitchell*, 8 S. & R. 522; *Mott v. Danforth*, 6 Watts, 304.

<sup>46</sup> *Biever v. Herr*, 1 Pearson, 510.

<sup>47</sup> *Kalbfus v. Rundell*, 134 Pa. 102.

## 7. Form of statement in trespass for conspiracy to defame.

Alice Beck v. Arthur Barnes, George Walsh and Russell Cutts.	}	In the Court of Common Pleas of Monroe County. No. ——.	— Term, 19—.
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The plaintiff, Alice Beck, claims of the defendants, Arthur Barnes, George Walsh and Russell Cutts, the sum of five thousand dollars, which sum is justly due and payable to the plaintiff by the defendants upon the cause of action whereof the following is a statement:

Before and at the time of the committing of the grievances by the defendants as hereinafter set forth the said Alice Beck followed the lawful occupation and profession of a teacher of music in the county of Monroe as a livelihood, and by means of her honesty, good reputation and capability in said profession for five years and upwards had acquired the confidence, good will and patronage of all the members of the community who were brought in business and professional relations with her, and said occupation was and is her only means of earning a living. The defendants well knowing the premises and basely and wickedly intending to injure the plaintiff and ruin her in her said occupation and deprive her of the means of livelihood, on the — day of —, A. D. 19—, at the county aforesaid, unlawfully, wickedly and maliciously combined, confederated, conspired and agreed together to injure the said plaintiff in her said calling as a teacher of music, to deprive her of her said patrons and inflict upon her great loss, by means of defaming her character and unlawfully depriving her of her means of earning a living; that the said defendants further unlawfully, wantonly and maliciously confederated and conspired together, at the county aforesaid, to effect their aforesaid unlawful, wicked and malicious purposes, by agreeing to circulate among the people of said county, the following false, malicious and wicked slander against the said plaintiff, to-wit: [here set out of what the same consisted]; and that in pursuance of said unlawful, wicked and malicious confederation, agreement and conspiracy the said defendants [or some or one of them] did, on the — day of —, A. D. —, and on the — day of —, A. D. —, at the county aforesaid, speak and utter in the presence and hearing of many other persons, the following false, defamatory and slanderous words, of and concerning the plaintiff, to-wit: [set out the exact words], meaning and intending thereby to charge that said plaintiff was guilty of the crime [or felony, designating it; or if not a crime, the matter intending thereby to bring said plaintiff into great contempt, reproach and contumely].

And the said plaintiff avers that she is in no wise guilty of the said charges so unlawfully, maliciously and wantonly by said defendants affirmed, reported and circulated against her; and that by reason of their said unlawful conspiracy so enacted by them, she has been grievously hurt in her good name and in her calling, among her patrons as aforesaid, and in the county and community generally, so that she is suspected of having been guilty of the false and malicious charge by them laid to her, resulting in the loss of her patrons, the ill-will and contempt of the neighbors, and has been shunned and avoided and insults and slurs have been leveled at

her, whereby she has lost her patrons and large sums of money which she was earning by her calling and might have continued to earn but for said unlawful and malicious conspiracy, and she has sustained and claims damages therefor in the sum of five thousand dollars. Whereupon she brings her suit.

Alice Beck.

By her attorney,

Date. — — —, — —.

## CHAPTER LIII.

### CRIMINAL CONVERSATION, ALIENATION AND SEDUCTION OF WIFE.

1. Character of action.
2. Form of statement for alienation of husband's affections.
3. Evidence.
4. Damages.

#### 1. Character of action.

The husband has an action for the alienation of the affections of his wife and criminal conversation or abduction at the common law, *per quod consortium amisit*. In England the form of crim. con. was abolished by 20 & 21 Victoria, ch. 85, sec. 59, but it remains in force in Pennsylvania, under the form of trespass. He may sue and recover damages for the seduction of his wife or for the alienation of her affections without seduction.<sup>1</sup> And so a wife may likewise have an action for alienation of the affections of her husband against his father, who without cause entices him away and causes her to be abandoned.<sup>2</sup> "The gist of the action is not the loss of assistance but the loss of *consortium* of the husband, under which terms are usually included the person's affection, society and aid."<sup>3</sup>

The husband's right to sue is not affected by the fact that his wife pursued, enticed and procured the criminal conversation, though it may mitigate the damages, if he could not be a Joseph.<sup>4</sup>

Where the husband sues his wife's father for alienation the parent stands in a different relation than a stranger and he must aver and prove that the father acted with malice and without cause; especially where she was a minor and was seduced by him who married her, also a minor and unable to support her.<sup>5</sup> When husband and wife have separated by articles of agreement the husband cannot maintain an action for *crim. con.*,<sup>6</sup> it seems.

#### 2. Form of statement for alienation of husband's affections.

Lillie M. Stocker	}	In the Court of Common Pleas of Berks	April Term, 1907.
v.		County.	
Katharine B. Stocker.		No. 48.	
		Action of trespass.	

<sup>1</sup> *Silvernali v. Westerman*, 2 Kulp, 7.

<sup>2</sup> *Gerner v. Gerner*, 185 Pa. 233.

<sup>3</sup> *Reading v. Gazzam*, 200 Pa. 70.

<sup>4</sup> *Sieber v. Pettit*, 200 Pa. 58.

<sup>5</sup> *Beisel v. Gerlach*, 221 Pa. 232.

<sup>6</sup> *Fry v. Drestler*, 2 Yeates, 278; *Sherwood v. Titman*, 55 Pa. 77.

*Plaintiff's Declaration.*

Berks County, ss.

The plaintiff, Lillie N. Stocker, claims of the defendant, Katharine B. Stocker, the damages hereinafter stated, which are justly due and payable to the plaintiff upon the cause of action whereof the following is a statement:

For that whereas, the said defendant, contriving and wrongfully, wickedly and unjustly intending to injure the said plaintiff and to deprive her of the support, comfort, fellowship, society, aid and assistance of Henry J. Stocker, the husband of said plaintiff, and to alienate and destroy his affection for said plaintiff, heretofore, to-wit, on the 10th day of September, A.D. 1905, and on divers other days and times between that day and before the commencement of this suit, at the county aforesaid, wrongfully, wickedly and unjustly prejudiced and poisoned the mind of the said Henry J. Stocker against the said plaintiff, and persuaded and induced him to desert and abandon the said plaintiff, the said plaintiff then and there and still being the wife of the said Henry J. Stocker, and thereby the affection of the said Henry J. Stocker for the said plaintiff was then and there alienated and destroyed, and also by means of the premises, the said plaintiff hath thence hitherto wholly lost and been deprived of the support, comfort, fellowship, society, aid and assistance of the said Henry J. Stocker, in her said domestic affairs, which the said plaintiff during all that time ought to have had, and otherwise might and would have had, to-wit, at the county aforesaid; to the damage of said plaintiff of ten thousand dollars, and therefore she brings her suit, &c.

Oliver Lentz,  
Stephen M. Meredith,  
Attorneys for Plaintiff.

**PLEA.**

Title.	}	Venue.
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And now, to-wit, Aug. 21, 1907, defendant pleads not guilty, with leave to add, alter or amend.

Jeremiah K. Grant,  
Attorney for Defendant.

Same day the within case put at issue, *sec. reg.*

Eldridge Zimmerman,  
Prothy.

*Statement for alienation and crim. con.*

Parties.	}	Number and term, etc.
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Follow form *supra*, and in count averring the gist as follows:

Wrongfully, wickedly and unjustly debauched and carnally knew the said ———, then and there and still being the wife of the said plaintiff, etc.

**3. Evidence.**

In this action the marriage must be averred and proved, though it may be shown by cohabitation, reputation and circumstances<sup>†</sup> and

<sup>†</sup> Durning v. Hastings, 183 Pa. 210.

the admissions of the defendant are evidence.<sup>8</sup> The fact of criminal conversation, or the adultery of the parties may be proved by circumstantial evidence;<sup>9</sup> such as their visiting a hotel at a late hour of the night and remaining there together for several hours.<sup>10</sup> The facts of each particular case of "nest hiding," must be diverse, and where the defendant gives his version of the circumstances the plaintiff may offer in rebuttal independent facts.<sup>11</sup> Evidence is not admissible of defendant's general reputation for chastity or otherwise.<sup>12</sup> The measure of proof is a preponderance.<sup>13</sup> Where the claim is laid for *crim. con.* before separation and divorce, evidence of criminal acts after as well as before the separation may be given.<sup>14</sup> But where the dates are fixed in the statement and there is no evidence of any acts between those dates, evidence as to subsequent acts will be ruled out.<sup>15</sup>

In a suit for *crim. con.* the husband is incompetent to prove his wife's adultery.<sup>16</sup> The reasons which the wife may have given on the eve of her departure from her husband's domicile are not material evidence in palliation.<sup>17</sup> Where the suit is by the wife against a brother of her husband for alienation she may sustain her action by showing that as soon as he heard of the marriage he hastened to the scene and by threats and intimidation caused him to leave her.<sup>18</sup> In case of a minor son who was secretly married to a servant, when the parents of the latter learned of it and being advised that the marriage was void proceeded to have it annulled, a case of alienation is not made out.<sup>19</sup>

#### 4. Damages.

The husband may recover punitive damages in the action of *crim. con.*<sup>20</sup> Evidence that "the woman handed him the apple and he did eat," is only admissible in mitigation of damages.<sup>21</sup> The station of the parties in life, the circumstances, etc., are for the jury to consider.<sup>22</sup> Where the wife has shown the annual expenses required for the family, in the accustomed style of living, the defendant may show that she has an income of her own which was applied to such expenses.<sup>23</sup>

<sup>8</sup> Forney v. Hallacher, 8 S. & R. 159.

<sup>9</sup> Silvernail v. Westerman, 2 Kulp, 7.

<sup>10</sup> Cornelius v. Hambay, 150 Pa. 359; Durning v. Hastings, 183 Pa. 210; Reading v. Gazzam, 200 Pa. 70; 202 Pa. 231.

<sup>11</sup> Sherwood v. Titman, 55 Pa. 77.

<sup>12</sup> Keath v. Shiffer, 25 Lanc. L. R. 253.

<sup>13</sup> Sieber v. Pettit, 200 Pa. 58.

<sup>14</sup> Sherwood v. Titman, 55 Pa. 77.

<sup>15</sup> Gardner v. Madeira, 2 Yeates, 466.

<sup>16</sup> Sahms v. Brown, 4 C. C. 488; Cornelius v. Hambay, 150 Pa. 359.

<sup>17</sup> Kidder v. Lovell, 14 Pa. 214. (But see Gilchrist v. Bale, 8 Watts, 355.)

<sup>18</sup> Lyon v. Lyon, 197 Pa. 212.

<sup>19</sup> Becker v. Becker, 13 D. R. 349.

<sup>20</sup> Cornelius v. Hambay, 150 Pa. 359.

<sup>21</sup> Durning v. Hastings, 183 Pa. 210.

<sup>22</sup> Mathies v. Mazet, 164 Pa. 580.

<sup>23</sup> Dunham v. McMichael, 214 Pa. 485.

The limitation of action is six years.<sup>24</sup> Under the act of June 24, 1895, P. L. 236, the right of action survives the death of the wrong-doer.<sup>25</sup> In the action of *crim. con.* the element of enticement is included and a verdict for the former bars a suit for the latter.<sup>26</sup>

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<sup>24</sup> Gerner v. Gerner, 185 Pa. 233.

<sup>25</sup> See Clark v. McClelland, 9 Pa. 128, as to the old rule.

<sup>26</sup> Gilchrist v. Bale, 8 Watts, 355.



## CHAPTER LIV.

### TRESPASS BY CUTTING AND CONVERTING TIMBER.

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|--|--|
| 1. Double and treble damages.  | 5. Form of præcipe for capias.           |
| 2. Receivers of timber made liable.                                    | 6. Form of affidavit of cause of action. |
| 3. Jurisdiction of justices of the peace.                              | 7. Form of plaintiff's statement.        |
| 4. Recovery in trespass <i>q. c. f.</i> when damages only are claimed. | 8. Form of capias.                       |
|  | 9. Form of sheriff's return.             |
|  | 10. Form of bond.                        |

#### 1. Double and treble damages.

Section 3 of the act of March 29, 1824, P. L. 152, provides as follows:

"In all cases where any person, after the said first day of September, shall cut down or fell, or employ any person or persons to cut down or fell, any timber tree or trees, growing upon the lands of another, without the consent of the owner thereof, he, she or they so offending shall be liable to pay such owner double the value of such tree or trees so cut down or felled; or, in case of the conversion thereof to the use of such offender or offenders, treble the value thereof, to be recovered, with costs of suit, by action of trespass or trover, as the case may be; and no prosecution by indictment shall be any bar to such action."

This action can be maintained only by the owner of the land<sup>1</sup> and it covers unseated as well as seated lands.<sup>2</sup> Either trespass or trover lies; if trespass for cutting only, double damages; and if trover and conversion, treble damages are allowed. The English rule does not apply, but double or treble the single damages, which either the court or jury may assess.<sup>3</sup> He may recover treble damages in trespass *q. c. f.* and *d. b. a.*<sup>4</sup> The defendant's liability to the owner was fixed at the time of the conversion, by the evidence then existing and not created subsequently.<sup>5</sup> The want of the owner's consent creates the liability of the trespasser. It is incumbent upon the cutter to ascertain where the line is, or delay cutting until it is ascertained.<sup>6</sup>

Where the possession is founded on *prima facie* title, at least, trespass will not lie for taking the timber.<sup>7</sup> The penalty of above

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<sup>1</sup> Tanfmany v. Whittaker, 4 Watts, 221.

<sup>2</sup> Houston v. Sims, 12 Pa. 195.

<sup>3</sup> Welsh v. Anthony, 16 Pa. 254.

<sup>4</sup> O'Reilly v. Shadle, 33 Pa. 489.

<sup>5</sup> Green v. Brennesholtz, 73 Pa. 423.

<sup>6</sup> Watson v. Rynd, 76 Pa. 59.

<sup>7</sup> Woodward v. Tudor, 81 \* Pa. 382.

act was not extended by the act of May 4, 1869, to an action by one tenant in common against his co-tenant.<sup>8</sup> This act was intended to prevent only the wilful and careless cutting of trees; not where one is misled by his neighbor to cut over the line.<sup>9</sup> A judgment in such suit is a provable debt in bankruptcy, and a discharge is a valid defense to the *sci. fa.*<sup>10</sup> The jury having found a verdict the presumption is that they found treble damages, and this can be rebutted only by showing by the verdict that they computed only single damages. Without this the court cannot double or treble the verdict.<sup>11</sup>

This act does not apply to a corporation which enters under the right of eminent domain.<sup>12</sup> The statement in this case must follow the statute, or treble damages cannot be recovered, nor will amendment be allowed after verdict to bring the case within the act.<sup>13</sup> One who claims and asserts that he owns timber lands and points out to his vendee the lines of such tract which he does not in fact own, is liable to treble damages jointly with his vendee for cutting the timber. Statutory damages do not bear interest prior to verdict.<sup>14</sup> Having the right to enter to cut certain trees, if he goes beyond that and cuts other trees the defendant will be liable to damages,<sup>15</sup> but not to treble damages.<sup>16</sup> It is sufficient to recover under this act to prove that defendant ratified the trespass.<sup>17</sup> If the timber cut is not within the reservation of the defendant he is liable to treble damages.<sup>18</sup> The court may submit the facts in dispute to the jury.<sup>19</sup> The treble damage act of May 8, 1876, P. L. 142, relating to coal and minerals applies to building stone,<sup>20</sup> but not to sand taken by a railroad company from its right of way.<sup>21</sup> The act of 1876 applies the same remedies as the act of 1824 to trespass in mining or digging out "any coal, iron or other minerals."

## 2. Receivers of timber made liable.

Section 1 of the act of April 1, 1840, P. L. 217, provides as follows:

"All and singular the penalty and provisions of the three first sections of the act, passed the twenty-ninth day of March, 1824, entitled 'An act to prevent the destruction of timber,' and supplementary to the act, entitled, 'An act to prevent the damages which may happen by firing woods,' passed the eighteenth day of April, 1794, shall be, and they are hereby made applicable to any person or per-

<sup>8</sup> *Wheeler v. Carpenter*, 107 Pa. 271; *Bush v. Gamble*, 127 Pa. 43.

<sup>9</sup> *Kramer v. Goodlander* (No. 1), 98 Pa. 353.

<sup>10</sup> *Spring Run Coal Co. v. Tosier*, 102 Pa. 342.

<sup>11</sup> *Clark v. Sargeant*, 112 Pa. 16; *Robbins v. Farwell*, 193 Pa. 37.

<sup>12</sup> *Bethlehem, Etc., Co. v. Yoder*, 112 Pa. 136.

<sup>13</sup> *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563; 128 Pa. 485.

<sup>14</sup> *McCloskey v. Powell*, 138 Pa. 383, affirming 123 Pa. 62.

<sup>15</sup> *Shiffer v. Brodhead*, 126 Pa. 260.

<sup>16</sup> *Shiffer v. Brodhead*, 134 Pa. 539, distinguished in *Dexter v. Lathrop*, 136 Pa. 565.

<sup>17</sup> *Whitney v. Backus*, 149 Pa. 29.

<sup>18</sup> *Irwin v. Patchen*, 164 Pa. 51.

<sup>19</sup> *Agnew v. Lewis, Etc., Co.*, 218 Pa. 505.

<sup>20</sup> *Ruttledge v. Kress*, 17 Supr. C. 490.

<sup>21</sup> *Hendler v. R. Co.*, 209 Pa. 263.

sons who shall purchase or receive any timber, tree or trees, knowing same to have been cut or removed from the lands of another person without the consent of the owner or owners thereof; or who shall purchase or receive any planks, boards, staves, shingles, or other lumber made from such timber, tree or trees, so, as aforesaid, cut or removed, knowing the same to have been so made; and in all cases of suits brought before a justice of the peace under the third section of the act of the twenty-ninth day of March, 1824, to which this is a supplement, against any person or persons for purchasing or receiving such timber, tree or trees, or lumber made therefrom, and the defendant shall offer to make oath or affirmation, agreeably to the second section of the act of the twenty-second of March, 1814, that the title of land will come in question, the same course of proceeding will be had as is provided in and by the tenth section of the act of the eighth day of April, 1833, entitled, 'An act relative to the supervisors in Loyalsock township, in Lycoming County, and collectors in certain townships in Fayette County, and for other purposes.'"

Under this act a purchaser is only liable to the damages prescribed by the act of 1824, if he had knowledge of the trespass committed.<sup>22</sup>

### 3. Jurisdiction of justice of the peace.

Section 10 of the act of April 8, 1833, P. L. 222, provides as follows:

"In all cases in which suit shall be brought before a justice of the peace, to recover damages for the cutting of timber trees, under and by virtue of the third section of the act of the twenty-ninth of March, 1824, and the defendant shall offer to make oath or affirmation, agreeably to the second section to the act of the twenty-second of March, 1814, that the title to the land will come in question, the justice shall not receive the same until the defendant shall enter into recognizance before him, with one or more sureties, in such sum as the justice may direct, to pay to the plaintiff such sum as shall be recovered against him in the said suit, when removed as hereinafter directed, together with costs, and on the said oath or affirmation being made, instead of dismissing the said suit, the justice shall transmit a copy of the record thereof, and of all the proceedings therein, to the prothonotary of the Court of Common Pleas of his county, who shall enter the same on his docket, and the said suit shall then be proceeded in in the said court as if originally rightly brought there."

### 4. Recovery in trespass *q. c. f.*, when damages only are claimed.

Section 6 of the act of April 20, 1846, P. L. 413, provides as follows:

"In all actions of trespass *quare clausum fregit* now pending, or which may hereafter be brought, in which, upon the trial of the cause, the value of any goods or property taken and damages for such taking and detention only shall be claimed, if the legal right to such goods or property shall be found to be in the plaintiff or plaintiffs, he or they shall be entitled to recover the value of such

<sup>22</sup> O'Reilly v. Shadle, 33 Pa. 489; Watson v. Rynd, 76 Pa. 59.

goods and property, and damages aforesaid in the same manner as in actions of trespass, for taking goods and chattels, without regard to the form of action, and notwithstanding the plaintiff may not have had the possession or title or claim to the land, in which the trespass is by the writ and declaration supposed to have been done."

#### 5. Form of præcipe.

Ario Pardee	}	In the Court of Common Pleas, in and for the County of Snyder.
Jos. H. Knepp.		

Issue capias in trespass against the defendant for cutting down, carrying away and converting to his own use, timber trees on and from the lands of the plaintiff and for the recovery of treble damages in pursuance of an act of assembly of the 29th day of March, 1824, and its supplements.

Linn & McKee,  
Attorneys for Plaintiff.  
July 12, 1883.

To J. Crouse, Esq.,  
Prothonotary.  
Bail demanded in \$3,000.

#### 6. Form of affidavit of cause of action.

Mifflin County, ss.

John Swartzell being duly sworn, says that Joseph Knepp, the defendant, on or about the first day of August, 1877, and then continuing on divers other days and times up to the bringing of this suit, did break and enter the close of the plaintiff in the county of Snyder, to-wit, that certain messuage, and close or tract of land lying and being [describe same] and the timber trees of said plaintiff, to-wit: one hundred and forty-four white oak trees [describe all varieties], all of the value of twelve hundred and fifty dollars, there standing and growing, then and there did cut down, fell, take and carry away, and convert the same to his own use, contrary to the force and effect of the acts of assembly of the Commonwealth of Pennsylvania in such case made and provided, to the damage of the plaintiff in the sum of three thousand eight hundred dollars.

Sworn to, etc.

John Swartzell.

#### 7. Form of plaintiff's statement.

[Title.]

No. 17.

Sept. T., 1883.

Snyder County, ss.

Joseph Knepp was attached to answer Ario Pardee of a plea of trespass and thereupon the said plaintiff, by his attorneys, Linn & McKee, complains: for that whereas, after the making of a certain act of assembly of the Commonwealth of Pennsylvania in the year A. D. 1824, entitled "An act to prevent the destruction of timber trees," supplementary to an act passed the 18th day of April, A. D. 1794, entitled, "An act to prevent damages which may happen by firing woods," and at the time of the committing of the grievance

by the defendant as hereinafter mentioned, the said plaintiff was seized of a certain messuage, close or tract of land [describe same as in præcipe], and the said plaintiff being so seized thereof, the said defendant, not regarding said act of assembly hereinbefore mentioned, and after the making of the same, and whilst the plaintiff was so seized, to-wit: on the first day of August, A. D. 1877, and before the bringing of this suit, and at divers other days and times before the commencement of this action, with force and arms, at the county aforesaid, broke and entered the said messuage, close or tract of land of the said plaintiff, without the consent of the said plaintiff, and then and there did cut down, fell and did employ other persons to cut down and fell certain timber trees growing upon the said messuage, close or tract of land of the said plaintiff, without his consent, to-wit: [describe the trees as in præcipe], all of the value of three thousand eight hundred dollars, and the same took and carried away, converting and disposing of the same to his own use and other wrongs to the said plaintiff then and there did in contempt of and against the peace and dignity of the Commonwealth of Pennsylvania and against the statute in such case made and provided.

Linn & McKee,  
Attorneys for Plaintiff.

July 12, 1883.

Another count may be added varying the number and kind of trees as "other trees."

#### 8. Form of capias.

Snyder County, ss.

The Commonwealth of Pennsylvania to the sheriff of said county, greeting:

We command you that you take the body of Joseph Knepp, if he shall be found in your bailiwick, and him safely keep, until he shall have given bail or made deposit according to law [bail demanded in the sum of three thousand dollars (\$3,000)], so that he be and appear in our Court of Common Pleas on the — day of — next, then and there to answer Ario Pardee of a plea in trespass, wherefore, with force and arms, etc., he, the said Joseph Knepp, the close of the said Ario Pardee, at the county of Snyder, did break and enter and the timber trees of the said Ario Pardee, there standing and growing, to the value of twelve hundred and fifty dollars (\$1,250) did cut down, carry away and convert to his own use, and other wrongs, to him the said Ario Pardee did, to the great damage of the said Ario Pardee and against the peace and dignity of the Commonwealth of Pennsylvania, or until the said Joseph Knepp shall by other lawful means be discharged from your custody and have you then and there this writ.

Witness the Honorable Joseph C. Bucher, President Judge of said court at Middleburg, the 12th day of July, A. D. 1883.

[Seal.]

J. Crouse,  
Prothonotary.

#### 9. Sheriff's return.

July 20th, A. D. 1883. By virtue of the within writ to me directed, I arrested and took the body of the said Joseph Knepp, who

then after arrested, gave a bail bond, which is herewith returned, with John Snook, a good man of Mifflin County, as surety in the sum of three thousand dollars, as within I was commanded. So answers

David Reichley,  
Sheriff.

#### 10. Form of bond.

Know all men by these presents, that we, Joseph Knepp, of Snyder County, Pennsylvania, and John Snook, of Mifflin County, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of three thousand dollars lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania, her certain attorney, to which payment well and truly to be made, we bind ourselves and each of us, and our heirs, executors and administrators firmly by these presents.

Sealed with our seals; dated the 20th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Now the condition of this obligation is such, that if the above-bounden Joseph Knepp, who has been arrested under a *capias* issued out of the Court of Common Pleas of Snyder County to No. 17, Sept. Term, 1883, at the instance of Ario Pardee, his heirs, executors, administrators or any of them, shall and do well and truly pay or cause to be paid unto the above-named Commonwealth of Pennsylvania, her certain attorney, if he shall be condemned in the action at the suit of the said plaintiff, Ario Pardee, as above set forth, for the cutting and carrying away of the timber trees, etc., as set out in the proceedings in said suit, the condemnation money and costs, or surrender himself into the custody of the sheriff of the said county of Snyder, or in default thereof that the said Joseph Snook, who is his bail, will do so for him without any fraud or further delay, then the above obligation to be void, or else to be and remain in full force and virtue.

Sealed and delivered in }  
the presence of  
Augustus Knepp.

Joseph Knepp [Seal].  
John Snook [Seal].

#### *Justification.*

If plaintiff requires justification of bail add same.

## CHAPTER LV.

### TRESPASS FOR DECEIT AND FRAUD.

- |  |                                   |
|--|-----------------------------------|
| 1. Nature of action.                     | 5. Scope of evidence.             |
| 2. Scienter in statement.                | 6. Measure of damages.            |
| 3. The general issue.                    | 7. Form of præcipe.               |
| 4. Proof required to sustain the action. | 8. Form of plaintiff's statement. |
|  | 9. Form of plea.                  |

#### 1. Nature of action.

Technically there is no form of action of deceit. Before the act of 1887 the action for fraud and deceit was trespass on the case for damages for the particular character of injury. Under the old forms of action a plaintiff might waive the tort and sue in assumpsit as for money had and received to his use,<sup>1</sup> in which form of action he could not recover damages but only the actual amount he was out,<sup>2</sup> and if there was no money paid, he could not maintain assumpsit,<sup>3</sup> but could change to case.<sup>4</sup> If the deceit consisted in fraudulently inducing plaintiff to enter into the contract, in order to maintain assumpsit he must show an offer to return the thing for which he parted with his money, before he can recover;<sup>5</sup> but if he sues in trespass he need not show such offer.<sup>6</sup> Where the defendant however has committed two wrongs, deceit in procuring the contract and a breach of contract the alternative is not presented.<sup>7</sup> The plaintiff has two distinct causes of action in such cases,<sup>8</sup> which should not be joined.<sup>9</sup> Where there is a false warranty an action in assumpsit will lie for breach of the warranty or one for trespass upon the false representations, but the two should not be commingled in one declaration.<sup>10</sup> The same applies to breach of fraudulent guaranty.<sup>11</sup> A judgment for the defendant in the action for deceit does not bar an action in assumpsit on the contract itself.<sup>12</sup> The evidence of false representations will not sustain a suit for the breach of warranty.<sup>13</sup> The action for deceit will not lie upon an implied

<sup>1</sup> *Mussi v. Lorain*, 2 Browne, 56; *Vantine v. Wood*, 13 Pa. 270.

<sup>2</sup> *Pearsoll v. Chapin*, 44 Pa. 9.

<sup>3</sup> *Beals v. See*, 10 Pa. 56.

<sup>4</sup> *Smith v. Bellows*, 77 Pa. 441.

<sup>5</sup> *Pearsoll v. Chapin*, 44 Pa. 9.

<sup>6</sup> *Heastings v. McGee*, 66 Pa. 384; *Guffey v. Clever*, 146 Pa. 548.

<sup>7</sup> *McNair v. Compton*, 35 Pa. 23.

<sup>8</sup> *Finley v. Hanbest*, 30 Pa. 190.

<sup>9</sup> *Erie City Iron Works v. Barber*, 118 Pa. 6; *Buehler v. Rapp*, 2 Woodward, 443.

<sup>10</sup> *Hexter v. Bast*, 125 Pa. 52.

<sup>11</sup> *Overton v. Tracy*, 14 S. & R. 311.

<sup>12</sup> *Schrivver v. Eckenrode*, 87 Pa. 213.

<sup>13</sup> *Jackson v. Wetherill*, 7 S. & R. 480; *Canan v. McCamy*, 1 Penny. 397.

warranty—for, an express warranty is essential to maintain it.<sup>14</sup>

## 2. *Scienter* in declaration.

It is necessary that the plaintiff's statement should contain a *scienter*, that is, an averment that the defendant well knew that his said representations were false and fraudulent. It has been held that this may be supplied by amendment,<sup>15</sup> but the pleader who takes pride in his art will not omit it. The omission cannot be taken advantage of after verdict.<sup>15a</sup> It is usual to lay special damages, though this has been held unnecessary where damages are generally claimed.<sup>16</sup>

## 3. The general issue.

The plea of the general issue is "not guilty," but if the defendant would avail himself of his discharge in bankruptcy he must plead it specially; that is, give notice of special matter.<sup>17</sup>

## 4. Proof required to sustain the action.

Proof of misrepresentations of existing facts as a basis of an unfulfilled promise is sufficient.<sup>18</sup>

A mere *suppressi veri* is not sufficient in itself,<sup>19</sup> but proof in addition, of actual misrepresentation<sup>20</sup> will sustain the statement; also where a party has acted upon an inducement in which defendant knowingly concealed a material fact, which the plaintiff could not know, it is a suppression of the truth amounting to deceit.<sup>21</sup>

And so the charge of wilfully and knowingly deceiving one may be made out by proof of devices and artifices which concealed the facts which plaintiff should have known in the transaction.<sup>22</sup> Proof of fraudulent representations made by another person in the presence and hearing of defendant, which he did not contradict, when he knew them to be false is sufficient.<sup>23</sup>

It must be proven as alleged that the defendant knew that the representations were false<sup>24</sup> when they were made;<sup>25</sup> for if he honestly believed his statements to be true the intent is lacking and deceit is not made out.<sup>26</sup> So where one makes statements which he

<sup>14</sup> *Hexter v. Bast*, 125 Pa. 52.

<sup>15</sup> *Erie City Iron Works v. Barber*, 102 Pa. 156.

<sup>15a</sup> *Windows v. Rudolph*, 37 Supr. C. 264.

<sup>16</sup> *Martachowski v. Orawitz*, 8 Kulp, 370.

<sup>17</sup> *Weiler v. Lockheim*, 6 W. N. C. 191; *Hughes v. Oliver*, 8 Pa. 426.

<sup>18</sup> *Wilkinson v. Starr*, 14 W. N. C. 359.

<sup>19</sup> *Bokee v. Walker*, 14 Pa. 139.

<sup>20</sup> *Cornelius v. Molloy*, 7 Pa. 293.

<sup>21</sup> *Boyd v. Browne*, 6 Pa. 310; *Rheem v. Naugatuck Wheel Co.*, 33 Pa. 358.

<sup>22</sup> *Croyle v. Moses*, 90 Pa. 250.

<sup>23</sup> *Hartranft v. Fussell*, 180 Pa. 552.

<sup>24</sup> *Kimmel v. Lichty*, 3 Yeates, 262; *Penna. R. Co. v. Zug*, 47 Pa. 480; *Cox v. Highly*, 100 Pa. 249; *Williams v. Beninger*, 1 D. R. 35; *Keefe v. Sholl*, 181 Pa. 90; *Scott v. Heisner*, 33 Supr. C. 286.

<sup>25</sup> *McNair v. Compton*, 35 Pa. 23; *Staines v. Shore*, 16 Pa. 200.

<sup>26</sup> *Erie City Iron Works v. Barber*, 106 Pa. 125; *Dilworth v. Bradner*,



did not know to be true and which were actually false and which he should have known to be such, in his relation, proof of the facts will sustain a verdict.<sup>27</sup> The question of whether knowledge has been proved is for the jury.<sup>28</sup> Intention to cheat need not be proved; it suffices to prove that the defendant knew the representations to be false, and the intention is inferred.<sup>29</sup> For mere failure of warranty without proof of some facts to raise the inference that the warrantor knew his representations were false there can be no recovery in trespass for deceit.<sup>30</sup> The plaintiff must prove that he relied upon such false representations,<sup>31</sup> and the defendant may show that plaintiff was advised and informed of the facts.<sup>32</sup> If the plaintiff had equal means of knowing the fact and that duty shifted upon him he cannot recover.<sup>33</sup>

The plaintiff must also show his damage by reason of the fraud;<sup>34</sup> though in an early case it was held if he proved the fraud he is entitled to nominal damages at least.<sup>35</sup>

##### 5. Scope of evidence.

Where fraud is alleged the whole range of circumstances connected with the transaction is admissible in evidence,<sup>36</sup> embracing what transpired both before and after the consummation of the fraud alleged.<sup>37</sup> So defendant's repetitions of the false statements afterwards are admissible,<sup>38</sup> but his statements contradictory of the plaintiff made to others are inadmissible in his own behalf.<sup>39</sup> He may however show, on the question of damages, that the property received from plaintiff was defective,<sup>40</sup> or that the property was as represented in value or nearly so.<sup>41</sup>

Where the contract is in writing the evidence to contradict it must be clear, precise and indubitable.<sup>42</sup> Where the defendant stopped payment of a check given for goods, the plaintiff must

85 Pa. 238; *Duff v. Williams*, 85 Pa. 490; *Lamberton v. Dunham*, 165 Pa. 129.

<sup>27</sup> *Griswold v. Gebbie*, 126 Pa. 353.

<sup>28</sup> *Wilson v. Talheimer*, 20 C. C. 203; *Messinger v. Hagenbuch*, 2 Wharton, 410.

<sup>29</sup> *Boyd v. Browne*, 6 Pa. 310; *Huber v. Wilson*, 23 Pa. 178; *Rosenagle v. Handley*, 151 Pa. 107.

<sup>30</sup> *Schrivver v. Eckenrode*, 87 Pa. 213; *P. & L. Dig.*, vol. 5, col. 6443.

<sup>31</sup> *McAleer v. McMurray*, 58 Pa. 126; *Cox v. Highly*, 100 Pa. 249; *Davis v. Hawkins*, 163 Pa. 228.

<sup>32</sup> *Swazey v. Herr*, 11 Pa. 278.

<sup>33</sup> *Oil Well Supply Co. v. Ex. Natl. Bank*, 131 Pa. 100; *Iron City Natl. Bank v. DuPuy*, 194 Pa. 205; *Craft v. Phillips*, 4 Penny. 45.

<sup>34</sup> *Kern v. Simpson*, 126 Pa. 42.

<sup>35</sup> *Messinger v. Hagenbuch*, 2 Wharton, 410.

<sup>36</sup> *Cole v. High*, 173 Pa. 590.

<sup>37</sup> *White v. Rosenthal*, 173 Pa. 175.

<sup>38</sup> *Cummings v. Cummings*, 5 W. & S. 553.

<sup>39</sup> *Graham v. Hollinger*, 46 Pa. 55.

<sup>40</sup> *M'lene v. Fullerton*, 4 Yeates, 522.

<sup>41</sup> *Verbach v. Davis*, 3 Walker, 176.

<sup>42</sup> *Sacks v. Schimmel*, 3 Supr. C. 426.

show more than the mere stopping — facts to raise the presumption of bad faith.<sup>43</sup>

#### 6. Measure of damages.

The measure of damages is the amount which will fairly compensate the plaintiff for his actual loss sustained by reason of defendant's fraud,<sup>44</sup> with interest from the time when the injury was done,<sup>45</sup> which is for the jury to determine from all the evidence;<sup>46</sup> but they are not allowed to give speculative or vindictory damages.<sup>47</sup> Consequential damages may be proven and awarded.<sup>48</sup>

#### 7. Præcipe for writ.

Biddle Hornbeck	}	305 December Term, 1906.
v. S. S. Stahl.		

Issue summons in an action of trespass returnable first Monday of December, 1906.

McDonald & Cray,  
D. M. Hertzog,  
Plaintiff's Attorneys.

Nov. 12, 1906.  
To Peter E. Sheppard, Esq.,  
Prothonotary.

#### 8. Form of plaintiff's statement.

Biddle Hornbeck	}	In the Court of Common Pleas of Fayette County.	December Term, 1906.
v. S. S. Stahl.			

Plaintiff avers that the defendant, S. S. Stahl, is justly indebted to him in the sum of two hundred and fifty dollars (\$250.00) upon a cause of action of which the following is a statement:

Plaintiff avers that on or about the — day of March, 1902, the defendant S. S. Stahl, came to plaintiff's office at Dickerson Run in said County of Fayette and solicited him to subscribe and pay for certain shares of stock in a corporation known as the Western Pennsylvania Gold Mining Company, stating that said company was the owner of certain real estate situate in the state of California; that said real estate consisted of a tract of land in which were located several valuable mines or ledges of gold-bearing rock, one of which ledges was eight feet in thickness and of great value and another nine feet in thickness. That one of the mines or ledges located in said tract of land was what is familiarly known as the "Mother Lode" which was of very great value, and that some of these mines were well developed and well paying mines, from which

<sup>43</sup> Cole v. High, 173 Pa. 590.

<sup>44</sup> High v. Berret, 148 Pa. 281; Martachowski v. Orawitz, 8 Kulp, 370.

<sup>45</sup> Guffey v. Clever, 146 Pa. 548; Lare v. West, Etc., Co., 155 Pa. 33.

<sup>46</sup> Weaver v. Cone, 174 Pa. 104.

<sup>47</sup> Erie City Iron Works v. Barber, 102 Pa. 156; Cole v. High, 173 Pa. 590.

<sup>48</sup> Stetson v. Croskey, 52 Pa. 230.

large quantities of gold were taken and that said company had paid fifty-five thousand dollars for said real estate; that he, the defendant, had been down in said mines and had given them a thorough examination and that he knew the facts above stated to be true and that he had himself spent considerable money and time in investigating the mine before attempting to sell any of the stock. Defendant also showed plaintiff specimens of quartz or ore which he said contained large quantities of gold and which he had himself personally taken from the said mines. Defendant further referred to the cordial relation which had always existed between himself and plaintiff and stated that he was only selling the stock to his particular friends.

Plaintiff further avers that he believed the statements so made by the said defendant were true and that, relying upon the truth of said statements, he purchased from said defendant five hundred shares of said stock at the price of fifty cents per share, amounting in all to two hundred and fifty dollars and that he paid said defendant for said shares the sum of two hundred and fifty dollars by giving him his check on the First National Bank of Dawson aforesaid, which check was dated March 19th, 1902, and was cashed by said bank, and that he, defendant, delivered to plaintiff a certificate for said five hundred shares of stock a short time thereafter.

Plaintiff further avers that he has no personal knowledge of gold mines and has had no experience whatever in connection with the investigation of any such mines. That the said mines were located so far away that it was impossible for him to make personal examination of the same before purchasing said stock.

Plaintiff further avers that he has since ascertained that all of said statements above mentioned which were made by said defendant, and upon which he, plaintiff, relied in purchasing said stock were false; that said company did not pay fifty-five thousand dollars for said land, but, instead, paid only ten thousand dollars for the same; that the said land did not contain the mine which is familiarly known as the "Mother Lode," nor did it have any well developed mine from which gold in large and paying quantities was then being produced nor were there any ledges in said land, of gold-bearing rock, of eight feet or nine feet in thickness, as stated by said defendant; that he, the said defendant, at the time of making said statements and averring that he knew the same to be true, then well knew that said statements were false and that he the said defendant, made said statements knowing them to be false, wilfully and fraudulently for the purpose and with the intent of deceiving plaintiff, and thereby inducing him to part with the said sum of money and pay the same to him, the said defendant, without delivering any value therefor; that because of lack of gold-bearing stone or any other gold-bearing material in said land the said stock was of far less value than the said price of fifty cents per share, and was really worth less than ten cents per share, all of which he, the said defendant then and there knew.

Plaintiff, therefore, avers that he was wholly deceived and misled by the false and fraudulent statements made as aforesaid by the said defendant and has suffered loss thereby of the said sum of

two hundred and fifty dollars and he therefore brings this action,  
all of which he is ready to prove.

McDonald & Cray,  
D. M. Hertzog,  
Plaintiff's Attorneys.

**9. Form of plea.**

August 29, 1907, defendant pleads not guilty.

Robinson, McKean & Martin,  
Defendant's Attorneys.

## CHAPTER LVI.

### TRESPASS FOR FALSE ARREST AND IMPRISONMENT AND MALICIOUS PROSECUTION.

- |  |  |
|--|--|
| 1. Character of offenses.  | 15. Liability of parties.                        |
| 2. Arrest for breaches of the peace.                                 | 16. Liability of justice of the peace.           |
| 3. Arrest in cases of felony.  | 17. Liability of superintendent of hospital.     |
| 4. Arrest by officers.   | 18. Pleading, etc., in malicious prosecution.    |
| 5. Power of constable.   | 19. Proof — probable cause.                      |
| 6. Searches and seizures.  | 20. Proof of malice.                             |
| 7. Power of justices.  | 21. Effect of advice of counsel and others.      |
| 8. Officers protected.   | 22. Evidence of character, etc.                  |
| 9. Distinction between false imprisonment and malicious prosecution. | 23. Measure of damages for false arrest, etc.    |
| 10. Malicious prosecution.   | 24. Measure of damages in malicious prosecution. |
| 11. Jurisdiction.  | 25. The verdict and costs.                       |
| 12. Form of præcipe.   | 26. Malicious use and abuse of process.          |
| 13. Probable cause, etc., in false arrest and detention.             |  |
| 14. Form of statement for malicious prosecution.                     |  |

#### 1. Character of offenses.

There is so close a relation between malicious arrest and false imprisonment that each seems to be a phase of the other, but law writers have found a distinction.

Any unlawful detention of the person is false imprisonment. It must be against the will of the person and the place where it occurs is not essential. It must be without legal authority; for, if one has a warrant or writ of detention, or commitment from some legal tribunal authorizing him to seize the person of another and detain him or commit him, he may justify under it. Or, for the preservation of the public peace, and without an express warrant, except that the law enjoins it as a duty, one citizen may restrain another who is about to break the peace.

#### 2. Arrest for breaches of the peace.

Hence it is that officers may without warrant arrest those who are taken in the act of breaking the public peace.

If a man comes into the house of a person, or is in it, and makes an unseemly noise and disturbs the peace of the family, although he commits no assault, the owner or master may put him out, using no more force than is necessary. So if one station himself opposite a man's house and makes a disturbance and incites others to disturbance and riot, blocking the street or sidewalk, he may be arrested for breach of the peace. But such offenders must be

taken in the act, while in view. After an affray is over and the parties have separated, neither a private person nor a constable, can arrest without a warrant, unless indeed a felony has been committed meantime.

### 3. Arrest in cases of felony.

In case of felony any one may pursue and arrest the felon forthwith and without a warrant, subject, however, to a chance that he may mistake the person. An arrest for felony on mere suspicion is a dangerous thing to do, without an information and warrant. There must be both reasonable and probable cause to sustain an arrest on suspicion.

### 4. Officers, arrest by.

An officer, however, who has reasonable ground to believe a felony has been committed may arrest and detain the suspect until an inquiry can be made. This is true of larceny, but not of one suspected of having obtained goods illegally.

Officers (and sometimes private citizens) are by statute authorized to arrest without warrant for certain violations of law—but they must look for such authority in the words of the particular law.

### 5. Power of constable.

The common law is thus stated:<sup>1</sup>

"A constable hath great original and inherent power with regard to arrests. He may without warrant, arrest any one for a breach of the peace committed in his view and carry him before a justice of the peace. And in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may, upon probable suspicion, or upon a reasonable charge made by a third person arrest the felon, and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken."

In order to constitute arrest actual force need not be applied, nor need there be a manual touching or visible restraint of the body.<sup>1a</sup>

### 6. Searches and seizures.

Our constitution protects the citizen against unreasonable searches and seizures. This is a part of civil liberty. So, to justify, entering a man's castle to search for property or seize papers, a warrant specifically describing the property is necessary.

### 7. Power of justices.

Says Sir Matthew Hale:<sup>2</sup> Justices of the peace have a double power in relation to arrest of felons; original, or, on complaint of another person. If a justice of the peace see a felony or other breach of the peace committed in his presence, he may in his own person, apprehend the felon. And so he may by word command

<sup>1</sup> Blackstone's Com., vol. 4, 292.

<sup>1a</sup> McAleer v. Good, 216 Pa. 473.

<sup>2</sup> Hale's Pleas of the Crown, vol. 2, p. 86.

any person to apprehend him and such command is a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal, to apprehend the malefactor." This power belongs to judges of our courts of common law, who are by virtue of their offices, justices of the peace, to this extent.

#### 8. Officers protected.

When a justice or a constable proceeds, in due course of law, he will not be liable for false arrest and imprisonment, neither will a private individual who proceeds to invoke the law, in due form, upon reasonable and probable cause; for a recovery must be based upon an act done "maliciously and without reasonable and probable cause."<sup>3</sup> If, however, an officer proceed wilfully and wantonly, in a matter whereof he has no jurisdiction, and cause the arrest and imprisonment of another, the case is different.

#### 9. Distinction between false imprisonment and malicious prosecution.

The distinction was formerly made between false imprisonment, which was in the form of trespass, and a malicious prosecution, which was in the form of case. It was said the former lies for what, as stated, was manifestly illegal, and the latter for what on its face was legal, but covering some *suggestio falsi* or *suppressio veri* to move to action. These distinctions are now unimportant, as one form of action covers every species.

#### 10. Malicious prosecution.

In malicious prosecution "probable cause" is a question for the court, but the facts are for the jury—and the gist of the case, if there was not "probable cause" may be the tortious or crooked conduct of the prosecutor.

There may be also a malicious conspiracy to indict, or to bring an action to discredit a person; or a malicious proceeding to throw a person into bankruptcy. In all these cases the person who puts the law in motion causes that to be done which ensues in course of law. So although a policeman make the arrest, he who instigated and procured it is liable to the action.<sup>3a</sup>

#### 11. Jurisdiction.

An action for false arrest cannot be commenced until the criminal proceedings are ended;<sup>4</sup> and a justice of the peace has no jurisdiction.<sup>5</sup> One would naturally presume that not even a learned J. P. would assume jurisdiction. But the old adage still holds good:

"Where ignorance is bliss  
'Tis folly to be wis."

<sup>3</sup> *Burley v. Bethune*, 5 Taunton, 580, 1 E. C. L. R.

<sup>3a</sup> *Moss v. Judge*, 16 D. R. 1021.

<sup>4</sup> *Garren v. Garren*, 1 W. N. C. 9.

<sup>5</sup> *Marvel v. Jones*, 7 Kulp, 508.

**12. Form of præcipe.**

This action was formerly case, but now the præcipe is simply in form of trespass for whatever phase it is: false arrest, false imprisonment or malicious prosecution and requests a summons or a *capias* as the plaintiff may choose. In case of the latter and a demand for special bail if the amount is in excess of that fixed by rule of court, a special allowance by the court fixing the bail, is necessary and also an affidavit of cause of action (see *Capias*, Vol. I). The time within which the action must be commenced is six years, the procedure act of May 25, 1887, in no wise changing the act of 1713 as to limitation.<sup>6</sup>

**13. Probable cause, etc., in false arrest and detention.**

The want of probable cause for arrest or detention is a necessary averment in the statement since the existence of probable cause is sufficient upon which to warrant an apprehension. It has been defined to be "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in believing the party to be guilty of the offense charged."<sup>7</sup>

Where there is no dispute as to the facts, the question of probable cause is for the court.<sup>8</sup> But where there is a dispute as to the facts it is for the jury to find the facts and for the court to pronounce whether they constitute probable cause.<sup>9</sup>

There is this distinction drawn between false imprisonment and malicious prosecution; in the former, the burden is upon the defendant to show that it was done by authority of law; in the latter the burden is on the plaintiff.<sup>10</sup> In malicious prosecution absence of probable cause raises a presumption of malice, which may be rebutted by showing that the prosecutor acted under advice of counsel, but it is for the jury to determine whether such advice was sought and followed in good faith, and whether a full disclosure of the facts was made to counsel, and it would be error for the court to instruct the jury that if they believed the testimony of counsel plaintiff could not recover, no matter how eminent the counsel.<sup>11</sup> For malicious use, or abuse of civil process, whereby a man is restrained of his liberty this action will lie.<sup>12</sup> In case for abuse it is not necessary that the action was determined or that the *capias* was sued out without probable cause; but for malicious use of legal process the action must be determined and both malice and want of probable cause must be averred and proved.<sup>13</sup> Where there has been no interference either with the person or property of the

<sup>6</sup> *Boyd v. Snyder*, 207 Pa. 330.

<sup>7</sup> *Albright, J.*, in *Replogle v. Frothingham*, 16 Supr. C. 374; *Hunter v. Roush*, 26 C. C. 33.

<sup>8</sup> *McCarthy v. DeArmit*, 99 Pa. 63; *Grohman v. Kirschman*, 168 Pa. 189.

<sup>9</sup> *Futhey, P. J.*, in *Neall v. Hart*, 115 Pa. 347; *Auer v. Mauser*, 6 Supr. C. 618.

<sup>10</sup> *Grohmann v. Kirschman*, 168 Pa. 189; *Mikelberg v. Phila., Etc., Co.*, 16 D. R. 906.

<sup>11</sup> *Smith v. Walter*, 125 Pa. 453; *Emerson v. Cochran*, 111 Pa. 619.

<sup>12</sup> *Kramer v. Stock*, 10 Watts, 115; *Mayer v. Walter*, 64 Pa. 283.

<sup>13</sup> *Mayer v. Walter*, 64 Pa. 283; *Emerson v. Cochran*, 111 Pa. 619.



defendant the action will not lie.<sup>14</sup> In malicious prosecution the want of probable cause without malice is not sufficient; and where probable cause appears the motive for the prosecution, however malicious, goes for nothing.<sup>15</sup> As to prosecution upon advice of counsel the rule laid down is: "If in good faith, the prosecutor seeks, obtains and honestly follows the advice of competent counsel, on a full and fair statement of all the facts within his knowledge or which he has reason to believe he is able to prove and omit none which with reasonable diligence he could ascertain or discover, the advice so received will constitute a defense."<sup>16</sup>

Reasonable cause to suspect one is not ground for locking her up for hours without procuring a warrant from a convenient justice of the peace.<sup>17</sup>

An arrest is justified by a private person where a felony has been committed;<sup>18</sup> or when a breach of the peace is being committed.<sup>19</sup> The gist of the decisions is that the chief element in probable cause is the reasonable ground for belief of guilt.<sup>20</sup> The definition by Judge Albright given, *supra*, has now been generally adopted.<sup>21</sup> Where the facts are such as would induce an ordinary prudent person to believe that the one prosecuted was guilty, probable cause is shown.<sup>22</sup>

But probable cause is lacking where the alleged crime was not committed against an insurance company,<sup>23</sup> also when it is shown that the bill was ignored because of the failure of the prosecutor to appear before the grand jury.<sup>24</sup> Where an arrest is made in good faith on the information of third parties and an investigation by the prosecutor probable cause is shown,<sup>25</sup> but such information must be more than suspicion or suggestion.<sup>26</sup> Where the defendant was summarily convicted before an alderman, although the fine was remitted want of probable cause cannot be inferred.<sup>27</sup> To summarize, as above stated, where the facts are not disputed, probable cause is for the court<sup>28</sup> but where they are disputed the question is for the jury under instructions as to what is the meaning of probable cause.<sup>29</sup>

<sup>14</sup> Muldoon v. Rickey, 103 Pa. 110.

<sup>15</sup> McCarthy v. DeArmit, 99 Pa. 63.

<sup>16</sup> Fry v. Wolf, 8 Supr. C. 468; Beihofer v. Loeffert, 159 Pa. 374; Barhight v. Tammany, 158 Pa. 545; McClafferty v. Philp, 151 Pa. 86.

<sup>17</sup> Butler v. Stockdale, 19 Supr. C. 98.

<sup>18</sup> McCarthy v. DeArmit, 99 Pa. 63; Mahaffey v. Byers, 151 Pa. 92.

<sup>19</sup> Sloan v. Schomacker, 136 Pa. 382.

<sup>20</sup> Smith v. Ege, 52 Pa. 419.

<sup>21</sup> Cooper v. Hart, 147 Pa. 594; Ritter v. Ewing, 174 Pa. 341.

<sup>22</sup> Bruff v. Kendrick, 21 Supr. C. 468; Baker v. Moore, 29 Supr. C. 301; Scott v. Dewey, 23 Supr. C. 396; Burgman v. Rosenstein, 22 Lanc. L. R. 235.

<sup>23</sup> Huckestein v. N. Y., Etc., Ins. Co., 205 Pa. 27.

<sup>24</sup> Campbell v. Sidwell, 20 Supr. C. 183.

<sup>25</sup> Bryant v. Kuntz, 25 Supr. C. 102.

<sup>26</sup> Huber v. Conway, 1 Phila. 121.

<sup>27</sup> Lipowicz v. Jervis, 209 Pa. 315.

<sup>28</sup> Bruff v. Kendrick, 21 Supr. C. 468; Bryan v. Kuntz, 25 Supr. C. 102; Scott v. Dewey, 23 Supr. C. 396.

<sup>29</sup> Bruff v. Kendrick, *supra*.

. 14. Form of statement, for malicious prosecution.

Frank Porter }  
 v. } In the Court of Common Pleas of Montour County.  
 Peter Reeder. } No. —, — Term, 19—.

The plaintiff Frank Porter claims of the defendant Peter Reeder the sum of ten thousand dollars which sum is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is his statement:

The said plaintiff is a good, true, honest and faithful citizen and always has behaved and conducted himself as such, and has never been guilty or suspected even of being guilty of any crime [or felony] whatsoever, until the time of the commission of the grievances against him by the defendant as hereinafter set forth; that by reason of such just and upright life said plaintiff had acquired the good opinion and credit of his fellow men and particularly of all his neighbors and citizens of the said county and vicinity, where he was well known; yet so it is that the defendant well-knowing the premises but wickedly contriving and maliciously intending him the said plaintiff to injure in his good name, fame and credit and to bring him into public scandal, infamy and disgrace and to cause him to be imprisoned and deprived of his liberty and happiness for a long period of time, and then and there, him wholly to impoverish, oppress and ruin, at the county aforesaid, did — on the — day of —, A. D. 19—, appear before —, Esq., then and there a legally commissioned and qualified justice of the peace [or other officer] authorized to issue warrants of arrest and to hear and determine upon probable cause, divers felonies crimes and misdemeanors and commit or bind over to court the defendant; and did then, at the county aforesaid, before said —, take an oath (or affirmation) wherein and whereby, he the said defendant did falsely and maliciously, and without probable cause charge the plaintiff with [here insert the charge as made in the information] and upon said charge, so falsely and maliciously and without probable cause made, caused and procured a warrant of arrest to be issued by said magistrate in the words and terms as follows [insert copy of warrant]: That in pursuance and by virtue of said warrant the said plaintiff was on the — day of —, A. D. —, at the county aforesaid, at the instance and by the procurement of said defendant wrongfully, unjustly, unlawfully and without probable cause, arrested and restrained of his liberty, and kept in detention [or imprisoned] for the period of —, then next following and until [here state the further steps—such as hearing, re-commitment; if any, the requiring of bail, or hearing and discharge; or presentation of the cause to the grand jury and the return of ignoramus, etc., down to the end of the prosecution]. That the said magistrate, having heard and considered all that the said defendant could say or allege against the said plaintiff touching and concerning his said false and malicious charge, then, to-wit, on the — day of —, A. D. 19—, adjudged and determined that the plaintiff was not guilty of the said supposed offense and that the prosecution was without probable cause and wholly dismissed the same and discharged the plaintiff from custody; and the defendant then and there wholly abandoned his said complaint and it is fully

ended and determined. [In case of trial and acquittal in the criminal courts, after reciting all the steps taken to the end.]

And thereupon the said jury on the — day of —, A. D. —, in open court rendered a verdict of "not guilty," which was entered of record and thereupon the judgment of the court was given and the plaintiff fully discharged and acquitted as by reference to No. —, — sessions, 19—, of said court will more fully appear;

That by means of the premises recited the said plaintiff has been and is greatly injured in his reputation and credit and that he has been brought into disgrace among his neighbors and many others by whom he was well-known, has been suspected of [crime or felony] has suffered great anxiety of mind and pain of body and was deprived of his liberty for —; has been obliged to expend large sums of money amounting to — dollars, in procuring his liberty and defending his reputation; has been greatly hindered in trade and injured in his business of —, and otherwise, by reason of the premises, injured in his credit and circumstances to the damage of the plaintiff ten thousand dollars.

Whereupon he brings suit.

Frank Porter,  
By his attorneys,  
— —

### 15. Liability of parties.

Where a member of a firm causes an arrest and the other members appear at the hearing, all are liable to prosecution for false arrest.<sup>1</sup> Where a brakeman arrests one on a train the conductor is jointly liable if he directs it or knowing of it consents—but not if he is not informed until after the train is on its way.<sup>2</sup> One arrested for contempt of court in an injunction case has no cause of action.<sup>2a</sup>

A police officer cannot justify under orders of a superior officer.<sup>3</sup> A U. S. marshal who shows his commission and recognition by the federal courts sufficiently gives his authority as such.<sup>4</sup> In malicious prosecution one who actively participates in the prosecution, although his name does not appear on the record as the prosecutor is liable to an action;<sup>5</sup> as where he causes the detention of the defendant in prison in hope of extorting a confession.<sup>6</sup> Such participation in and promotion of the prosecution may be proven by the circumstances.<sup>7</sup> "An arrest without just cause, a wrongful or unlawful arrest, and an abuse of a lawful arrest, stand upon the same footing as regards duress."<sup>8</sup>

An arrest merely to enforce a claim for money, is false imprison-

<sup>1</sup> *Buchanan v. Goettman*, 46 Pitts. L. J. 302.

<sup>2</sup> *Drake v. Kiely*, 93 Pa. 492.

<sup>2a</sup> *Hoskins v. Somerset Coal Co.*, 219 Pa. 373.

<sup>3</sup> *Flinn v. Graham*, 3 Pitts. 195.

<sup>4</sup> *Kilpatrick v. Frost*, 2 Grant, 168.

<sup>5</sup> *Cotton v. Huidekoper*, 2 P. & W. 149; *Baker v. Moore*, 29 Supr. C. 301.

<sup>6</sup> *Burk v. Howley*, 179 Pa. 539.

<sup>7</sup> *Walbridge v. Pruden*, 102 Pa. 1.

<sup>8</sup> *Thayer, J.*, in *Owen v. Schmidt*, 14 Phila. 183; 10 W. N. C. 5.

ment and all who participate in this abuse of process are liable.<sup>9</sup> One who testifies before a grand jury in obedience to a subpoena cannot be held liable merely because his servant brought the prosecution;<sup>10</sup> nor can one who directed a justice to notify a person to pay, be made liable if the justice on his own motion issues a warrant.<sup>11</sup> A corporation is liable as such.<sup>12</sup> The record showing that defendant was prosecutor is conclusive upon him.<sup>13</sup> The principal becomes liable for the act of his agent only when expressly authorized or when the authority may be fairly inferred from the nature and scope of his employment.<sup>14</sup>

#### 16. Liability of justice of the peace.

Where a justice of the peace issues a warrant on an information charging no offense, a prosecution will not lie against him when no notice was given him as required by act of March 21, 1772. 1 Sm. L. 364.<sup>15</sup>

A justice is liable for illegally causing the arrest of a person, or for refusing bail when the offense is bailable, although the latter fact is not averred in the statement.<sup>16</sup> A warrant cannot be justification to any one when the charge made is not a criminal offense.<sup>17</sup> An information setting out a cheat and fraud has been held sufficient ground for a warrant.<sup>18</sup> An alderman's advice to one to issue a warrant for libel is no excuse. It may be offered in mitigation of damages only.<sup>19</sup>

#### 17. Liability of superintendent of hospital.

Where the superintendent of a hospital for the insane is sued by one who was committed under the forms of law, the plaintiff must show by a preponderance that he was unlawfully detained by the defendant. The officer is not liable for a mistake of judgment as to the sanity of the patient.<sup>20</sup> The same rule shields the physicians who certify to the insanity of a person under the act of April 20, 1869, P. L. 78.<sup>21</sup>

#### 18. Pleading, etc., in malicious prosecution.

It was held that a statement did not need to aver that defendant caused plaintiff to be tried, if he averred that he caused him to be indicted.<sup>22</sup> Omissions to aver that the prosecution was without

<sup>9</sup> Fillman v. Ryan, 168 Pa. 484.

<sup>10</sup> Comly v. Wanamaker, 14 Montg. Co. 30.

<sup>11</sup> Pownall v. Lancaster, Etc., Co., 16 Lanc. L. R. 411.

<sup>12</sup> Fenton v. Wilson, Etc., Co., 9 Phila. 189.

<sup>13</sup> Katterman v. Stitzer, 7 Watts, 189.

<sup>14</sup> Markley v. Snow, 207 Pa. 447; Matheys v. Allemania Ins. Co., 50 Pitts. L. J. 32.

<sup>15</sup> Magnussen v. Shortt, 200 Pa. 257.

<sup>16</sup> Grohmann v. Kirschman, 168 Pa. 189.

<sup>17</sup> Williams v. Jones, 6 Phila. 541; Ross v. Hudson, 6 Supr. C. 552; Kessler v. Hoffman, 9 D. R. 365.

<sup>18</sup> Neall v. Hart, 115 Pa. 347.

<sup>19</sup> Frederick v. Minehart, 34 Leg. Int. 305.

<sup>20</sup> Hindman v. Hutchinson, 47 Pitts. L. J. 422.

<sup>21</sup> Williams v. LeBar, 141 Pa. 149.

<sup>22</sup> Graham v. Noble, 13 S. & R. 233.

probable cause and that it was ended were held cured by the verdict.<sup>23</sup> Smith, J., said:<sup>24</sup> "It is not material whether the injury set forth in this action was a malicious prosecution or a false imprisonment. In practice, the distinction between these torts has related to the form of the action and this distinction is abolished by the procedure act of 1887."

The wrong is the false charge, which led to the arrest, which caused the consequential injuries to the plaintiff.<sup>25</sup> Where the complaint charged trespass and the warrant was for larceny, the court rightly refused to charge that plaintiff could not recover for such prosecution.<sup>26</sup> Slander cannot be changed to malicious prosecution by amendment.<sup>27</sup> But the plaintiff's statement may be amended after verdict by adding the amount of damages claimed.<sup>28</sup> If the plaintiff's affidavit to hold to bail omits a vital averment negating the charge in the prosecution, defendant will be discharged on common bail.<sup>29</sup> All the ingredients of a cause of action for malicious prosecution must be made out in an action for conspiracy to indict. In such case it must be averred and proved that they combined and confederated to do the particular unlawful act.<sup>30</sup>

#### 19. Proof — Probable cause in malicious prosecution.

Inasmuch as every prosecution is presumed to have been begun on probable cause, the burden of proof is upon the plaintiff to show want of probable cause.<sup>31</sup> Where the indictment did not set forth the crime alleged in the information a verdict of "not guilty" does not show the end of the proceedings, so as to warrant bringing suit.<sup>32</sup>

A complete determination must be shown;<sup>33</sup> but whether it is a determination is a question of law for the court.<sup>34</sup> Courts have held these to be a determination: discharge by the magistrate who examined;<sup>35</sup> discharge on habeas corpus;<sup>36</sup> entry of a *nol. pros.*;<sup>37</sup> ignoring of the bill.<sup>38</sup> They have also held these not to be an end of the prosecution: discharge of defendant without notice to the prosecutor;<sup>39</sup> discharge, after conviction on a motion in arrest of judgment.<sup>40</sup>

<sup>23</sup> Weinberger v. Shelly, 6 W. & S. 336.

<sup>24</sup> Hess v. Heft, 3 Supr. C. 582.

<sup>25</sup> Barry v. Penna. Salt Co., 8 W. N. C. 307.

<sup>26</sup> Reel v. Martin, 12 Supr. C. 340.

<sup>27</sup> Shock v. M'Chesney, 4 Yeates, 507.

<sup>28</sup> Brobst v. Ruff, 100 Pa. 91.

<sup>29</sup> Aarons v. Dunseith, 1 D. R. 701.

<sup>30</sup> Newall v. Jenkins, 26 Pa. 159.

<sup>31</sup> Walter v. Sample, 25 Pa. 275; Mitchell v. Logan, 172 Pa. 349; Mahaffey v. Byers, 151 Pa. 92. (See, Probable Cause, *supra*.)

<sup>32</sup> Griffith v. Whitestone, 14 D. R. 622.

<sup>33</sup> Reiter v. Brown, 21 Pitts. L. J. 131; P. & L. Dig., vol. 11, col. 19394.

<sup>34</sup> Walker v. Curran, 1 Phila. 113.

<sup>35</sup> Mentel v. Hippely, 165 Pa. 558.

<sup>36</sup> Charles v. Abell, Brightly, 131; Zebbley v. Storey, 117 Pa. 478.

<sup>37</sup> Murphy v. Moore, 11 Atl. 665.

<sup>38</sup> Auer v. Mauser, 6 Supr. C. 618.

<sup>39</sup> Hill v. Eagan, 168 Pa. 119.

<sup>40</sup> Kirkpatrick v. Kirkpatrick, 39 Pa. 288.

Proof of discharge by the committing magistrate is *prima facie* proof of want of probable cause;<sup>41</sup> but not if the discharge is illegal as in a surety of the peace case.<sup>42</sup> After acquittal by a jury, however, the burden of proving probable cause is on the defendant in the suit for *mal. pros.*;<sup>43</sup> also where such verdict is directed by the court.<sup>44</sup> Where a party issues a warrant to arrest a defendant in a civil proceeding, pending an appeal, on the pretext of fraudulent removal, he must answer in damages for such abuse of process on proof of the facts.<sup>45</sup>

Probable cause is shown where the defendant admitted taking the goods;<sup>1</sup> or where he used violent and abusive language and broke the peace.<sup>2</sup> There are many cases illustrating "probable cause," for which reference is here made to vol. 11, P. & L. Dig., col. 19403, *et seq.*

#### 20. Proof of malice.

In malicious prosecution, the rule is different from false arrest and imprisonment. The plaintiff must prove express malice from the inception.<sup>3</sup> Both malice and want of probable cause must be shown.<sup>4</sup> But proof of want of probable cause will raise a legitimate inference of malice;<sup>5</sup> however, this with the related facts, is for the jury and not the court.<sup>6</sup> The proof of probable cause defeats the action, and thereupon malice ceases to be a factor.<sup>7</sup> It is proof of malice that the prosecution was instituted for private purposes, such as to force the payment of money, or other advantage to the prosecutor;<sup>8</sup> and it is conclusive where no probable cause is shown.<sup>9</sup> Where several were jointly prosecuted evidence of malice against one cannot supply evidence of malice against the other who has brought this action.<sup>10</sup>

#### 21. Effect of advice of counsel and others.

The rule as to the effect of advice of counsel upon probable cause

<sup>41</sup> *Burgman v. Rosenstein*, 22 *Lanc. L. R.* 235.

<sup>42</sup> *Sardo v. Crout*, 6 *Jus. of P.* 74.

<sup>43</sup> *Scott v. Dewey*, 23 *Supr. C.* 396.

<sup>44</sup> *Rosenthal v. Rosenthal*, 13 *D. R.* 317.

<sup>45</sup> *Mihalyik v. Klein*, 22 *Supr. C.* 193.

<sup>1</sup> *Sutton v. Anderson*, 103 *Pa.* 151.

<sup>2</sup> *Sloan v. Schomacker*, 136 *Pa.* 382.

<sup>3</sup> *Kirkpatrick v. Kirkpatrick*, 39 *Pa.* 288; *Campbell v. Sidwell*, 20 *Supr. C.* 183; *Bryant v. Kuntz*, 25 *Supr. C.* 102; *P. & L. Dig.*, vol. 11, col. 19412.

<sup>4</sup> *Dietz v. Langfitt*, 63 *Pa.* 234.

<sup>5</sup> *Abrahams v. Cooper*, 81 *Pa.* 232; *Acker v. Gundy*, 12 *Atl.* 595; *Leahy v. March*, 155 *Pa.* 458; *Mihalyik v. Klein*, 22 *Supr. C.* 193.

<sup>6</sup> *Schofield v. Ferrers*, 47 *Pa.* 194; *Mann v. Cowan*, 8 *Supr. C.* 30; *Fry v. Wolf*, 8 *Supr. C.* 468; *Ritter v. Ewing*, 174 *Pa.* 341; *Humphreys v. Mead*, 23 *Supr. C.* 415; *Baker v. Moore*, 29 *Supr. C.* 301.

<sup>7</sup> *Beihofer v. Loeffert*, 159 *Pa.* 365, 374; *Ruffner v. Hooks*, 2 *Supr. C.* 278; *Jones v. Matheis*, 17 *Supr. C.* 220; *Lipowicz v. Jervis*, 209 *Pa.* 315.

<sup>8</sup> *McElroy v. Meredith*, 12 *Atl.* 170; *Wenger v. Phillips*, 195 *Pa.* 214; *Gaertner v. Heyl*, 179 *Pa.* 391.

<sup>9</sup> *Reed v. Loosemore*, 197 *Pa.* 261.

<sup>10</sup> *Miller v. Hammer*, 141 *Pa.* 196.

has been stated, *supra*. It is important as rebutting malice,<sup>11</sup> whether the facts warrant a prosecution or not.<sup>12</sup> But all the facts must have been submitted to counsel and his advice followed in good faith.<sup>13</sup> Whether this has been done is for the jury to find.<sup>14</sup> The advice of a layman or a justice of the peace does not reach as high.<sup>15</sup>

## 22. Evidence of character, etc.

The plaintiff may give evidence of his good character even though it has not been assailed.<sup>16</sup> Bad character of plaintiff since the prosecution is inadmissible by defendant to show probable cause;<sup>17</sup> so of conversation at the time of the arrest;<sup>18</sup> also declarations of third parties.<sup>19</sup> An offer of the prosecutor to settle is not admissible to rebut malice.<sup>20</sup> But evidence of the circumstances connected with the transaction is;<sup>21</sup> also that the prosecutor discovered his error after he had begun and stated his intention not to press the prosecution.<sup>22</sup>

In rebuttal defendant may prove that on the former trial the plaintiff agreed not to bring a suit for damages if no evidence were given and a verdict of not guilty be taken.<sup>23</sup>

## 23. Measure of damages for false arrest, etc.

The plaintiff in the action for false arrest and imprisonment is entitled to damages which will not only compensate him for the money he expended or lost, but also for the outrage, humiliation and disgrace inflicted upon him. The jury may consider all the circumstances of the case to determine this, and they may also give punitive damages.<sup>24</sup>

Where the person acts as an officer and in good faith, without malice or wantonness, damages, if any, should be only compensatory.<sup>25</sup> But if the arrest is wilful, wanton and malicious, punitive damages may be given in the conscience of the jury.<sup>26</sup> Evidence of plaintiff's character is inadmissible to mitigate the damages.<sup>27</sup>

When a passenger is wrongfully arrested by an officer of a rail-

<sup>11</sup> *Madison v. Penna. R. Co.*, 147 Pa. 509; P. & L. Dig., vol. 11, col. 19415.

<sup>12</sup> *Walter v. Sample*, 25 Pa. 275.

<sup>13</sup> *Humphreys v. Mead*, 23 Supr. C. 415.

<sup>14</sup> *Bell v. Atlantic City R. Co.*, 202 Pa. 178.

<sup>15</sup> *Brobst v. Ruff*, 100 Pa. 91; *Beihofer v. Loeffert*, 159 Pa. 365; P. & L. Dig., vol. 11, col. 19419.

<sup>16</sup> *Glace v. Hummel*, 10 D. R. 110; *Quinn v. Crowell*, 4 Wharton, 334.

<sup>17</sup> *Winebiddle v. Porterfield*, 9 Pa. 137.

<sup>18</sup> *Burk v. Howley*, 179 Pa. 539.

<sup>19</sup> *McElroy v. Meredith*, 12 Atl. 170.

<sup>20</sup> *Gilliford v. Windel*, 108 Pa. 142; *Mitchell v. Logan*, 172 Pa. 349.

<sup>21</sup> *Mylott v. Skinner*, 12 Supr. C. 137.

<sup>22</sup> *Dietz v. Langftt*, 63 Pa. 234.

<sup>23</sup> *Kramer v. Kister*, 187 Pa. 227.

<sup>24</sup> *Buchanan v. Goettmann*, 46 Pitts. L. J. 302.

<sup>25</sup> *McCarthy v. De Armit*, 99 Pa. 63.

<sup>26</sup> *Grohmann v. Kirschman*, 168 Pa. 189; *Butler v. Stockdale*, 19 Supr. C. 98.

<sup>27</sup> *Russell v. Shuster*, 8 W. & S. 308.

road company and ejected from the car he may recover not only for the loss of time and money, but for injury to his person and health and feelings and the humiliation he suffered.<sup>28</sup>

#### 24. Measure of damages in malicious prosecution.

The jury in their best judgment are the measurers of the damages in each case, subject only to the revision of the court if deemed excessive or inadequate.<sup>29</sup> They may consider the injury to plaintiff's feelings, loss of character and hurt to his opportunity to gain employment or transact business in the community;<sup>30</sup> and injury to him physically by deprivation and discomfort whilst in prison.<sup>31</sup> Where the prosecution was wantonly and recklessly instituted to harass the plaintiff, punitive damages may be given;<sup>32</sup> also where the prosecution was brought for a private purpose only.<sup>33</sup> Under the act of 1705, 1 Sm. L. 56, double damages were allowed, when the declaration cited the act;<sup>34</sup> and it was presumed that a jury gave double damages in their verdict.<sup>35</sup>

#### 25. The verdict and costs.

In the action for malicious prosecution where there are several defendants, each one is liable for the whole amount of damages, and therefore the verdict is against them generally.<sup>36</sup> The verdict carries full costs.<sup>37</sup> The act of March 27, 1713, applies only to "slandereous words," and not to trespass, except trespass *q. c. f.* and *vi et armis* for assault and battery. So full costs follow though the jury found but one cent damage.<sup>38</sup>

#### 26. Malicious use and abuse of process.

Reference has been made, *supra*, to a distinct form of trespass for malicious misuse or abuse of process. The form of action is now the same simple trespass, no matter how it arose. Before this suit can be brought the former action must be ended.<sup>39</sup> The plaintiff has the burden of proving want of probable cause.<sup>40</sup> The recovery in the former action is conclusive proof of probable cause,<sup>41</sup> although

<sup>28</sup> B. & O. R. Co. v. Bambrey, 2 Mona. 109; Perry v. Pitts., Etc., R. Co., 153 Pa. 236; Duggan v. B. & O. R. Co., 159 Pa. 248; Laird v. Pitts. Tr. Co., 166 Pa. 4; Light v. Harrisburg, Etc., R. Co., 4 Supr. C. 427.

<sup>29</sup> Myers v. Litts, 3 Lack. L. N. 363.

<sup>30</sup> Burk v. Howley, 179 Pa. 539.

<sup>31</sup> Abrahams v. Cooper, 81 Pa. 232; Paxson in Zebley v. Storey, 117 Pa. 478, to the contrary notwithstanding.

<sup>32</sup> Baldwin v. Von der Ahe, 184 Pa. 116.

<sup>33</sup> Orr v. Seiler, 1 Penny. 445.

<sup>34</sup> Morrison v. Gross, 1 Browne, 1.

<sup>35</sup> Campbell v. Finney, 3 Watts, 84.

<sup>36</sup> Shultz v. Hunter, 2 Browne, 233.

<sup>37</sup> Kunkle v. Aiken, 23 W. N. C. 372.

<sup>38</sup> Small v. Arnhold, 17 Phila. 256, where the statutes of costs in Pennsylvania are reviewed.

<sup>39</sup> Mayer v. Walter, 64 Pa. 283.

<sup>40</sup> Murson v. Austin, 2 Phila. 116; Rosenstein v. Brown, 7 Phila. 144; Beach v. Wheeler, 24 Pa. 212.

<sup>41</sup> Herman v. Brookerhoff, 8 Watts, 240; Eberly v. Rupp, 90 Pa. 259.



reached by compromise;<sup>42</sup> but an offer to compromise is not evidence of probable cause,<sup>43</sup> which may be shown by the particular circumstances of each case.<sup>44</sup> Malice also enters into this species of harms. It has been defined as "an improper act, injurious to another, proceeding from an improper motive."<sup>45</sup> The rules are similar to those laid down, *supra*, in malicious prosecution.<sup>46</sup> The damages may be compensatory or punitive according to the circumstances.<sup>47</sup> But if special damages are sought they must be averred in the statement.<sup>48</sup>

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<sup>42</sup> *Clark v. Everett*, 2 Grant, 416.

<sup>43</sup> *Emerson v. Cochran*, 111 Pa. 619.

<sup>44</sup> P. & L. Dig., vol. 11, col. 19434.

<sup>45</sup> *Duncan, J.*, in *Sommer v. Wilt*, 4 S. & R. 19.

<sup>46</sup> P. & L. Dig., vol. 11, col. 19435.

<sup>47</sup> *Barnett v. Reed*, 51 Pa. 190.

<sup>48</sup> *Stanfield v. Phillips*, 78 Pa. 73.

## CHAPTER LVII.

### TRESPASS FOR LIBEL OR SLANDER.

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33. Privileged communications.
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39. Evidence, admissibility, etc.
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42. General damages.
43. Special damages.
44. Punitive damages.
45. Powers of jury and court.
46. Costs.

#### 1. Definition of terms.

Injuries to a man's reputation are such as are produced by publishing and printing a libel; or by speaking and publishing orally false and defamatory words called slander. Libel has been defined: "A malicious defamation in print, writing or by signs, tending to injure the reputation of another, and exposing him to public hatred, contempt or ridicule." A publication must be averred also that it was falsely and maliciously done. It has been said that in a prosecution for libel: "The greater the truth, the greater the libel." But in an action the truth of the matter published may be shown in mitigation of damages. Even in a prosecution defense is allowable on the ground of proper motives and justification.

Malice will be implied from the tenor of the words — if defama-

tory. To render words actionable *per se*, they must impute an offense of moral turpitude punishable criminally.<sup>1</sup>

There are numerous authorities which hold that any malicious publication, whether written, printed or painted, which by words or signs tends to expose a person to ridicule, contempt, hatred or degradation of character, is a libel; and the person so libeled may recover damages, unless it be shown that the publication was true and made for proper purposes.<sup>2</sup> It is not the law that "unless the jury find that the publication was false and malicious and published by the defendant with malicious intent, the plaintiff is not entitled to recover."<sup>3</sup> Publications are libelous *per se* which charge or impute an indictable and infamous offense;<sup>4</sup> or that the person was once arrested and imprisoned;<sup>5</sup> or that he was guilty of fraudulent and hypocritical conduct;<sup>6</sup> or that he was habitually associating with criminals;<sup>7</sup> or that, being a detective he was guilty of cowardice;<sup>8</sup> or that the person is insane;<sup>9</sup> or a witch;<sup>10</sup> or that he has been disgraced by his church for mendacity;<sup>11</sup> or having lied and suborned perjury;<sup>12</sup> or that a steal was only made possible by a judge's charge to the jury.<sup>13</sup>

## 2. Libel in respect to profession or vocation.

Words calculated to injure a person in his trade, vocation or profession, by imputing to him dishonesty, insolvency or embarrassment are actionable,<sup>14</sup> but unless they import damages, they must be laid and proved specially.<sup>15</sup> Where the statement by a mercantile agency is that a judgment was entered against a merchant when in fact it was a verdict, a witness may be asked whether or not his conduct would have been the same in either case.<sup>16</sup>

## 3. Words held to be slanderous *per se*.

The common law rule as to when words are slanderous *per se* is stated above. This has been somewhat modified by statute and

<sup>1</sup> Klumph v. Dunn, 66 Pa. 141.

<sup>2</sup> Barr v. Moore, 87 Pa. 385; Neeb v. Hope, 111 Pa. 145; Oles v. Pittsburgh Times, 2 Supr. C. 130; Chase v. Scranton, 4 Walker, 355; P. & L. Dig., vol. 11, col. 18494.

<sup>3</sup> Wills v. Hardcastle, 19 Supr. C. 525.

<sup>4</sup> Bryant v. Pittsburgh Times, 192 Pa. 585; Moore v. Leader Pub'g Co., 8 Supr. C. 152; Coates v. Wallace, 4 Supr. C. 253; Wallace v. Jameson, 179 Pa. 98; Collins v. Pitts. Dispatch, 152 Pa. 187.

<sup>5</sup> Godshalk v. Metzgar, 1 Mona. 382.

<sup>6</sup> Wood v. Boyle, 177 Pa. 620; Pittock v. O'Neill, 63 Pa. 253.

<sup>7</sup> Barr v. Moore, 87 Pa. 385; Conroy v. Pittsburgh Times, 139 Pa. 334.

<sup>8</sup> Holland v. Flick, 212 Pa. 201.

<sup>9</sup> Seip v. Deshler, 170 Pa. 334.

<sup>10</sup> Oles v. Pittsburgh Times, 2 Supr. C. 130.

<sup>11</sup> M'Corkle v. Binns, 5 Binney, 340.

<sup>12</sup> Magauran v. Patterson, 6 S. & R. 278.

<sup>13</sup> Briggs v. Garrett, 111 Pa. 404.

<sup>14</sup> Hayes v. Press Co., 127 Pa. 642; Price v. Conway, 134 Pa. 340; Wallace v. Jameson, 179 Pa. 98; Meas v. Johnson, 185 Pa. 12; McIntyre v. Weinert, 195 Pa. 52.

<sup>15</sup> Allison v. Bradstreet Co., 17 Phila. 348; Press Co. v. Stewart, 119 Pa. 584.

<sup>16</sup> Hessel v. Bradstreet Co., 141 Pa. 501.

construction. Words which charge or impute a crime of moral turpitude or which is subject to an infamous punishment are actionable *per se*;<sup>17</sup> and the legal responsibility may be but slight,<sup>18</sup> and the penalty barred by the statute of limitations.<sup>19</sup>

It is slander when a criminal offense is charged "if there be but one ear to listen."<sup>20</sup> It was said a charge made by gestures alone is not actionable;<sup>21</sup> but otherwise when words and gestures together complete a criminal charge.<sup>22</sup> Words which have several meanings, such as "bitch," will be interpreted in the sense in which it was intended and understood when spoken, as to whether it meant a slut or an ornery woman.<sup>23</sup> A charge which would subject the person to a penal action is actionable;<sup>24</sup> or commitment to prison as to call one a "vagrant";<sup>25</sup> or that one had served a term as a convict.<sup>26</sup> It is actionable to charge one with a crime that never happened,<sup>27</sup> or from the circumstances, does not amount to a crime or imputation of legal or moral turpitude.<sup>28</sup> If the words uttered are laid in the alternative and one set does not charge a crime, they are not actionable *per se*;<sup>29</sup> also if they charge an intent which is lacking.<sup>30</sup>

#### 4. Slander against chastity.

Words are actionable *per se* which charge or impute want of personal chastity, as adultery;<sup>31</sup> calling one a whore, or a bitch,<sup>32</sup> or charging one with fornication or its equivalent.<sup>33</sup> But to charge the daughter of a married woman with being "a bastard" was held not to be actionable *per se*.<sup>34</sup> Though a man be married, if he is alleged to have committed fornication, it is actionable.<sup>35</sup> If the words themselves do not charge a crime though one is imputed, the crime must

<sup>17</sup> Davis v. Carey, 141 Pa. 314; P. & L. Dig., vol. 11, col. 18502.

<sup>18</sup> Beck v. Stitzel, 21 Pa. 522.

<sup>19</sup> Smith v. Stewart, 5 Pa. 372.

<sup>20</sup> Donnelly v. Public Ledger, 2 Phila. 57.

<sup>21</sup> Yundt v. Yundt, 12 S. & R. 427.

<sup>22</sup> Rhoads v. Anderson, 13 Atl. 823.

<sup>23</sup> Stoner v. Erisman, 206 Pa. 600.

<sup>24</sup> Todd v. Rough, 10 S. & R. 18.

<sup>25</sup> Miles v. Oldfield, 4 Yeates, 423.

<sup>26</sup> Smith v. Stewart, 5 Pa. 372.

<sup>27</sup> Eckart v. Wilson, 10 S. & R. 44; Bricker v. Potts, 12 Pa. 200; Colbert v. Caldwell, 3 Grant, 181.

<sup>28</sup> Harvey v. Bois, 1 P. & W. 12; Bash v. Sommer, 20 Pa. 159; Hornburger v. Seiler, 24 C. C. 476; McClurg v. Ross, 5 Binney, 218; Hughes v. Bateman, 15 W. N. C. 239; Miler v. Rittinger, 2 Pearson, 351.

<sup>29</sup> Lukehart v. Byerly, 53 Pa. 418.

<sup>30</sup> Weaver v. Ritter, 3 D. R. 419; Kennelly v. Bricker, 48 Pitts. L. J. 280.

<sup>31</sup> Hartranft v. Hesser, 34 Pa. 117; Gallagher v. Daley, 2 W. N. C. 426.

<sup>32</sup> Rhoads v. Anderson, 13 Atl. 823; Swalm v. Walbourn, 15 Lanc. L. R. 118.

<sup>33</sup> Walton v. Singleton, 7 S. & R. 449; Klumph v. Dunn, 66 Pa. 141; Stoke v. Miller, 5 Atl. 621; Vanderlip v. Roe, 23 Pa. 82.

<sup>34</sup> Maxwell v. Allison, 11 S. & R. 343.

<sup>35</sup> Walton v. Singleton, 7 S. & R. 449.

be laid with an inuendo, that is, meaning and intending thereby to charge plaintiff with a crime.<sup>36</sup>

##### 5. Charge of larceny or robbery.

When the charge is directly made that one is a thief, or that he has stolen or robbed, it is actionable *per se*.<sup>37</sup> To say that a man who "would do that would steal" is not actionable;<sup>38</sup> but that one who did so is a thief, when the party had done so is a direct charge of larceny.<sup>39</sup> To charge one with having stolen what is not the subject of larceny is not actionable.<sup>40</sup> But if the words are so spoken as to be tantamount to a charge of larceny, it is otherwise.<sup>41</sup> To say that a man is dishonest, unless connected with his business is not actionable.<sup>42</sup>

A charge of fraud which does not amount to embezzlement or a criminal character is not actionable.<sup>43</sup> The words "cheat," "fraud," "liar," "rascal," "rogue," "impostor," etc., are not actionable *per se*.<sup>44</sup> But to call one a "defaulter," meaning to accuse him with embezzlement of funds entrusted to him is, because it is a misdemeanor and punishable with imprisonment.<sup>45</sup> So is a charge of conspiracy to defraud;<sup>46</sup> or the secretion of trust property, the test being whether a penalty is attached and a probable prosecution and incarceration.<sup>47</sup> It is actionable *per se* to charge one with having burned his property to get the insurance money,<sup>48</sup> but not that he burned his own property, without annexing the criminal intent.<sup>49</sup>

##### 6. Charge of perjury, etc.

To charge one with perjury, false swearing, etc., in any form is actionable *per se*,<sup>50</sup> although it was before an alderman only, or a justice of the peace,<sup>51</sup> or one called in common parlance a 'Squire.<sup>52</sup> But such charge must be made in connection with a judicial pro-

<sup>36</sup> Evans v. Tibbins, 2 Grant, 451; Moles v. Crozier, 48 Pitts. L. J. 216; Hays v. Brierly, 4 Watts, 392.

<sup>37</sup> Shultz v. Chambers, 8 Watts, 300; Rowand v. De Camp, 96 Pa. 493; Fiss v. Plater, 9 Lanc. L. R. 97; Walter v. Erdman, 4 Supr. C. 348.

<sup>38</sup> Stees v. Kemble, 27 Pa. 112.

<sup>39</sup> Kerr v. Atticks, 20 C. C. 233; Dottarer v. Bushey, 16 Pa. 204; Bash v. Sommer, 20 Pa. 159.

<sup>40</sup> Findlay v. Bear, 8 S. & R. 571; Stitzell v. Reynolds, 59 Pa. 488; 67 Pa. 54; Lukehart v. Byerly, *supra*.

<sup>41</sup> Bornman v. Boyer, 3 Binney, 515; Mitchell v. Hendrix, 3 York, 5.

<sup>42</sup> Wright v. Ewing, 1 Am. L. J. 428; Gosling v. Morgan, 32 Pa. 273.

<sup>43</sup> Weierbach v. Trone, 2 W. & S. 408.

<sup>44</sup> Gosling v. Morgan, 32 Pa. 273; Meas v. Johnson, 185 Pa. 12.

<sup>45</sup> Walter v. Erdman, 4 Supr. C. 348; Miller v. Knabb, 5 C. C. 636.

<sup>46</sup> Beehler v. Steever, 2 Wharton, 313.

<sup>47</sup> Beck v. Stitzell, 21 Pa. 522.

<sup>48</sup> Davis v. Carey, 141 Pa. 314.

<sup>49</sup> Kennelly v. Bricker, 48 Pitts. L. J. 286.

<sup>50</sup> Deford v. Miller, 3 P. & W. 103; McCulloch v. Craig, 1 Phila. 74; Colbert v. Caldwell, 3 Grant, 181.

<sup>51</sup> McGaw v. Hamilton, 184 Pa. 108; Call v. Foresman, 5 Watts, 331.

<sup>52</sup> Rue v. Mitchell, 2 Dallas, 58.

ceeding;<sup>53</sup> otherwise, it has been held, it is not actionable,<sup>54</sup> the reason being that the party cannot be prosecuted for wilful and corrupt perjury unless the false oath was made in a judicial proceeding, and in a matter material to the issue.<sup>55</sup> It is actionable *per se* to charge one with murder;<sup>56</sup> or making a libel, but not in the provincial sense of going before a 'Squire and signing a paper acknowledging that the person lied.<sup>57</sup>

#### 7. Other charges imputing odious misdemeanors.

It is actionable to charge one with having moved a boundary line for which the 163d section of the Criminal Code of March 31, 1860, P. L. 382, imposes a penalty;<sup>1</sup> or that he sold diseased or tainted meat causing sickness,<sup>2</sup> or that he maintained a public nuisance, which is indictable;<sup>3</sup> or that a woman is a witch—" *jest czaroinica* " in Polish dialect.<sup>4</sup> There are a few offenses, however, which the courts have held not actionable *per se*—assault and battery;<sup>5</sup> irregularity in keeping accounts;<sup>6</sup> forgery of a recommendation of a medicine;<sup>7</sup> suit for selling liquor on Sunday.<sup>8</sup>

#### 8. Charges injuring one in his profession or vocation.

Where words are uttered against a person with reference to the conduct of his profession, trade or vocation, which naturally import injury or detraction, they have been held to be actionable *per se*; as, for instance, to say a judge violated his oath in a certain case;<sup>9</sup> or that an attorney-at-law is a cheat in his profession,<sup>10</sup> or a physician a quack; but to charge him with being a "two-penny bleeder" is not;<sup>11</sup> or to call a minister of the gospel a drunkard;<sup>12</sup> or perhaps a school teacher a drunkard;<sup>13</sup> or that a farmer is in danger of being sold out by the sheriff;<sup>14</sup> or an insurance company bankrupt.<sup>15</sup> The general rule has been stated to be that "words which impute the want of integrity or capacity, whether mental, moral or pecu-

<sup>53</sup> Packer v. Spangler, 2 Binney, 60; Tipton v. Kahle, 3 Watts, 90; Barger v. Barger, 18 Pa. 489; Bricker v. Potts, 12 Pa. 200.

<sup>54</sup> Shaffer v. Kintzer, 1 Binney, 537; Harvey v. Bois, 1 P. & W. 12.

<sup>55</sup> Barger v. Barger, 18 Pa. 489.

<sup>56</sup> Eckart v. Wilson, *supra*.

<sup>57</sup> Proper v. Luce, 3 P. & W. 65, explaining Andres v. Koppenhefer, 3 S. & R. 255.

<sup>1</sup> Todd v. Rough, 10 S. & R. 18.

<sup>2</sup> Leitz v. Hohman, 16 Supr. C. 276.

<sup>3</sup> Noll v. Jacoby, 7 Lanc. L. R. 365.

<sup>4</sup> Wisa v. —, 19 W. N. C. 158; act April 8, 1861, P. L. 270.

<sup>5</sup> Weaver v. Ritter, 3 D. R. 419.

<sup>6</sup> Beriac v. Wellhof, 27 W. N. C. 53.

<sup>7</sup> Miller v. Rittinger, 2 Pearson, 351.

<sup>8</sup> Smith v. Kegel, 12 Lanc. L. R. 302.

<sup>9</sup> Hook v. Hackney, 16 S. & R. 385.

<sup>10</sup> Rush v. Cavanaugh, 2 Pa. 187; Wallace v. Jameson, 179 Pa. 98;

Hanbest v. Cox, 10 Leg. Int. 106.

<sup>11</sup> Foster v. Small, 3 Wharton, 138.

<sup>12</sup> M'Millan v. Birch, 1 Binney, 178.

<sup>13</sup> Kennedy v. Gregory, 1 Binney, 85.

<sup>14</sup> Phillips v. Hoeffler, 1 Pa. 62.

<sup>15</sup> Temperance, Etc., Assn. v. Schweinhart, 3 C. C. 353.

niary, in the conduct of a profession, trade or calling in which the party unjustly accused is engaged, are actionable.<sup>16</sup>

#### 9. Slander by proxy.

There is a current error that words which one repeats as having heard another utter do not make this one liable for slander. "They say," "It is said," "I heard one say," "It is rumor," etc., prefixed to a slander do not divest it of its character, if special damage results. One who repeats a slanderous rumor cannot justify, though he believes it to be true, unless it was said by him on a privileged occasion.<sup>17</sup> A rumor thus passed from tongue to tongue, does not make words which are not actionable *per se*, so by reason of their repetition to the damage of the subject to whom they relate.<sup>18</sup>

#### 10. Interpretation of words.

The rule of interpretation whether the words be libelous or slanderous, is that they must be taken in the plain popular sense in which the public generally understands them;<sup>19</sup> and the jury are not to guess the meaning from the intent of the defendant.<sup>20</sup> If the name does not refer to the plaintiff but the description does, the court should call their attention to the whole article to determine whether or not he was meant.<sup>21</sup>

#### 11. Inuendo — Averment of meaning.

Where the words are not *per se* actionable, or where on their face they do not express fully what was meant, the plaintiff avers the meaning as commonly understood, by inuendo;<sup>22</sup> and it will be for the jury to find whether such is the common acceptation of the meaning of the words,<sup>23</sup> and were so intended to be understood,<sup>24</sup> under the instruction of the court as to whether the words are actionable should they find the meaning as averred.<sup>25</sup> But the ordinary meaning of the words may not be enlarged,<sup>26</sup> and the jury must be guided by the evidence, or their verdict will be overturned.<sup>27</sup>

<sup>16</sup> Wildee v. McKee, 111 Pa. 335; Wallace v. Rodgers, 156 Pa. 395.

<sup>17</sup> Watkins v. Hall, 3 Q. B. 396; Beehler v. Steever, 2 Wharton, 313; Dottarer v. Bushey, 16 Pa. 204; Smith v. Stewart, 5 Pa. 372.

<sup>18</sup> Dixon v. Smith, 5 H. & N. 450 (Eng.).

<sup>19</sup> Meas v. Johnson, 185 Pa. 12; Wood v. Boyle, 177 Pa. 620; Stoner v. Erisman, 206 Pa. 600.

<sup>20</sup> Goebeler v. Wilhelm, 17 Supr. C. 432.

<sup>21</sup> Clark v. North American, 203 Pa. 346.

<sup>22</sup> Bloom v. Bloom, 5 S. & R. 391; McKennon v. Greer, 2 Watts, 352; Hays v. Brierly, 4 Watts, 392; Harker v. Orr, 10 Watts, 245; Farley v. Rank, 3 W. & S. 554; Kay v. Fredrigal, 3 Pa. 221.

<sup>23</sup> Bruce v. Reed, 104 Pa. 408; Herst v. Borbridge, 57 Pa. 62; Evans v. Tibbins, 2 Grant, 451; Vanderlip v. Roe, 23 Pa. 82; Dottarer v. Bushey, 16 Pa. 204; Brown v. Lamberton, 2 Binney, 34; Gallagher v. Daly, 2 W. N. C. 426; Aspell v. Smith, 134 Pa. 59.

<sup>24</sup> Price v. Conway, 134 Pa. 340; Walter v. Erdman, 4 Supr. C. 348.

<sup>25</sup> Pittock v. O'Neill, 63 Pa. 253; Goebeler v. Wilhelm, 17 Supr. C. 432.

<sup>26</sup> Shaffer v. Kintzer, *supra*; Maxwell v. Allison, 11 S. & R. 343; Stitzell v. Reynolds, 59 Pa. 488; P. & L. Dig., vol. 11, col. 18528.

<sup>27</sup> Pitts., Etc., R. Co. v. McCurdy, 114 Pa. 554; Tipton v. Kahle, 3 Watts, 90; Gosling v. Morgan, 32 Pa. 273.

But if the words be spoken in a foreign language as set forth, with the meaning laid in the inuendo, if they convey a larger meaning to those who use that language, than the translation would warrant in English, they will be given the meaning which they convey in that foreign tongue.<sup>28</sup> If a colloquium is laid and there is a doubt whether the words meant to charge only a fraud or a larceny, the verdict will decide.<sup>29</sup> The office of the inuendo is to set out the defamatory meaning and how they are related to the plaintiff and give him a cause of action. But the plaintiff's interpretation by the inuendo is not necessarily the construction which the words may bear under the circumstances, and if they are not commonly accepted and understood to mean what is averred in the statement, it must fail, and there is nothing for the jury to pass upon.<sup>30</sup>

If they have a double or doubtful meaning, the inuendo attributes the meaning taken by the plaintiff, but it will then be for the jury to determine which meaning was given to them.<sup>31</sup> It is for the court to determine, however, what is the effect of a paper alleged to be libelous;<sup>32</sup> or the materiality of the testimony relating to the charge.<sup>33</sup> If the words were understood by those who heard them, to impute a crime, the inuendo so laying it will sustain the statement.<sup>34</sup> If the words are actionable *per se* a faulty inuendo may be treated as surplusage.<sup>35</sup> The inuendo cannot be assisted by the opinion of a witness,<sup>36</sup> but the jury may infer the meaning from the words.<sup>37</sup> A demurrer to the statement, it has been said, admits the inuendo.<sup>38</sup> If the statement contains no inuendo, but the amended statement filed by leave of court does, the defect is cured; so also of a plea of justification.<sup>39</sup>

## 12. Colloquium — Narration of connecting circumstances.

The colloquium is a brief statement of the related circumstances connecting the words used with them, so as to show the meaning more fully.<sup>40</sup> The colloquium supplies the circumstances which the inuendo by its office cannot.<sup>41</sup> To illustrate, words which charge the taking of a false oath must be accompanied with a colloquium

<sup>28</sup> Wisa v. Lewandowski, 19 W. N. C. 158.

<sup>29</sup> Herst v. Borbridge, 57 Pa. 62.

<sup>30</sup> Swalm v. Walbourn, 15 Lanc. L. R. 118; Naulty v. Bulletin Co., 206 Pa. 128.

<sup>31</sup> Stoner v. Erisman, 206 Pa. 600; Goebeler v. Wilhelm, 17 Supr. C. 432.

<sup>32</sup> Flitercraft v. Jenks, 3 Wharton, 158.

<sup>33</sup> Steinman v. McWilliams, 6 Pa. 170.

<sup>34</sup> C. v. A. B., 1 W. N. C. 291.

<sup>35</sup> Beirer v. Bushfield, 1 Watts, 23; Shultz v. Chambers, 8 Watts, 300; Collins v. Dispatch Pub'g Co., 152 Pa. 187.

<sup>36</sup> Pitts., Etc., R. Co. v. McCurdy, 114 Pa. 554; Rangler v. Hummel, 37 Pa. 130; McCue v. Ferguson, 73 Pa. 333.

<sup>37</sup> Savage v. Bunn, 19 W. N. C. 448.

<sup>38</sup> Evans v. Tibbins, 2 Grant, 451.

<sup>39</sup> Kay v. Fredrigal, 3 Pa. 221.

<sup>40</sup> Maxwell v. Allison, 11 S. & R. 343; Hill v. Boswell, 2 Pitts. 336; McIntyre v. Weinert, 195 Pa. 52.

<sup>41</sup> Thompson v. Lusk, 2 Watts, 17.



that such oath was taken in a judicial proceeding and in a matter material to the issue.<sup>42</sup>

A colloquium is not necessary where the meaning and application are clear.<sup>43</sup> Where there is no dispute as to the meaning of the words, the court may so charge and leave the effect of the facts to the jury.<sup>44</sup>

### 13. Slander of title to property.

There is a species of slander actionable which relates to one's title to property, real or personal, which affects its value or salability.<sup>45</sup> In order to maintain this action it must be averred and shown that the statements were not only false but made with express malice, and that special damages resulted.<sup>46</sup>

Express malice may be proved by the circumstances.<sup>47</sup> It is not in respect to the open and obvious qualities of realty, but those which are not, that this action lies.<sup>48</sup> All the ingredients above stated must be made out where the slander is alleged to have been uttered and published about stock advertised to be sold.<sup>49</sup>

### 14. Statutory provisions.

The act of 1897 was intended to take away punitive damages, but this was repealed by the act of 1901, *infra*. The act of 1903 was a more drastic act which raised universal oburgation for the act itself and its authors, and was repealed by the act of 1907.

### 15. Plaintiff's statement.

A statement for slander has been held to be good which laid that defendant spoke "in substance, the following false, scandalous and defamatory words."<sup>1</sup> But this must be brought as near the exact words as possible and not consist of a summary in the plaintiff's own words;<sup>2</sup> nor a mere conclusion that a certain offense was charged.<sup>3</sup> If the words were spoken in another language they must be set out as spoken, with a translation.<sup>4</sup> It should also be averred that they were spoken of the plaintiff, but if the plaintiff's name is used in the words, it is sufficient.<sup>5</sup> Where a *capias* is sued out for words charging a gross crime which are actionable *per se*, special

<sup>42</sup> Tipton v. Kahle, 3 Watts, 90; Bricker v. Potts, 12 Pa. 200; Barger v. Barger, 18 Pa. 489.

<sup>43</sup> Smith v. Stewart, P. & L. Dig., vol. 11, cols. 18535-6.

<sup>44</sup> McLenahan v. Andrews, 135 Pa. 383.

<sup>45</sup> Stieh v. Todd, 11 Montg. Co. 70; Paull v. Halferty, 63 Pa. 46.

<sup>46</sup> Moore v. Rowbotham, 19 Phila. 272; West v. O'Callaghan, 15 Phila. 257.

<sup>47</sup> Bolton v. Bray, 15 Phila. 200.

<sup>48</sup> Paull v. Halferty, 63 Pa. 46.

<sup>49</sup> Young v. Geiske, 209 Pa. 515.

<sup>1</sup> Kennedy v. Lowry, 1 Binney, 393; Lukehart v. Byerly, 53 Pa. 418.

<sup>2</sup> Tipton v. Kahle, 3 Watts, 90.

<sup>3</sup> Yundt v. Yundt, 12 S. & R. 427; Harker v. Orr, 10 Watts, 245; Wittmaier v. Krieg, 13 C. C. 64.

<sup>4</sup> Rahausen v. Barth, 3 Watts, 28; Trianovski v. Kleinschmidt, 20 W. N. C. 296; Yundt v. Yundt, *supra*.

<sup>5</sup> Brown v. Lamberton, 2 Binney, 34.

damages need not be averred in order to demand special bail.<sup>6</sup> But if they are not actionable *per se*, special damages must be laid.<sup>7</sup> The statement is not demurrable on the ground that the affidavit is made on information and belief and expectation to prove.<sup>8</sup> But to lay words as uttered before suit and the same words uttered after suit will be bad on demurrer.<sup>9</sup>

#### 16. Form of statement.

Eglantine Helene Gacon } In the Court of Common Pleas of Ches-  
v. } ter County.  
Henri Rochefort. } No. —, — Term, 19—.

Eglantine Helene Gacon, the plaintiff in this action, claims of the defendant, Henri Rochefort, damages in the sum of ten thousand dollars, upon a cause of action, as follows, to-wit:

The said Eglantine Helene Gacon is and hitherto has been a good, true, honest and virtuous inhabitant of the commonwealth of Pennsylvania, and as such hath from the time of her nativity demeaned herself, and has been always free from and unsuspected of all manner of crimes and especially [here state the crime or matter alleged in the slander], until the time of speaking and uttering the false, scandalous, malicious and defamatory words hereinafter set forth; and she, the said plaintiff, was esteemed and reputed to be a person of good name, fame, credit and reputation, by reason whereof she had gained the good will, love and esteem of all her neighbors and divers other good citizens of this commonwealth. And whereas the said plaintiff, for a long time past and before the speaking and uttering of the false, scandalous and defamatory words hereinafter mentioned to have been spoken, followed and carried on the lawful art, trade and business of [give same] and by means thereof earned a livelihood and acquired large sums of money. Nevertheless the said defendant, contriving and intending the said plaintiff not only to deprive of her good name, fame and credit aforesaid and to bring her into scandal and disrepute among her neighbors, but also to subject her to prosecution and punishment for [name the offense], on the — day of —, A. D. 19—, at the county aforesaid, in the presence and hearing of others, did speak and publish the following, false, scandalous and defamatory words, to-wit: [Here give the words in the language used, to be translated following.] Thereby meaning and intending to charge the plaintiff with [state the crime or thing charged]. And the said plaintiff in fact saith that she is in no wise guilty of [the matter charged], by the said false, malicious and defamatory words so wantonly charged upon her; by reason whereof she has not only been grievously hurt and greatly injured in her good name, fame and reputation, as aforesaid, and been brought into disgrace and disrepute among her neighbors and other persons, who ever since the uttering and speaking of said several false, scandalous and defamatory words, have suspected her

<sup>6</sup> McCawley v. Smith, 4 Yeates, 193; A. B. *et ux* v. R., 4 W. N. C. 185; Charles v. Holmes, 1 Browne, 297.

<sup>7</sup> McCawley v. Smith, 4 Yeates, 193.

<sup>8</sup> Grimley v. Receveuve, 21 W. N. C. 573.

<sup>9</sup> Hines v. Willey, 11 D. R. 273.

of being guilty of [state the crime], and also as being a person meriting punishment, that they have refused to have any communion or conversation with her, or to transact any business with her, but the said plaintiff has been made liable to prosecution and punishment; and also [in case of injury to trade, etc.], she further saith, that divers persons who used to have dealing and business with her in her said lawful art, trade or business, and by which means, she gained large sums of money, have ever since the speaking and uttering of said false, scandalous and defamatory words, refused to have dealings or business with her; wherefore she has sustained damages and herein claims the same, to the sum of ten thousand dollars.

Whereupon she brings suit.  
August 31, 1910.

Eglantine Helene Gacon,  
By her attorney.

This form may be adjusted so as to cover libel by averring the uttering and publishing of the matter, and the means and instrument. If special damages are sought the loss must be particularized.

#### 17. Averments in statement.

Since the act of 1887 the *narr* in slander is called a statement, but a venue should be laid, as "at the county aforesaid," but it may be amended to add this.<sup>10</sup> The statement need not aver to whom or in what particular place the words were spoken,<sup>11</sup> it being sufficient to aver that they were spoken in the presence of divers other persons at the county aforesaid.<sup>12</sup> But these may be required by a rule for a bill of particulars.<sup>13</sup> Damages which are the necessary result of the slander need not be specially averred.<sup>14</sup> The social position of the plaintiff need not be set out in the statement,<sup>15</sup> though it is usual to state the character and standing of the person injured.

Evidence of the character of the plaintiff is not admissible where he has declared for damages for slander of his house and not himself.<sup>16</sup> Where the words are not actionable *per se*, and the special damage averred is the loss of customers or patrons, the plaintiff should name them, and if he does not, he may be ruled to file a more specific statement thereof.<sup>17</sup> If he be an officer and wishes to give evidence of special damage to him as such officer, he must aver that they were spoken of him with reference to his official conduct.<sup>18</sup> Where one avers malice and injury on a claim of testamentary libel, in the Orphans' Court, he is entitled to prove the same.<sup>19</sup>

#### 18. Amendment of statement.

A statement defectively charging a slander or libel may be amended

<sup>10</sup> Sundstrom v. Schofield, 21 W. N. C. 541.

<sup>11</sup> Thacher v. Schaeffer, 19 W. N. C. 566; Wright v. Percells, 5 D. R. 158; Doan v. Sellers, 2 Chester Co. 172.

<sup>12</sup> Brown v. Brashier, 2 P. & W. 114.

<sup>13</sup> Michael v. Williams, 16 W. N. C. 284.

<sup>14</sup> Haldeman v. Martin, 10 Pa. 369.

<sup>15</sup> Klumph v. Dunn, 66 Pa. 141.

<sup>16</sup> Flitcraft v. Jenks, 3 Wharton, 158.

<sup>17</sup> Beriac v. Wellhoff, 27 W. N. C. 96.

<sup>18</sup> McDowell v. Harper, 14 D. R. 344.

<sup>19</sup> Gallagher's Est., 10 D. R. 733.

so as to state the same over, but not to introduce a new cause.<sup>20</sup> New counts may be added, but not so as to introduce a new and different slander;<sup>21</sup> especially after one year has elapsed since.<sup>22</sup> Words may be added to the original statement of words spoken.<sup>23</sup>

#### 19. Bill of particulars.

A bill of particulars may be ruled for in slander or libel,<sup>24</sup> but if not regulated by rule of court the requirement is discretionary with the court.<sup>25</sup> When a bill is ordered it must be furnished in good faith, in detail.<sup>26</sup> Where special damages are claimed the defendant is entitled to a specification of the facts proposed to be proved in this regard.<sup>27</sup>

#### 20. Joinder of words and acts.

Not all the words alleged need be shown to be actionable, if all were spoken at the same time.<sup>28</sup> Slander accompanied by an averment of imprisonment in consequence, may be joined.<sup>29</sup>

Though the words impute more than one offense, it is no cause to arrest the judgment that but one was sustained.<sup>30</sup> Errors in the statement, such as laying words spoken after the writ issued are cured by the verdict;<sup>31</sup> or where the words "false and malicious" were omitted<sup>32</sup> or that the person was married with whom adultery was alleged to have been committed;<sup>33</sup> or that the goods alleged to have been stolen belonged to a third party;<sup>34</sup> or that an attorney was such at the time the alleged slander was spoken of him as an attorney;<sup>35</sup> or as to the names of the party plaintiff.<sup>36</sup>

#### 21. Joinder of parties.

Slander is a wrong occasioned by words spoken and a joint action cannot be maintained, because the words of one are not the words of another.<sup>37</sup> If husband and wife are joined the statement may be amended so as to exclude one.<sup>38</sup> Two cannot be joined for

<sup>20</sup> *Proper v. Luce*, 3 P. & W. 65; P. & L. Dig., vol. 11, col. 18550.

<sup>21</sup> *Conroe v. Conroe*, 47 Pa. 198; *Smith v. Smith*, 45 Pa. 403.

<sup>22</sup> *Moles v. Crozier*, 48 Pitts. L. J. 216.

<sup>23</sup> *Stoner v. Erisman*, 206 Pa. 600.

<sup>24</sup> *Michael v. Williams*, 16 W. N. C. 284; *Stell v. Moyer*, 9 D. R. 516.

<sup>25</sup> *Balliet v. Walters*, 3 Northam. 356; *Doan v. Sellers*, 2 Chester County, 172; *Thacher v. Schaeffer*, 19 W. N. C. 566.

<sup>26</sup> *Michael v. Williams*, *supra*; *Weil v. Dun*, 2 C. C. 72.

<sup>27</sup> *Fritchey v. York Daily Pub. Co.*, 17 York, 80.

<sup>28</sup> *Bloom v. Bloom*, 5 S. & R. 391; *Bash v. Sommer*, 20 Pa. 159; *Klumph v. Dunn*, 66 Pa. 141.

<sup>29</sup> *Miles v. Oldfield*, 4 Yeates, 423.

<sup>30</sup> *Shultz v. Chambers*, 8 Watts, 300.

<sup>31</sup> *Skinner v. Robeson*, 4 Yeates, 375; *Beirer v. Bushfield*, 1 Watts, 23.

<sup>32</sup> *Miles v. Oldfield*, 4 Yeates, 423; *Young v. Geiske*, 209 Pa. 515.

<sup>33</sup> *McLenahan v. Andrews*, 135 Pa. 383.

<sup>34</sup> *Thompson v. Barkley*, 27 Pa. 263.

<sup>35</sup> *Hanbest v. Cox*, 10 Leg. Int. 106.

<sup>36</sup> *Long v. Long*, 4 Pa. 29.

<sup>37</sup> *Buzzard v. Guest*, 7 Montg. Co. 197; *Stieh v. Todd*, 11 Montg. Co. 70.

<sup>38</sup> *Watres v. Floyd*, 1 Wilcox, 116; *Carvill v. Cochran*, 1 Phila. 399.

slander, even by conspiracy.<sup>39</sup> But the rule as to libel is different, where they may be found jointly guilty for a joint publication, but they cannot separate the damages.<sup>40</sup> Two persons cannot join for a slander against them, although they be husband and wife.<sup>41</sup> A corporation, being but one person in law, may sue for slander.<sup>42</sup> A partnership may also sue in the firm name for a slander of its business.<sup>43</sup> Suits for slander must be brought within one year or they will be barred by act of March 27, 1713, 1 Sm. L. 76.

## 22. Proof of words.

The rule as stated by Chief Justice Gibson is that a particular set of words must be laid, but it will be sufficient at the trial, if the charge which they import be substantially contained in the words which are proved to have been actually spoken.<sup>44</sup> But the substantial slanderous words must be laid and proved,<sup>45</sup> and not other words which do not measure up to a positive asseveration.<sup>46</sup> The words are for the jury, but their measuring up to the charge, or not, is for the court.<sup>47</sup> Whether the words are laid in one person and proved in another person is immaterial.<sup>48</sup> Where the words as declared on are equivocal, laid with an inuendo, and the proof sustained the words as laid, it was held that the statement would have been bad on demurrer and the judgment was reversed.<sup>49</sup> But where the words as laid and as proved mean the same virtually, the jury has the case.<sup>50</sup>

If a slander is laid in a foreign tongue, it is necessary to aver and prove that they were understood by those who heard them; but this does not apply to a libel.<sup>51</sup>

## 23. Proof of malice.

Legal malice need not be proved. In slander and libel defamatory words spoken or published are necessarily malicious, unless privileged, and it is not necessary to prove ill-will or anger.<sup>1</sup> Malice will be implied from the defamatory words.<sup>2</sup> Where the defendant does not deny speaking the words, but says he spoke by report and does not know whether the words were true or false, he does not admit that the charge against him is true.<sup>3</sup>

<sup>39</sup> Glass v. Stewart, 10 S. & R. 222; Nash v. Bloom, 10 C. C. 358.

<sup>40</sup> Leidig v. Bucher, 74 Pa. 65.

<sup>41</sup> Ebersoll v. King, 3 Binney, 555; Bash v. Sommer, 20 Pa. 159.

<sup>42</sup> Temperance, Etc., Assn. v. Schweinhard, 3 C. C. 353.

<sup>43</sup> Struthers v. Peacock, 3 W. N. C. 517.

<sup>44</sup> Yundt v. Yundt, 12 S. & R. 427; Kerr v. Atticks, 20 C. C. 233.

<sup>45</sup> Hersh v. Ringwalt, 3 Yeates, 506; Elliott v. Boyles, 31 Pa. 66; Burford v. Wible, 32 Pa. 95.

<sup>46</sup> Cooper v. Bruce, 2 Watts, 109; Long v. Fleming, 2 Miles, 104.

<sup>47</sup> Foster v. Small, 3 Wharton, 138.

<sup>48</sup> McConnell v. McCoy, 7 S. & R. 223.

<sup>49</sup> Lukehart v. Byerly, 53 Pa. 418.

<sup>50</sup> M'Almont v. McClelland, 14 S. & R. 358.

<sup>51</sup> Palmer v. Harris, 60 Pa. 156.

<sup>1</sup> Farley v. Rauck, 3 W. & S. 554; Barr v. Moore, 87 Pa. 385.

<sup>2</sup> Neeb v. Hope, 111 Pa. 145; Press Co. v. Stewart, 119 Pa. 584; Collins v. Dispatch Co., 152 Pa. 187; Moore v. Leader Co., 8 Supr. C. 152.

<sup>3</sup> Leitz v. Hohman, 16 Supr. C. 276.

#### 24. Words spoken or published by report.

It is no defense either to slander or libel for the defendant to claim by plea or on the trial, for the first time, that he uttered or published the words as those of another, giving his name.<sup>4</sup> But, if, when he uttered the words, he gave the name, he may justify; for then the party injured may sue the party named.<sup>5</sup> He must, however, show that the report was such as caused belief in its truth.<sup>6</sup> Even where a slander is instigated by a husband against his wife, it is no excuse to another to repeat it.<sup>7</sup> So where a publisher reprints an article from an other paper he must plead it, if he seeks to justify.<sup>8</sup> The fact that the words were spoken on report by another may be shown in mitigation of damages,<sup>9</sup> but not in justification.<sup>10</sup> And so a newspaper cannot offer evidence that other papers published similar accounts.<sup>11</sup>

The general issue in slander or libel is "not guilty" and under this, one who uttered words on his own knowledge cannot prove that he received the matter from another.<sup>12</sup> Nor can one so pleading show general or particular reports<sup>13</sup> or accusations.<sup>14</sup> The republication of a defamatory article from a newspaper or other print is no excuse and may be the basis of punitive damages.<sup>15</sup>

#### 25. Responsibility for words published by another.

Every one who requests, procures or commands another to publish a libel is responsible the same as if he had himself published it.<sup>16</sup> The proprietor or manager of a newspaper is liable for anything published therein by those in his employ, in the scope of their employment, whether he knew of it at the time or not.<sup>17</sup> A general or managing editor is bound, but an assistant who knew nothing of it, is not.<sup>18</sup> One who has control of the columns of a paper during a political campaign, may or may not be liable, as the jury find.<sup>19</sup> If an attorney inserts slanderous words into his pleadings without the knowledge and consent of his client, the latter will not be responsible.<sup>20</sup> A railroad company is not liable on the ground of

<sup>4</sup> Kennedy v. Gregory, 1 Binney, 85; Runkle v. Meyer, 3 Yeates, 518; Fitzgerald v. Stewart, 53 Pa. 343; Wallace v. Rodgers, 156 Pa. 393.

<sup>5</sup> Henry v. Norwood, 4 Watts, 347.

<sup>6</sup> Hersh v. Ringwalt, 3 Yeates, 508.

<sup>7</sup> McMichael v. Greenhaw, 6 C. C. 561; Swalm v. Walbourn, 15 Lanc. L. R. 118.

<sup>8</sup> Binns v. McCorkle, 2 Browne, 79.

<sup>9</sup> Kennedy v. Gregory, 1 Binney, 85; Leitz v. Hohman, 16 Supr. C. 276; Pease v. Shippen, 80 Pa. 513; Petrie v. Rose, 5 W. & S. 364.

<sup>10</sup> Stepp v. Croft, 18 Supr. C. 101.

<sup>11</sup> Clark v. North American, 203 Pa. 346.

<sup>12</sup> Elliott v. Boyles, 31 Pa. 65.

<sup>13</sup> Lukehart v. Byerly, 53 Pa. 418.

<sup>14</sup> Smith v. Buckecker, 4 Rawle, 295.

<sup>15</sup> Regensperger v. Kiefer, 20 W. N. C. 97.

<sup>16</sup> Wills v. Hardcastle, 19 Supr. C. 525.

<sup>17</sup> O'Neill v. Kredel, 1 W. N. C. 69; Bruce v. Reed, 104 Pa. 408; Nevin v. Spieckemann, 4 Atl. 497; P. & L. Dig., vol. 11, col. 18571.

<sup>18</sup> Weil v. Nevin, 1 Mona. 65.

<sup>19</sup> Wallace v. Jameson, 179 Pa. 98.

<sup>20</sup> Stieh v. Todd, 11 Montg. Co. 70.

*respondent superior*, for a libel published without its authority by its general superintendent.<sup>21</sup>

## 26. Justification — Truth as a defense.

In an action of trespass for slander or libel the only plea now is "not guilty," which does not cover justification. Whilst an affidavit of defense is not required, if the defendant chooses he may file it in the nature of a plea of not guilty, with justification setting up the nature of his defense. In criminal libel the truth could not be formerly set up as a defense; but in a civil action it may.<sup>22</sup> If a defendant wishes to justify he must plead it. All the old cases hold that evidence of justification is inadmissible under "not guilty" alone,<sup>23</sup> and some since the act of 1887 limiting the plea in trespass to "not guilty."<sup>24</sup> Whilst "not guilty" and justification seem repugnant, they are not in fact. Justification admits the utterance or publication but denies that the plaintiff was slandered or libeled because the words were not "false and malicious." Proof of the truth destroys the *gravamen* of the plaintiff's cause.<sup>25</sup> Without averring that the words were true, defendant cannot complain if the court submits the question to the jury whether or not they were true.<sup>26</sup>

In case the defense is privilege, evidence of probable cause and reasonable belief in the truth of the publication or utterance may be admitted under the general issue.<sup>27</sup> When the defendant pleads the general issue alone, the plaintiff cannot, in chief, prove that "defendant well knew they were false."<sup>28</sup>

Prior to the act of 1887 it was the rule to plead both "not guilty" and justification, as stated,<sup>29</sup> and evidence of a partial justification was admissible.<sup>30</sup> The plea of "not guilty" was allowed to be withdrawn,<sup>31</sup> this being discretionary with the court.<sup>32</sup> A withdrawn plea of justification is not evidence that the words were spoken.<sup>33</sup> In a recent case it was held that a statement of counsel on the trial of the case is not equivalent to a plea of justification.<sup>34</sup> It seems clear that the act of 1887 did not contemplate the pleading in libel and slander, while consolidating trespass forms in one.

When a plea of justification is put in the plaintiff should put in a replication thereto and thus plead to issue. But if the parties go to

<sup>21</sup> *Henry v. Pitts., Etc.*, R. Co., 139 Pa. 289.

<sup>22</sup> *Press Co. v. Stewart*, 119 Pa. 584; *Oles v. Pittsburg Times*, 2 Supr. C. 130; *Donnelly v. Public Ledger*, 2 Phila. 57.

<sup>23</sup> *Kay v. Fredrigal*, 3 Pa. 221; *Upægrove v. Zimmerman*, 13 Pa. 619; *Smith v. Smith*, 39 Pa. 441; *Porter v. Botkins*, 59 Pa. 484.

<sup>24</sup> *Spence v. Burt*, 18 Lanc. L. R. 251; *Ferber v. Gazette, Etc., Assn.*, 212 Pa. 367.

<sup>25</sup> *Fleer v. Reagan*, 24 Supr. C. 170.

<sup>26</sup> *Stepp v. Croft*, 18 Supr. C. 101.

<sup>27</sup> *Chapman v. Calder*, 14 Pa. 365; *Donnelly v. Swain*, 2 Phila. 93.

<sup>28</sup> *Hartranft v. Hesser*, 34 Pa. 117.

<sup>29</sup> *Peters v. Ulmer*, 74 Pa. 402; *Drown v. Allen*, 91 Pa. 393.

<sup>30</sup> *Burford v. Wible*, 32 Pa. 95.

<sup>31</sup> *Steinman v. McWilliams*, 6 Pa. 170.

<sup>32</sup> *Rush v. Cavanaugh*, 2 Pa. 187.

<sup>33</sup> *McCue v. Ferguson*, 73 Pa. 333.

<sup>34</sup> *Smith v. Times Pub'g Co.*, 178 Pa. 481.

trial without an issue on this plea, the judgment will not be reversed on this ground alone.<sup>35</sup>

**27. Failure of justification an aggravation.**

When a defendant pleads justification and fails to sustain it the offense will be aggravated and the jury may award increased damages;<sup>36</sup> nor should he be permitted to withdraw it.<sup>37</sup>

**28. Justification regulated by Act of 1901.**

Section 2 of the act of April 11, 1901, P. L. 74, provides:

"In all civil actions for libel, the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded and proved to the satisfaction of the jury, under the direction of the court as in other cases, that the publication is substantially true and is proper for public information or investigation, and has not been maliciously or negligently made."

**29. Jury to control damages.**

Section 3 of the act of 1901 provides:

"In all civil actions for libel no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears, such damages may be awarded as the jury shall deem proper."

**30. Damages to be recovered in one suit.**

Section 4 of the act of 1901 provides:

"No defendant shall be criminally tried nor shall any civil actions for damages be maintained for the printing or publication of the same libel upon the same individual, in more than one county in the state, and all damages shall be recoverable in one suit."

**31. Freedom of the press.**

Section 7 of article 1 of the constitution, being the Declaration of Rights, provides:

"The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government and no law shall be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall

<sup>35</sup> Long v. Long, 4 Pa. 29.

<sup>36</sup> Farley v. Ranck, 3 W. & S. 554; Updegrove v. Zimmerman, 13 Pa. 619; Gorman v. Sutton, 32 Pa. 247; P. & L. Dig., vol. 11, col. 18583.

<sup>37</sup> Rush v. Cavanaugh, 2 Pa. 187.



have the right to determine the law and the facts, under the direction of the court, as in other cases."

The above section was held to apply only to criminal prosecutions and not to civil actions.<sup>1</sup>

### 32. Publication of libel.

There are various ways of publishing a libel. The meaning of the words employed is that ascribed to them in common use — and if they are not directly used, their meaning and application may be laid in the complaint by inuendo. In libel the words are actionable, *per se*, and damage is implied; in slander damages must be averred and proved specially, unless the words impute a crime, or a contagious disorder which would exclude the person from society, or are calculated to injure him in his trade, office, profession or calling.<sup>2</sup>

### 33. Privileged communications.

There are cases in which one accused of libel or slander may plead that the communication was privileged, given with a legal and proper motive. Said Willes, J.: "Where the matter is written in the assertion of some legal or moral duty, or in self-defense, and the thing is done honestly and without sinister motive, and in the *bona fide* belief in the truth of the statement at the time of making it the law declares it privileged."<sup>3</sup> Criticism of public men for public acts, of literary works, dramas, plays and other things concerning the public are privileged if fair, candid and not abusive. But to charge one with crime, dishonesty or immorality is not privileged, whether it be done orally or in writing.

### 34. Rule as to privilege.

There are many cases establishing the rule that to be a privileged communication it must be made on a proper occasion, from a proper motive, in a proper manner and be based upon reasonable or probable cause;<sup>4</sup> and all these elements are essential.<sup>5</sup> But a statement made in good faith concerning a right or duty in which the person is vitally interested, before a council or body of men in control of a matter, is privileged.<sup>6</sup>

It is a matter of law to be determined by the court whether the occasion was such as to render the matter privileged, so as to repel the legal inference of malice.<sup>7</sup> But whether there was actual malice is for the jury.<sup>8</sup>

<sup>1</sup> Barr v. Moore, 87 Pa. 385; Briggs v. Garrett, 111 Pa. 404.

<sup>2</sup> McGregor v. Thwaites, 3 B. & C. 33 (Eng. C. L.).

<sup>3</sup> Huntley v. Ward, 6 C. B. N. S. 517 (76 E. C. L. R.).

<sup>4</sup> McGaw v. Hamilton, 184 Pa. 108; Ingram v. Reed, 5 Supr. C. 550; Moore v. Leader Pub'g Co., 8 Supr. C. 152; Conroy v. Pittsburg Times, 139 Pa. 334; P. & L. Dig., vol. 11, col. 18584.

<sup>5</sup> Fritchey v. York Daily Pub. Co., 18 York, 174.

<sup>6</sup> Echard v. Norton, 26 Supr. C. 579.

<sup>7</sup> Neeb v. Hope, 111 Pa. 145; Jackson v. Pittsburg Times, 152 Pa. 406; P. & L. Dig., vol. 11, col. 18584.

<sup>8</sup> Echard v. Morton, 26 Supr. C. 579.

**35. Probable cause.**

When an indictable offense is charged the defendant is put upon his proofs to show probable cause and privilege.<sup>9</sup> Being an exceptional defense he must make out his privilege affirmatively.<sup>10</sup>

It is not enough to show that circumstances tended to the belief that it was true — but the circumstances on which the belief was founded must be shown.<sup>11</sup> Evidence that the same article appeared in other papers is not admissible.<sup>12</sup> By way of defense as privileged, the defendant should show the information upon which he relied; and then the plaintiff has the rebuttal.<sup>13</sup> It will not be privileged unless the defendant shows that he used all the attainable sources of information before publication.<sup>14</sup>

Before publishing words charging a crime, reasonable inquiry is necessary in all cases, to ascertain whether there is probable cause.<sup>15</sup> But where the privilege is absolute, as in the case of a candidate for office, an honest belief in the truth is sufficient.<sup>16</sup> If upon investigation it is found that there is a question of identity, there is no probable cause made out.<sup>17</sup> The probable cause required to justify is such reasonable cause as would justify a prosecution.<sup>18</sup>

Publication is not justified where the prosecution has been discontinued for want of probable cause;<sup>19</sup> or where the record would have shown that the publication was untrue.<sup>20</sup> If the record was improperly made up by a clerk and the publisher was misled thereby, he has shown probable cause, although the charge was false.<sup>21</sup>

**36. Proof of actual malice.**

Although the publication may be privileged, if actual malice be shown, the plaintiff has a good cause of action;<sup>22</sup> and when he avers it, defendant cannot set up privilege, by way of demurrer.<sup>23</sup> Actual malice cannot be inferred from the publication;<sup>24</sup> nor from the fact that it was false, since the publisher may have had probable cause and his motives may have been proper.<sup>25</sup> But falsehood and absence of probable cause may amount to proof of actual malice.<sup>26</sup> "A lie is never privileged. It always has malice coiled up

<sup>9</sup> *Conroy v. Pittsburg Times*, 139 Pa. 334; *Coates v. Wallace*, 4 Supr. C. 253; *Bryant v. Pittsburg Times*, 192 Pa. 585.

<sup>10</sup> *Conroy v. Pittsburg Times*, *supra*.

<sup>11</sup> *Coates v. Wallace*, 4 Supr. C. 253; *Moore v. Leader Pub'g Co.*, 8 Supr. C. 152; *Jackson v. Pittsburg Times*, 152 Pa. 406.

<sup>12</sup> *Hayes v. Press Co.*, 127 Pa. 642.

<sup>13</sup> *Conroy v. Pittsburg Times*, *supra*.

<sup>14</sup> *Collins v. Morning News Co.*, 6 Supr. C. 330.

<sup>15</sup> *Neeb v. Hope*, 111 Pa. 145; *Ingram v. Reed*, 5 Supr. C. 550.

<sup>16</sup> *Briggs v. Garrett*, 111 Pa. 404; *Wallace v. Jameson*, 179 Pa. 98.

<sup>17</sup> *Moore v. Leader Pub'g Co.*, 8 Supr. C. 152.

<sup>18</sup> *Shelly v. Dampman*, 1 Supr. C. 115; 174 Pa. 495.

<sup>19</sup> *Donnelly v. Public Ledger*, 2 Phila. 57.

<sup>20</sup> *Coates v. Wallace*, 4 Supr. C. 253.

<sup>21</sup> *Armstrong v. Rauch*, 3 Lanc. Bar, No. 52.

<sup>22</sup> *Rowand v. DeCamp*, 96 Pa. 493.

<sup>23</sup> *Engelman v. Seiler*, 16 W. N. C. 440; *McIntyre v. Weinert*, 195 Pa. 52.

<sup>24</sup> *Press Co. v. Stewart*, 119 Pa. 584.

<sup>25</sup> *Metzler v. Romine*, 20 Phila. 247; *Briggs v. Garrett*, *supra*.

<sup>26</sup> *Neeb v. Hope*, 111 Pa. 145.

in it."<sup>27</sup> Actual malice must be proved by the plaintiff.<sup>28</sup> Although the subject matter may be privileged, if the manner of using the privilege is so exaggerated and excessive, it becomes an abuse of privilege, and by such excess the privilege is lost.<sup>29</sup> Want of probable cause may be left to the jury.<sup>30</sup>

### 37. Privileged communications, by word of mouth.

The statements of witnesses and parties to a judicial proceeding, in relation thereto, *ore tenus*, are absolutely privileged.<sup>31</sup> But if slanderous words are uttered against a witness who has testified they are not.<sup>32</sup> The words of the judge and counsel in relation to the cause whilst on trial are also privileged;<sup>33</sup> also, a communication made by client to counsel loud enough to be heard.<sup>34</sup> But a slander uttered by a witness before a justice of the peace against a party who was not called as a witness is actionable.<sup>35</sup> Although the proceedings of a deliberative or legislative body are privileged, a member has no privilege as such to hurl a charge of perjury at a claimant who has recovered in a suit at law against the municipality.<sup>36</sup> It is for the jury to say whether he exercised properly or abused his privilege.<sup>37</sup> A statement of a public officer, by request, as to why he did an official act is privileged.<sup>38</sup> So also a statement before a medical society that an applicant for membership was guilty of unprofessional and criminal conduct.<sup>39</sup> The same principle applies to a committee's report in a lodge of a secret society appointed to inquire and report on the character and fitness of an applicant. Communications of this kind pertinent to the occasion and circumstances are privileged, even before the State Board of Pardons.<sup>40</sup>

### 38. Privileged communications by publication.

A newspaper is privileged to publish, without malice, proceedings in a court of justice,<sup>41</sup> which includes preliminary hearings before magistrates; official acts of the legislature;<sup>42</sup> or of an attorney at law;<sup>43</sup> or an officer of the militia;<sup>44</sup> or one who holds himself out as a public instructor;<sup>45</sup> or current events as they occur;<sup>46</sup> and

<sup>27</sup> *Briggs v. Garrett*, *supra*.

<sup>28</sup> *Gray v. Pentland*, 4 S. & R. 420.

<sup>29</sup> *Jackson v. Pittsburg Times*, 152 Pa. 406.

<sup>30</sup> *Gray v. Pentland*, 4 S. & R. 420.

<sup>31</sup> *Thompson v. McCready*, 194 Pa. 32.

<sup>32</sup> *Kean v. M'Laughlin*, 2 S. & R. 469.

<sup>33</sup> *Burns v. Smith*, 2 Lack. L. N. 78.

<sup>34</sup> *Swearingen v. Birch*, 4 Yeates, 322.

<sup>35</sup> *Vigours v. Palmer*, 1 Browne, 40; *McGee v. Kinsey*, 1 Phila. 326.

<sup>36</sup> *McGaw v. Hamilton*, 184 Pa. 108.

<sup>37</sup> *McGaw v. Hamilton*, 15 Supr. C. 181; *Rowand v. DeCamp*, 96 Pa. 493.

<sup>38</sup> *Brockerman v. Keyser*, 1 Phila. 269.

<sup>39</sup> *Furey v. Bradley*, 5 Montg. Co. 183.

<sup>40</sup> *Keenan v. McMurray*, 51 Pitts. L. J. 223.

<sup>41</sup> *Pittock v. O'Neill*, 63 Pa. 253; P. & L. Dig., vol. 11, col. 18601.

<sup>42</sup> *Armstrong v. Rauch*, 3 Lanc. Bar, No. 52.

<sup>43</sup> *Miller v. Knabb*, 5 C. C. 636.

<sup>44</sup> *Jackson v. Pittsburg Times*, 152 Pa. 406.

<sup>45</sup> *Press Co. v. Stewart*, 119 Pa. 584.

meetings of public or *quasi*-public bodies such as fire companies;<sup>47</sup> or criticizing the public acts of public officers, such as judges;<sup>48</sup> or remonstrance against a saloon characterizing it as a public nuisance, the refuge of vagrants, the idle and dissipated;<sup>49</sup> or an affidavit for a search warrant.<sup>50</sup>

Notwithstanding the privilege accorded by the law, it may be abused, and become malicious and the vehicle for the gratification of spite or "the wiping out of old scores." In such cases the question is one for the jury, whether actually there has been an abuse. For numerous cases illustrating this, see footnote.<sup>51</sup>

### 39. Evidence — Admissibility, etc.

The opinion of witnesses as to whom was meant by the alleged slander is not generally admissible;<sup>52</sup> but if addressed to one in the second person as: "You, etc.," it is part of the *res gestæ*.<sup>53</sup>

The identification of the handwriting may be made by one who swears that she is familiar with the defendant's handwriting and that it is his.<sup>54</sup> Other evidence may be corroborated by comparison of handwriting.<sup>55</sup> But, for such comparison, a genuine writing, admitted or proven to be so, must be used as a standard.<sup>56</sup> Upon this question of handwriting there is room for experts to win large pay. The simulation of handwriting is an art in itself. In the Hartje case,<sup>57</sup> where an admittedly genuine letter was compared with numerous letters declared forgeries by the woman in the case, about an equal number of experts testified against each other and they were declared not genuine because there were dissimilarities in some letters although all bore a general similarity. The rule laid down by the late E. H. Rauch, the greatest handwriting expert of his time, was that minor dissimilarities are evidence of genuineness and not simulation. On the contrary, one who simulates is less apt to deviate in minor particulars than one who writes genuinely. When challenged to prove this in the case of *Commonwealth v. Purcell et al.*,<sup>58</sup> by the late Henry C. Parsons, Esq., who asked him to simulate his peculiar choppy back-hand, the expert so perfectly imitated the writing of the attorney that he could not tell which he had written and which the expert wrote.

The comparison of types, etc., of a newspaper is a question for the jury.<sup>59</sup> Depositing a postal card in the mail is a sufficient publica-

<sup>46</sup> *Urban v. Pittsburg Times*, 1 Mona. 135.

<sup>47</sup> *Miller v. Knabb*, 5 C. C. 636.

<sup>48</sup> *Briggs v. Garrett*, 111 Pa. 404; *Wallace v. Jameson*, 179 Pa. 98.

<sup>49</sup> *Flitcraft v. Jenks*, 3 Wharton, 158; *Metzler v. Romine*, 20 Phila. 247.

<sup>50</sup> *Warden v. Whalen*, 8 C. C. 660.

<sup>51</sup> *P. & L. Dig.*, vol. 11, cols. 18604-5-6-7-8.

<sup>52</sup> *Rangler v. Hummel*, 37 Pa. 130.

<sup>53</sup> *McCue v. Ferguson*, 73 Pa. 333.

<sup>54</sup> *Aspell v. Smith*, 134 Pa. 59.

<sup>55</sup> *Callan v. Gaylord*, 3 Watts, 321.

<sup>56</sup> *Baker v. Haines*, 6 Wharton, 284.

<sup>57</sup> *Hartje v. Hartje*, 39 Supr. C. 490.

<sup>58</sup> Before Judge Joseph Bucher, *Lycoming Co.*, 1874, Ms.

<sup>59</sup> *McCorkle v. Binns*, 5 Binney, 340. (Defendant was the author of *Binns' Justice of the Peace*.)

tion.<sup>60</sup> And so of a letter, although never received by the one to whom written, if it came to some one else.<sup>1</sup> Irrelevant matter to prejudice the jury against the plaintiff is properly excluded.<sup>2</sup> Evidence as to the financial ability of one defendant cannot be objected to on behalf of the other on a motion for a new trial.<sup>3</sup>

#### 40. Evidence in mitigation of damages.

Although the evidence of circumstances does not amount to justification, it may be admitted by way of amelioration and to lessen the damages.<sup>4</sup> The circumstances as to provocation, etc., may be shown for this purpose only.<sup>5</sup> The defendant may give evidence of the bad character of the plaintiff to minimize the injury to it;<sup>6</sup> but not when the slander is of plaintiff's business and not his character.<sup>7</sup> The fact that defendant made all the reparation he could when he discovered that he was in error is also admissible.<sup>8</sup> Defendant being a competent witness under act of May 23, 1887, P. L. 158, may testify that he had no ill-will, and explain the circumstances.<sup>9</sup> The record of a prosecution for libel cannot be admitted in the civil suit to mitigate the damages.<sup>10</sup> The offer of evidence in mitigation is not an admission that the charge was false.<sup>11</sup>

#### 41. Evidence in aggravation of damages.

The plaintiff may show in aggravation of damages, the number and state of his family at the time;<sup>12</sup> and his social position;<sup>13</sup> nor is it necessary to lay it in the statement;<sup>14</sup> or such other natural sequences of a slander.<sup>15</sup> Repetition of the slander or libel may be shown in aggravation<sup>16</sup> even if after suit commenced.<sup>17</sup> But evidence of other publications cannot be inquired for, on the trial, unless the articles published are produced.<sup>18</sup>

<sup>60</sup> *Spence v. Burt*, 18 *Lanc. L. R.* 251.

<sup>1</sup> *Callan v. Gaylord*, 3 *Watts*, 321.

<sup>2</sup> *Clark v. North American Co.*, 203 *Pa.* 346.

<sup>3</sup> *Mix v. North American Co.*, 12 *D. R.* 440; 209 *Pa.* 636.

<sup>4</sup> *Morris v. Duane*, 1 *Binney*, 90n; *Beehler v. Steever*, 2 *Wharton*, 313; *Minesinger v. Kerr*, 9 *Pa.* 312; *Stees v. Kemble*, 27 *Pa.* 112; *Rowand v. De Camp*, 96 *Pa.* 493; *P. & L. Dig.*, vol. 11, col. 18614.

<sup>5</sup> *Thompson v. McCready*, 194 *Pa.* 32.

<sup>6</sup> *Miller v. Knabb*, 5 *C. C.* 636; *Godshalk v. Metzgar*, 1 *Mona.* 382.

<sup>7</sup> *Flitcraft v. Jenks*, 3 *Wharton*, 158.

<sup>8</sup> *O'Neill v. Kredel*, 1 *W. N. C.* 69; *Struthers v. Peacock*, 11 *Phila.* 287.

<sup>9</sup> *Scranton v. Chase*, 4 *Law Times (N. S.)*, 17; *Spence v. Burt*, 18 *Lanc. L. R.* 251.

<sup>10</sup> *Neeb v. Hope*, 111 *Pa.* 145.

<sup>11</sup> *Bruce v. Reed*, 104 *Pa.* 408.

<sup>12</sup> *Beehler v. Steever*, 2 *Wharton*, 313; *Rhoads v. Anderson*, 13 *Atl.* 823.

<sup>13</sup> *O'Neill v. Kredel*, 1 *W. N. C.* 69; *Mitchell v. Hendrix*, 3 *York*, 5.

<sup>14</sup> *Klumph v. Dunn*, 66 *Pa.* 141.

<sup>15</sup> *Haldeman v. Martin*, 10 *Pa.* 369; *O'Toole v. Post, Etc., Co.*, 179 *Pa.* 271.

<sup>16</sup> *Brown v. Reiter*, 21 *Pitts. L. J.* 143; *Crawford v. Ryan*, 7 *Atl.* 738; *Elliott v. Boyles*, 31 *Pa.* 65.

<sup>17</sup> *M'Almont v. McClelland*, 14 *S. & R.* 359.

<sup>18</sup> *Carothers v. O'Brien*, 29 *Pitts. L. J.* 395.

**42. General damages.**

If the words proved are actionable, *per se*, no special damages need be proved and the plaintiff is entitled to general damages.<sup>19</sup> All damages directly flowing from the slander are recoverable without being laid specially.<sup>20</sup>

**43. Special damages.**

But if damages are sought such as do not naturally follow, they, with the special facts relied upon to recover, must be distinctly claimed and averred.<sup>21</sup> Such averment, however, may be added after demurrer.<sup>22</sup> The proof of special damages must measure up to the averment with particularity.<sup>23</sup> If the slander is concerning a man's trade or vocation special damages need not be averred to sustain the action;<sup>24</sup> but when so averred must be proved specially, general proof being only sufficient to sustain a general verdict.<sup>25</sup> The question is for the jury.<sup>26</sup>

**44. Punitive damages.**

Punitive damages follow a wanton, reckless and malicious publication or utterance;<sup>27</sup> and also where the publisher of the libel refuses to retract on request.<sup>28</sup> But where there is no evidence of actual malice or wantonness the measure of damages is the injury done.<sup>29</sup> Since the act of 1901, *supra*, vindictive damages are again allowable<sup>30</sup> as before the act of 1897 repealed by it.

**45. Powers of jury and court.**

The damages which a jury may allow is in their best judgment under proper instructions from the court as to the measure applicable to the case.<sup>31</sup> The court will not set aside a verdict and order a new trial except in "a clear case of exorbitancy."<sup>32</sup> But if the jury have disregarded the instructions given them it is otherwise.<sup>33</sup> A verdict may be set aside for inadequacy of damages as well as ex-

<sup>19</sup> *Leitz v. Hohman*, 16 Supr. C. 276; *Neeb v. Hope*, 111 Pa. 145; *Meas v. Johnson*, 185 Pa. 12; *P. & L. Dig.*, vol. 11, col. 18626; *Stepp v. Croft*, 18 Supr. C. 101.

<sup>20</sup> *Haldeman v. Martin*, *supra*.

<sup>21</sup> *Hersh v. Ringwalt*, 3 Yeates, 508; *Wallace v. Rodgers*, 156 Pa. 395; *Ripple v. Little*, 5 Lack. Jur. 193.

<sup>22</sup> *Hornburger v. Seiler*, 24 C. C. 476.

<sup>23</sup> *Colbert v. Caldwell*, 3 Grant, 181; *Weaver v. Ritter*, 3 D. R. 419.

<sup>24</sup> *McIntyre v. Weinert*, 195 Pa. 52.

<sup>25</sup> *Leitz v. Hohman*, 16 Supr. C. 276.

<sup>26</sup> *Stroud v. Smith*, 194 Pa. 502.

<sup>27</sup> *Neeb v. Hope*, 111 Pa. 145; *O'Neill v. Kredel*, 1 W. N. C. 69; *Barr v. Moore*, 87 Pa. 385; *P. & L. Dig.*, vol. 11, col. 18630.

<sup>28</sup> *Clark v. North American*, 203 Pa. 346.

<sup>29</sup> *Collins v. Morning News Co.*, 6 Supr. C. 330.

<sup>30</sup> *Mix v. North American Co.*, 12 D. R. 446; 209 Pa. 636.

<sup>31</sup> *Runkle v. Meyer*, 3 Yeates, 518; *Struthers v. Peacock*, 11 Phila. 287; *Spence v. Burt*, 18 Lanc. L. R. 251, where the various kinds of damages are defined.

<sup>32</sup> *Swalm v. Walbourn*, 15 Lanc. L. R. 118.

<sup>33</sup> *Cooper v. Keeler*, 1 W. N. C. 116; *Stroud v. Smith*, 194 Pa. 502.

cessive.<sup>34</sup> A judgment has been reversed for excessive damages.<sup>35</sup> What damages are fair and just depends largely on each case, but they should not be confiscatory,<sup>36</sup> and if so the court will grant a new trial, unless a remission is filed.<sup>37</sup>

Where a verdict is entered generally on a statement containing several counts, some of which charges are not actionable, it is erroneous.<sup>38</sup>

#### 46. Costs.

If the plaintiff recovers a less sum, in slander, than forty shillings,<sup>39</sup> under act of March 27, 1713, 1 Sm. L. 76, he cannot have more costs than damages;<sup>40</sup> unless the jury or arbitrators award the costs by dividing them or by putting all the costs on one party.<sup>41</sup> This act does not apply to libel.<sup>42</sup> It is a re-enactment of 21 James I, sec. 6, ch. 16, which relates to slander only.<sup>43</sup> The jury has power over the costs, but if their verdict as to costs does not import all the costs of suit, "with costs," has been defined those allowed by the act.<sup>44</sup> A rule requiring security for costs will not be enforced where one is too poor to comply with it.<sup>45</sup>

<sup>34</sup> *Palmer v. Leader Pub'g Co.*, 7 Supr. C. 594.

<sup>35</sup> *Smith v. Times Co.*, 178 Pa. 481.

<sup>36</sup> *Stitzell v. Reynolds*, 67 Pa. 54.

<sup>37</sup> *Goebler v. Wilhelm*, 47 Pitts. L. J. 432; *Thompson v. McCready*, 194 Pa. 32.

<sup>38</sup> *Shaffer v. Kintzer*, 1 Binney, 537; *Ruth v. Kutz*, 1 Watts, 489; *Gosling v. Morgan*, 32 Pa. 273. (This was under the old style of pleading.)

<sup>39</sup> Pennsylvania shillings,—\$5.33⅓.

<sup>40</sup> *M'Carrigher v. Wilcox*, 2 Luz. L. R. 208; *Muckle v. Smith*, 16 Lanc. L. R. 309; *Gailey v. Beard*, 4 Yeates, 546.

<sup>41</sup> *Willet v. Seville*, 2 Grant, 388; *Stuart v. Harkins*, 3 Binney, 321; *Gower v. Clayton*, 6 S. & R. 85; *Moon v. Long*, 12 Pa. 207.

<sup>42</sup> *Ruth v. Edelman*, 2 Leg. Gaz. 125.

<sup>43</sup> *Brown v. Ellita*, 3 Luz. L. Obs. 166.

<sup>44</sup> *Refowich v. Rice*, 4 Penny. 449.

<sup>45</sup> *Schade v. Luppert*, 17 C. C. 460.

## CHAPTER LVIII.

### TRESPASS FOR MESNE PROFITS.

1. Form of action.
2. Notice of action.
3. Who may maintain it.
4. Who are liable.
5. Pleading and defense.

#### 1. Form of action.

Formerly mesne profits were recoverable in the action of ejectment on notice of intention to claim them.<sup>1</sup> But at the common law the form is trespass;<sup>2</sup> and neither assumpsit<sup>3</sup> nor account render will lie.<sup>4</sup> Like ejectment, it may be equitable in its character, though in form *ex delicto*, and there can be no recovery except for mesne profits after wrongful possession begun, where the possession was lawful in its inception.<sup>5</sup>

#### 2. Notice of action for mesne profits.

By section 1 of the act of April 12, 1869, P. L. 27, it was provided that the action for mesne profits or trespass should not abate by reason of the death of the person liable therefor; and the act of May 2, 1876, P. L. 95, provided for giving notice not less than fifteen days before the trial, of the intention to claim mesne profits up to the trial. The act of Feb'y 23, 1889, P. L. 8, which may be said to be an enlargement of the act of June 11, 1879, P. L. 125, provides:

"Whenever an action for ejectment is pending for the recovery of real estate, the plaintiff or plaintiffs therein, or any person having such right of action, may as well before as after the termination of such action of ejectment, institute an action or actions for mesne profits, against the defendant or defendants in such action of ejectment, or against any other person or persons who may be liable to such plaintiff or plaintiffs, or other person, having such right of action for such profits, but such action or actions for mesne profits shall not be proceeded with to trial, until the plaintiff or plaintiffs shall have recovered possession of the real estate in controversy."

Prior to these acts mesne profits were recoverable in the action of ejectment.

#### 3. Who may maintain it.

The plaintiff in ejectment may recover not only mesne profits of

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<sup>1</sup> Cook v. Nicholas, 2 W. & S. 27; Dawson v. McGill, 4 Wharton, 230; Means v. Presbyterian Church, 3 Pa. 93; Carman v. Beam, 88 Pa. 319.

<sup>2</sup> Osbourn v. Osbourn, 11 S. & R. 55.

<sup>3</sup> Bard v. Nevin, 9 Watts, 328; Reilly v. Crown, Etc., Co., 213 Pa. 595; Lazarus v. Morris, 17 D. R. 804.

<sup>4</sup> Harker v. Whitaker, 5 Watts, 474.

<sup>5</sup> Zimmerman v. Eshbach, 15 Pa. 417; Heckart v. Zerbe, 6 Watts, 260.



the past but is also entitled to rents of the future;<sup>6</sup> but a bona fide occupant may set off his improvements, as well as taxes, insurance, etc.<sup>7</sup> Executors may maintain the action.<sup>8</sup> Where a *cestui que trust* brings ejectment against a trustee to compel conveyance, and the action necessarily involves an accounting for the rents and profits, no subsequent action for mesne profits will lie.<sup>9</sup>

If there be a tenant he becomes responsible to the plaintiff for mesne profits from the time that the action results in an actual or virtual eviction. The tenant has a right to call upon his landlord for defense of his title and if eviction follows he must fall back on his covenant for quiet and peaceable enjoyment.<sup>7</sup> This action is for the incidental tort from wrongful use and occupation, and not as if the defendant were a tenant.<sup>8</sup>

Where there is a recovery against the wife, in ejectment, the action will not lie against her husband, unless it be proved that he participated in the profits;<sup>9</sup> nor can it be maintained by one who is not entitled to the possession.<sup>10</sup> But in the case of wild or unseated lands a recovery in ejectment carries with it constructive possession.<sup>11</sup> The record of recovery is conclusive.<sup>12</sup> But where the judgment is by default, an entry must be proved as well.<sup>13</sup>

After recovery, but before a writ of *hab. fac. pos.* issues, the proper form of action is trespass for mesne profits or a writ of *estrepement*.<sup>14</sup> It was said that one entitled to the possession of land by virtue of the freehold may enter upon it without any legal process whatsoever and may sue for mesne profits with the same force and effect as if he had recovered possession by ejectment.<sup>15</sup>

As to tenants in common, it has been held that one who has recovered in ejectment may maintain the action against his co-tenant.<sup>16</sup> He is entitled to recover from the time he became the owner, as for use and occupation;<sup>17</sup> but he must not sleep on his rights and after a lapse of several years seek to recover for mesne profits.<sup>18</sup> He must act within reasonable time.<sup>19</sup>

#### 4. Who are liable.

If one intermeddles with land and puts a party in possession and afterwards by a lease to others endeavors to put them in possession,

<sup>6</sup> Grambs v. Lynch, 7 Law Times (N. S.), 16.

<sup>7</sup> Muthersbaugh v. McCabe, 22 Supr. C. 587.

<sup>8</sup> Blight v. Ewing, 26 Pa. 135.

<sup>9</sup> Cox v. Harry, 32 Pa. 18.

<sup>10</sup> Schuylkill, Etc., R. Co. v. Schmaele, 57 Pa. 271, qualifying Bauders v. Fletcher, 11 S. & R. 419.

<sup>11</sup> Mozart Building Assn. v. Frisdjen, 5 W. N. C. 318.

<sup>12</sup> Pace v. Hoban, 27 Supr. C. 574; P. & L. Dig., vol. 5, col. 7827.

<sup>13</sup> Caldwell v. Walters, 22 Pa. 378.

<sup>14</sup> Craft v. Yeane, 66 Pa. 210.

<sup>15</sup> Jeffries v. Zane, 1 Miles, 287; Postens v. Postens, 3 W. & S. 182.

<sup>16</sup> Brown v. Galloway, Peter's Cir. Ct. R. 299.

<sup>17</sup> Harlan v. Harlan, 15 Pa. 514.

<sup>18</sup> Reed v. Stanley, 6 W. & S. 369.

<sup>19</sup> Lane v. Harrold, 72 Pa. 267.

<sup>20</sup> Critchfield v. Humbert, 39 Pa. 427.

<sup>21</sup> Hare v. Fury, 2 Yeates, 13.

<sup>22</sup> Chambers v. Lapsley, 7 Pa. 24.

he is liable with the occupants for mesne profits.<sup>20</sup> If a defendant openly leaves the premises pending an ejectment he is not liable for mesne profits after the date of his so leaving.<sup>21</sup>

Under section 28 of the act of Feb'y 24, 1834, P. L. 77, the right to recover mesne profits survives as against the legal representative of the wrong-doer.<sup>22</sup> It will lie against legal representatives for profits accruing during the lifetime of their testator, or if he die *pendente lite*, they may be substituted in the suit.<sup>23</sup>

A bona fide purchaser is not liable beyond the time when his title accrued.<sup>24</sup>

### 5. Pleading and defense.

In this action the general issue is "not guilty" and the statute of limitations may also be pleaded.<sup>25</sup>

A release may be pleaded, but the defendant cannot avail himself of any defense that he should have pleaded in ejectment.<sup>26</sup> A tortfeasor cannot set up the rights of others in his own defense.<sup>27</sup>

After recovery by verdict or judgment by default the tenant cannot deny the right of the plaintiff in an action for mesne profits,<sup>28</sup> unless the claim be for damages reaching back before the issuance of the writ, when he must show his right by title.<sup>29</sup> This rule applies to tenants in common as well as strangers.<sup>30</sup>

But the defendant is not concluded nor estopped from showing that he was not in possession when the writ of ejectment was served,<sup>31</sup> nor as to his possession after service.<sup>32</sup> An equitable defense may be interposed as to the profits;<sup>33</sup> but losses in experiments on another part of the land cannot be set up.<sup>34</sup> Repairs may be liquidated and set off, and improvements by one who is in possession in good faith;<sup>35</sup> or made by his predecessor,<sup>36</sup> and that such improvements were full compensation for use and occupation.<sup>37</sup>

While the action is one in form *vi et armis*, exemplary damages are no longer allowed, as formerly, the jury being confined to the actual rent<sup>38</sup> or to damages estimated as for use and occupation.<sup>39</sup>

<sup>20</sup> Storch v. Carr, 28 Pa. 135; Longenberger v. Case, 6 W. N. C. 74.

<sup>21</sup> Donford v. Ellys, 12 Modern, 138.

<sup>22</sup> Arundel v. Springer, 71 Pa. 398; act April 12, 1869, P. L. 27.

<sup>23</sup> Arundel v. Springer, *supra*.

<sup>24</sup> Reed v. Ingraham, 3 Dallas, 505.

<sup>25</sup> Lynch v. Cox, 23 Pa. 265; Hill v. Meyers, 46 Pa. 15.

<sup>26</sup> Lloyd v. Nourse, 2 Rawle, 49.

<sup>27</sup> Karns v. Tanner, 74 Pa. 339.

<sup>28</sup> Baily v. Watson, 6 Binney, 450; Drexel v. Man, 2 Pa. 271.

<sup>29</sup> Osbourn v. Osbourn, 11 S. & R. 55; Huston v. Wickersham, 2 W. & S. 308.

<sup>30</sup> Chambers v. Lapsley, 7 Pa. 24.

<sup>31</sup> Miller v. Henry, 84 Pa. 33.

<sup>32</sup> Sopp v. Winpenny, 68 Pa. 78.

<sup>33</sup> Ewalt v. Gray, 6 Watts, 427.

<sup>34</sup> Marvin v. Biddle, 2 W. N. C. 658.

<sup>35</sup> Jones v. Brownfield, 2 Pa. 59.

<sup>36</sup> Morrison v. Robinson, 31 Pa. 456; Walker v. Humbert, 55 Pa. 407; Kille v. Ege, 82 Pa. 102.

<sup>37</sup> Ege v. Kille, 84 Pa. 333.

<sup>38</sup> Hanna v. Phillips, 1 Grant, 253.

<sup>39</sup> Blight v. Ewing, 26 Pa. 135.

So it is error to consider the expense of the plaintiff in prosecuting his action, etc.<sup>40</sup> The mesne profits may be calculated to the time of verdict.<sup>41</sup> If the defendant file a disclaimer the plaintiff is limited by it.<sup>42</sup>

Where defendants plead jointly but a separate verdict is taken, judgment may be entered against one and a *nol. pros.* as to the other.<sup>43</sup> A recovery in ejectment does not necessarily bind all the defendants equally for mesne profits.<sup>44</sup> The costs taxed in the ejectment may be recovered as damages in the action for mesne profits.<sup>45</sup> If a new plaintiff is added by amendment, his right to mesne profits dates only from the amendment.<sup>46</sup> An affidavit of defense is not necessary. Assumpsit may be brought on the bond after judgment.<sup>47</sup>

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<sup>40</sup> Alexander v. Herr, 11 Pa. 537.

<sup>41</sup> Dawson v. McGill, 4 Wharton, 230

<sup>42</sup> Crea v. Hertzler, 8 Phila. 644.

<sup>43</sup> Chambers v. Lapsley, 7 Pa. 24.

<sup>44</sup> Eastwick v. Saylor, 85 Pa. 15.

<sup>45</sup> Alexander v. Herr, 11 Pa. 539.

<sup>46</sup> Kille v. Ege, 82 Pa. 102.

<sup>47</sup> Lazarus v. Morris, 17 D. R. 804.

## CHAPTER LIX.

### TRESPASS FOR NEGLIGENCE.

1. General principles.
2. Proximate cause.
3. Contributory negligence.
4. Contributory negligence of parent.
5. Imputed negligence.
6. Liability of master for servant's negligence.
7. When relation of master and servant obtains.
8. Liability of parent for negligence of child.
9. Liability of employer to third persons.
10. Joint and several liability.
11. Liability of employer to employee.
12. Rule of duty of employer.
13. Safe appliances and materials.
14. Rule of safety.
15. Warning, notice and instruction to infants.
16. Warning and instruction to adults.
17. Responsibility for negligence of fellow servant.
18. Agent of employer defined.
19. No presumption of negligence.
20. Physician's liability for malpractice.
21. Form of action — *præcipe*.
22. Plaintiff's statement.
23. Amendments.
24. Bill of particulars.
25. Form of statement — railroad crossing.
26. Form of rule for bill of particulars.
27. Form of answer to rule.
28. Compulsory nonsuit.
29. Exception and order.
30. Form of statement — not protecting passenger in waiting room.
31. Statement — joint suit of parent and child.
32. Statement against citizen of another state.
33. Who must sue for personal injuries when death ensues.
34. Damages — how estimated.
35. Joint action by husband and wife.
36. Joint action by parent and child.
37. Action for fire set by engine.

#### **i. Trespass for negligence — General principles.**

There are so many features of the law of negligence that it would require a whole volume to go into details. All the authorities in Pennsylvania illustrative of this statement are systematically arranged in Pepper & Lewis' Digest of Decisions, vol. 13, col. 21596, *et seq.*, and in volumes 2 and 4 of C. R. A., which supplement and bring the original volumes of Pepper & Lewis' Digest down to date. It would be an assumption of supererogation to attempt to equal that presentation of the law in Pennsylvania, which, it must be remembered, is in many respects different from that in other states and laid down as "principles" in the ponderous encyclopedias and interminable digests of every color of law.

Our courts have defined negligence to be the absence of due care, under the circumstances.<sup>1</sup>

<sup>1</sup> Penna. R. Co. v. Coon, 111 Pa. 430; Ellis v. Lake Shore, Etc., R. Co., 138 Pa. 506; P. & L. Dig., vol. 13, col. 2165.

It is also a general proposition that the circumstances of each case furnish the measure of care required and what constitutes ordinary care and negligence is a question for the jury when the facts are disputed.<sup>2</sup> The care required is that imposed by some duty, or is such as a reasonable and prudent person would be expected to exercise under the circumstances.<sup>3</sup> So the ordinary usage of business may be ordinary care, upon a question of negligence, though this is exceptional.<sup>4</sup> Negligence is the absence of that care which men of common sense and common prudence ordinarily exercise in like employments under similar circumstances.<sup>5</sup> Where one is suddenly confronted by an imminent peril without his own fault, he cannot be held to as high a measure of care and prudence in endeavoring to save himself as under ordinary circumstances;<sup>6</sup> and this is peculiarly so of an infant of tender years.<sup>7</sup> It is also a general rule that where no duty is imposed or owed there is no negligence unless it is shown that the injury was wilful or wanton.<sup>8</sup> One is not bound to anticipate that another will act negligently;<sup>9</sup> so when a person is warned but rushes into immediate danger he assumes the risks himself. Where the question is disputed whether a flood was an ordinary one or an extraordinary one, it is for the jury to decide.<sup>10</sup>

## 2. Proximate cause.

All negligence cases formerly were in case, but now are sued in trespass. The question of proximate cause of the injury is still of the first importance. Proximate cause has been held to be the natural and probable cause of the injury.<sup>11</sup> It is that which in natural sequence, undisturbed by another cause, produces the result complained of.<sup>12</sup> It is determined by the succession of events connected logically,<sup>13</sup> making up a chain from which no link is missing.<sup>14</sup>

<sup>2</sup> McKee v. Bidwell, 74 Pa. 218.

<sup>3</sup> Gilchrist v. Hartley, 198 Pa. 132; Catawissa R. Co. v. Armstrong, 49 Pa. 186.

<sup>4</sup> Beck v. Hood, 185 Pa. 32.

<sup>5</sup> O'Brien v. Phila., Etc., R. Co., 3 Phila. 76; Penna. R. Co. v. Peters, 116 Pa. 206; Gress v. Braddock, Etc., R. Co., 14 Supr. C. 87.

<sup>6</sup> Flaherty v. Scranton, Etc., Co., 30 Supr. C. 446; Szynter v. Scranton R. Co., 7 Lack. Jur. 165; Brown v. French, 104 Pa. 604; Sekerak v. Jutte, 153 Pa. 117; Floyd v. Phila. & R. R. Co., 162 Pa. 29; Downing v. Pittsburgh R. Co., 219 Pa. 592; Donahue v. Kelly, 181 Pa. 93; Phillips v. People's, Etc., R. Co., 190 Pa. 222; Fetterman v. Rush Twp., 28 Supr. C. 77; P. & L. Dig., vol. 13, col. 21673; C. R. A., vol. 2, col. 3407.

<sup>7</sup> Chilton v. Central Tr. Co., 152 Pa. 425; P. & L. Dig., vol. 13, col. 21621.

<sup>8</sup> Phillips v. Craft, 139 Pa. 125; P. & L. Dig., vol. 13, col. 21622-3, *et seq.*

<sup>9</sup> Brown v. Lynn, 31 Pa. 510; Reeves v. Del., Etc., R. Co., 30 Pa. 454; Seth v. Burt, 9 Del. Co. 571.

<sup>10</sup> Shaughnessy v. Pittsburg, 20 Supr. C. 609.

<sup>11</sup> Robb v. Penna. Co., Etc., 186 Pa. 456; Swanson v. Crandall, 2 Supr. C. 85; P. & L. Dig., vol. 13, col. 21630, 2 C. R. A. 3397.

<sup>12</sup> Behling v. Southwest, Etc., 160 Pa. 359.

<sup>13</sup> Penna. R. Co. v. Kerr, 62 Pa. 353.

<sup>14</sup> Douglass v. N. Y., Etc., R. Co., 209 Pa. 128; Scott v. Allegheny, Etc., R. Co., 172 Pa. 646; 2 C. R. A., *Pep. & Lew.*, col 33997.

Where the facts are not in dispute, it is for the court to say whether proximate cause exists;<sup>15</sup> otherwise it is for the jury.<sup>16</sup> The consequence must be connected with the negligence of the defendant; otherwise an important link is missing;<sup>17</sup> and it must be directly in the chain and not a remote possibility.<sup>18</sup>

### 3. Contributory negligence.

The doctrine of contributory negligence enters largely into many cases. It is that where the plaintiff's own negligence contributed in any degree to the consequence he cannot recover for injuries from it.<sup>19</sup> One who risks his life to save another from peril into which he has gone voluntarily, is not guilty of contributory negligence.<sup>20</sup>

A child of tender years cannot be held to the same rule as to contributory negligence as an adult, or one of an age of capacity to see, know and appreciate danger. The age of incapacity to contribute to the injury has varied, scarcely going beyond seven,<sup>21</sup> although it has gone as high as eight,<sup>22</sup> ten,<sup>23</sup> and eleven years.<sup>24</sup> It depends on the circumstances and the capacity of the child, and this, when above the age of seven, is a question for the jury.<sup>25</sup>

### 4. Contributory negligence of parent.

Where the parent sues for injuries to his child caused by negligence, a defense is allowed, that the parent contributed to the result by not restraining the child from going into a place of danger, as he was in duty bound.<sup>26</sup> A duty which parents owe is to keep their children off the streets, unless accompanied by a care-taker.<sup>27</sup>

<sup>15</sup> *Russell v. Westmoreland County*, 26 Supr. C. 425; *Bannon v. Penna. R. Co.*, 29 Supr. C. 231.

<sup>16</sup> *Gudfelder v. Pitts, Etc., R. Co.*, 207 Pa. 629; *Morford v. Sharpsville Boro'*, 28 Supr. C. 544; *P. & L. Dig.*, vol. 13, col. 21636.

<sup>17</sup> *P. & R. R. Co. v. Spearen*, 47 Pa. 300; *Coml. Ice Co. v. P. & R. R. Co.*, 197 Pa. 238; *Simmons v. Penna. R. Co.*, 199 Pa. 232; *Snyder v. Penna. R. Co.*, 205 Pa. 619; *Fullmer v. N. Y. C. R. Co.*, 208 Pa. 598; *Herbstritt v. Lack. L. Co.*, 212 Pa. 495.

<sup>18</sup> *Jones v. Phila. Tr. Co.*, 185 Pa. 75; 4 C. R. A., *P. & L. Dig.*, col. 1596.

<sup>19</sup> *P. & R. R. Co. v. Ervin*, 89 Pa. 71; *Monon City v. Fischer*, 111 Pa. 9; *Scowden v. Erie R. Co.*, 26 Supr. C. 15; *McCartney v. Union Tr. Co.*, 27 Supr. C. 222; *P. & L. Dig.*, vol. 13, col. 21667; *Weir v. Haverford, Etc., Co.*, 221 Pa. 611. (See *Bierly on Juries and Jury Trials*.)

<sup>20</sup> *Corbin v. Phila.*, 195 Pa. 461.

<sup>21</sup> *Phila., Etc., R. Co. v. Laver*, 112 Pa. 414; *P. & L. Dig.*, vol. 13, col. 21681; *Rachmel v. Clark*, 205 Pa. 314; *Daltry v. Media, Etc., R. Co.*, 208 Pa. 403; *Dynes v. Bromley*, 208 Pa. 633; *Metzler v. P. & R. R. Co.*, 28 Supr. C. 180; *P. & L. C. R. A.*, vol. 2, col. 3408.

<sup>22</sup> *Taylor v. Del. & H. Canal Co.*, 113 Pa. 162.

<sup>23</sup> *McMullen v. Penna. R. Co.*, 132 Pa. 107.

<sup>24</sup> *Schilling v. Abernathy*, 112 Pa. 437.

<sup>25</sup> *Kelly v. Pitts. Tr. Co.*, 204 Pa. 623; *Kirschner v. Oil City R. Co.*, 210 Pa. 45; *Byron v. Central R. Co., Etc.*, 215 Pa. 82; *Bracken v. Penna. R. Co.*, 32 Supr. C. 22; *Davis v. Penna. R. Co.*, 34 Supr. C. 388.

<sup>26</sup> *Glassey v. Hestonville, Etc., R. Co.*, 57 Pa. 172. (See the parental duty in this case.) *Johnson v. Reading, Etc., R. Co.*, 160 Pa. 647; *Kay v. Penna. R. Co.*, 65 Pa. 269; *Dickey v. Hartman*, 25 *Lanc. L. R.* 139.

<sup>27</sup> *Mahoney v. R. Co.*, 6 *Phila.* 242; *Feehan v. Dobson*, 10 Supr. C. 6;

But whether this care has been exercised, under the circumstances, has recently been held to be a question for the jury.<sup>28</sup> The parent is barred if he takes his child to a place of known danger and leaves him there.<sup>29</sup> But if the child gets away and wanders alone to a place of danger the court cannot say as a matter of law that the parent was negligent.<sup>30</sup>

The parent also assumes the risks naturally and reasonably incident to the employment in which he permits or requires his child to engage, and cannot recover for injuries resulting to such child in the course of such employment.<sup>31</sup> The mother of a boy over sixteen years old was held not to be responsible.<sup>32</sup> Whether the parent knew of the dangerous character of the employment is a question for the jury.<sup>33</sup>

##### 5. Imputed negligence.

The negligence of a driver of a vehicle is not imputable to the passengers who have no control over his actions;<sup>34</sup> but if one hires a carriage and the driver who accompanies it is subject to his direction and restraint it is otherwise.<sup>35</sup> The passenger of a common carrier is under no duty to look out for danger and therefore is not chargeable with negligence of the driver.<sup>36</sup> The contributory negligence of a parent or another to whom a child was entrusted cannot be imputed to the child in an action by it.<sup>37</sup>

##### 6. Liability of master for servant's negligence.

The rule is that the master is liable for the negligence of his servant, only when it results from acts within the scope of his employment, and not when outside of that, or by wilful and malicious trespass of his own motion.<sup>38</sup> But if done within such a scope al-

P. & L. Dig., vol. 13, col. 21691; *Sullenberger v. Chester Tr. Co.*, 33 Supr. C. 12.

<sup>28</sup> *Del Rossi v. Cooney*, 208 Pa. 233; *Weida v. Hanover Twp.*, 30 Supr. C. 424; *Duffy v. Sable Iron Works*, 210 Pa. 326; *Enright v. Pitts., Etc., R. Co.*, 204 Pa. 543; *Herron v. Pittsburg*, 204 Pa. 509; *Henderson v. Contrl. Ref. Co.*, 219 Pa. 384; *Distatio v. United Tr. Co.*, 35 Supr. C. 406; *Murray v. Scranton R. Co.*, 36 Supr. C. 576; *Corpies v. Iron City Sand Co.*, 31 Supr. C. 107.

<sup>29</sup> *Pollock v. Penna. R. Co.*, 210 Pa. 634.

<sup>30</sup> *Jones v. United Traction Co.*, 201 Pa. 346.

<sup>31</sup> *Smith v. Hestonville, Etc., R. Co.*, 92 Pa. 450; *Tagg v. McGeorge*, 155 Pa. 368; *Schwenk v. Kebler*, 122 Pa. 67; *McCool v. Lucas Coal Co.*, 150 Pa. 638.

<sup>32</sup> *Sheetram v. Trexler, Etc., Co.*, 13 Supr. C. 219.

<sup>33</sup> *Weaver v. Iselin*, 161 Pa. 386.

<sup>34</sup> *Jones v. Lehigh, Etc., Co.*, 202 Pa. 81; *Dean v. Penna. R. Co.*, 129 Pa. 514; *Bunting v. Hoggsett*, 139 Pa. 363.

<sup>35</sup> *Dryden v. Penna. R. Co.*, 211 Pa. 620.

<sup>36</sup> *O'Toole v. Pitts., Etc., R. Co.*, 158 Pa. 99; *Carr v. Easton*, 142 Pa. 139; *Faust v. Phila., Etc., R. Co.*, 191 Pa. 420. (See 4 C. R. A., P. & L. Dig., col. 1605, for latest cases.)

<sup>37</sup> *Kay v. Penna. R. Co.*, 65 Pa. 269; *Erie, Etc., R. Co. v. Schuster*, 113 Pa. 412; P. & L. Dig., vol. 13, col. 21707.

<sup>38</sup> *Snodgrass v. Bradley*, 2 Grant, 43; *McFarlan v. Penna. R. Co.*, 199 Pa. 408; P. & L. Dig., vol. 13, col. 21800.

though in a manner contrary to the directions of his employer, liability attaches.<sup>39</sup> Even where the servant's acts do not come within the scope of his employment, ordinarily, if the evidence tends to the legitimate inference that he acted in the matter, with the authority and for the benefit of his employer, the question will then be for the jury.<sup>40</sup> This is peculiarly the case with drivers of vehicles and operators of cars.<sup>41</sup> Whether or not the servant was at the time engaged in the employment of his master is for the jury,<sup>42</sup> under proper directions of the court; and sometimes for the court to declare whether there is sufficient evidence for the jury to pass upon.<sup>43</sup> If the employer is at the time in the vehicle with the employee it will be presumed that the negligence was within the scope of his employment.<sup>44</sup> But a passenger cannot in violation of the master's rules of which he has notice, justify his act because the servant directed him to do it.<sup>45</sup>

#### 7. When relation of master and servant obtains.

In order to hold the master responsible for the acts of his servant, on the principle of *respondeat superior*, the relation must be established and the pleadings should distinctly show it.<sup>46</sup> Although a chauffeur is operating his master's automobile, it may be shown that he was then operating it on his own private business and not his master's.<sup>47</sup> And herein is one of the lax points of the law. When the state licenses a dangerous machine, liable to frighten horses, to run on the public highway, it should in all cases hold the owner responsible for its negligent use and the incompetency of those operating it. It should at least be subject to the same rule as the owner of a wagon;<sup>48</sup> or a hansom cab with the name of a railroad company upon it,<sup>49</sup> except where the driver is a bailee by contract;<sup>50</sup> or the owner of a vicious dog;<sup>51</sup> or the harbinger of such an animal;<sup>52</sup> or the owner of horses.<sup>53</sup>

<sup>39</sup> Phila., Etc., R. Co. v. Brannan, 17 W. N. C. 227; Whaley v. Citizens' Natl. Bank, 28 Supr. C. 531; Ahern v. Melvin, 21 Supr. C. 462. (See automobile cases under "Nuisance," *infra*.)

<sup>40</sup> Brunner v. Tel. & Tel. Co., 151 Pa. 447; P. & L. Dig., vol. 13, col. 21803; Brennan v. Merchant & Co., 205 Pa. 258.

<sup>41</sup> Hyman v. Tilton, 208 Pa. 641; Pollack v. Penna. R. Co., 210 Pa. 631.

<sup>42</sup> Simmons v. Penna. R. Co., 199 Pa. 232; P. & L. Dig., vol. 13, col. 21804; Quinn v. Shamokin, Etc., R. Co., 7 Supr. C. 19; Madara v. Shamokin, Etc., R. Co., 192 Pa. 542.

<sup>43</sup> Penna. Co. v. Toomey, 91 Pa. 256; Pitts., Etc., Co. v. Donahue, 70 Pa. 119; Connor v. Penna. R. Co., 24 Supr. C. 241; Towanda, Etc., Co. v. Heeman, 86 Pa. 418; Guille v. Campbell, 200 Pa. 119.

<sup>44</sup> Kelton v. Fifer, 26 Supr. C. 603.

<sup>45</sup> Schimpf v. Harris, 185 Pa. 46.

<sup>46</sup> Patton v. McDonald, 204 Pa. 517; Connor v. Penna. R. Co., 24 Supr. C. 241.

<sup>47</sup> Quigley v. Thompson, 211 Pa. 107.

<sup>48</sup> Hennessy v. Baugh, 29 Supr. C. 310.

<sup>49</sup> Hershinger v. Penna. R. Co., 25 Supr. C. 147.

<sup>50</sup> Connor v. Penna. R. Co., 24 Supr. C. 241.

<sup>51</sup> Mann v. Weiland, 81 \* Pa. 243; McConnell v. Lloyd, 9 Supr. C. 25; Sylvester v. Maag, 155 Pa. 225.

<sup>52</sup> Snyder v. Patterson, 161 Pa. 98.

<sup>53</sup> Goodman v. Gay, 15 Pa. 188; Henry v. Kloppe, 147 Pa. 178; Keller



### 8. Liability of parent for negligence of child.

An infant is liable for its own tort when not based on contract.<sup>1</sup> But it cannot be taken by a *capias*, under act of July 9, 1901, P. L. 614, clause 6 of section 1. The writ must be served as in the case of a summons. However, where the father entered bail for his child, the writ will not be quashed.<sup>2</sup> The parents are not liable for the negligence of an infant which was not induced or ratified by them.<sup>3</sup> But where the negligence results in the course of employment by the father he is liable; <sup>4</sup> or in his presence and with his approval.<sup>5</sup>

### 9. Liability of employer to third persons.

This subject is discussed in detail in vol. 13, *Pepper & Lewis' Digest*, col. 21811, and in vol. 2, C. R. A., col. 3429, and vol. 4, C. R. A. 1620, reference to which is here made.

### 10. Joint and several liability.

Where two or more persons jointly commit a negligent act, or where one of several fails to perform a common duty which all owe, they are liable, either jointly or severally.<sup>6</sup> But there must be a union of fault or neglect in that which causes the injury, without which there can be no recovery.<sup>7</sup> If the plaintiff has sued one it is no defense to plead the tort of the other.<sup>8</sup> The general principle as to wrong-doers is that there can be no contribution.<sup>9</sup>

Where the tort is produced by several causes operating independently, though with a common result, the liability is several and not joint.<sup>10</sup> But where the negligence of two railroad companies results in an accident they are jointly liable.<sup>11</sup> A verdict against both will be sustained.<sup>12</sup> An action will lie against each one of the negligent actors.<sup>13</sup> He may sue either or both concurring tortfeasors,<sup>14</sup> regardless of primary or secondary liability.<sup>15</sup> Whether or

v. Boorse, 185 Pa. 535; *Quigley v. Adams Express Co.*, 27 Supr. C. 116; *Miller v. Atlantic Refining Co.*, 210 Pa. 628.

<sup>1</sup> *Stroh v. Dorrance*, 11 Kulp, 146.

<sup>2</sup> *Powell v. Perkins*, 211 Pa. 233.

<sup>3</sup> *Swanson v. Crandall*, 2 Supr. C. 85; *McClung v. Dearborne*, 134 Pa. 396; *Hower v. Ulrich*, 156 Pa. 410.

<sup>4</sup> *Sample v. Styer*, 3 Lanc. L. R. 161.

<sup>5</sup> *Strohl v. Levan*, 39 Pa. 177.

<sup>6</sup> *Klander v. McGrath*, 35 Pa. 128; *Gallagher v. Phila.*, 4 Supr. C. 60; *Rahenkamp v. United Tr. Co.*, 14 Supr. C. 635.

<sup>7</sup> *Sturtzebecker v. Inland Tr. Co.*, 211 Pa. 156; *Goodman v. Coal Twp.*, 206 Pa. 621; *Howard v. Union Tr. Co.*, 195 Pa. 391; *Wiest v. Electric, Etc., Co.*, 200 Pa. 148.

<sup>8</sup> *Tool v. Del., Etc., R. Co.*, 27 Supr. C. 577.

<sup>9</sup> *Morton v. Union Tr. Co.*, 20 Supr. C. 325. (See *Boyer v. Bolender*, 129 Pa. 324.)

<sup>10</sup> *Little, Etc., Co. v. Richards*, 57 Pa. 142; *Gallagher v. Kemmerer*, 144 Pa. 509; *Boyd v. Ins. Patrol*, 113 Pa. 269.

<sup>11</sup> *Downey v. Phila. Tr. Co.*, 161 Pa. 588.

<sup>12</sup> *Goorin v. Allegheny Tr. Co.*, 179 Pa. 327, 333.

<sup>13</sup> *Comey v. Phila. Tr. Co.*, 175 Pa. 133; *McKenna v. Citizens' Natl. Gas Co.*, 198 Pa. 31.

<sup>14</sup> *Koelsch v. Phila. Co.*, 152 Pa. 355.

<sup>15</sup> *Allegheny v. Campbell*, 107 Pa. 530; *Gates v. Penna. R. Co.*, 150 Pa. 50; *Rahenkamp v. United Tr. Co.*, 14 Supr. C. 635.

not both were responsible is a question of fact for the jury and not a matter of construction for the court.<sup>16</sup> To be a participant one defendant need not be actually present, if he is interested in the business.<sup>17</sup> If the evidence does not sustain a joint tort it is error to submit the case to the jury against all. A verdict against only one, under such circumstances, has been overturned.<sup>18</sup> The plaintiff should *nol. pros.* or discontinue as to those not proven guilty.<sup>19</sup> He may amend on the trial, subject to surprise and continuance. But if not surprised, the defendant will not be heard to object in the appellate court.<sup>20</sup> If the court directs a verdict for one defendant and submits the case to the jury as to the other, it will not be reversed.<sup>21</sup> Satisfaction from one joint tort-feasor operates as satisfaction for all;<sup>22</sup> contribution cannot be had as a general rule where each party is presumed to know that the act was unlawful;<sup>23</sup> but it may be required as to partners or joint contractors,<sup>24</sup> or a street railway company and a gas company.<sup>25</sup>

#### 11. Liability of employer to employee.

The first duty which an employer owes to his employee is to furnish him a reasonably safe place in which to work, though his floor need not be of the safest material;<sup>26</sup> but if the floor had been previously unsafe and the employee had no knowledge of the dangerous condition, the employer is negligent.<sup>27</sup> The employee must point out and prove in what respects the fall of a floor was the negligent act of the employer.<sup>28</sup> And under the act of May 11, 1893, P. L. 41, requiring joists to be covered on each floor above the third, if suit is brought for damages beside the penalty given in the act, it is necessary to aver and prove other negligence as the cause.<sup>29</sup>

The employer is not held to the highest care in providing a safe place in which to work, but it must be reasonably and prudently safe.<sup>30</sup> And the question of whether there was a safe place, and if not, the workman had due notice of its dangers, is not always for the jury.<sup>31</sup> The duty to furnish a safe place also includes that to

<sup>16</sup> Beck v. Hood, 185 Pa. 32.

<sup>17</sup> Baker v. Hagey, 177 Pa. 128.

<sup>18</sup> Wiest v. Electric Tr. Co., 200 Pa. 148.

<sup>19</sup> Dutton v. Lansdowne Boro', 198 Pa. 563. (See discussion of these and all prior cases, vol. 13, P. & L. Dig., col. 21848.)

<sup>20</sup> Roland v. Phila., 202 Pa. 50.

<sup>21</sup> Turton v. Powelton, Elec. Co., 185 Pa. 406.

<sup>22</sup> Seither v. Phila. Tr. Co., 125 Pa. 397.

<sup>23</sup> Armstrong County v. Clarion County, 66 Pa. 218; Oakdale Boro' v. Gamble, 201 Pa. 289.

<sup>24</sup> Horbach v. Elder, 18 Pa. 33.

<sup>25</sup> Phila. Co. v. Central Tr. Co., 165 Pa. 456. (See *supra*.)

<sup>26</sup> McCarthy v. Shoneman, 198 Pa. 568; Franczak v. Nazareth Cem. Co., 42 Supr. C. 263.

<sup>27</sup> O'Brien v. Sullivan, 195 Pa. 474.

<sup>28</sup> Walton v. Bryn Mawr Hotel Co., 160 Pa. 3.

<sup>29</sup> Mack v. Wright, 180 Pa. 472.

<sup>30</sup> Baldwin v. Urner, 206 Pa. 459; Surles v. Kistler, 202 Pa. 289; Powell v. Am., Etc., Co., 216 Pa. 618.

<sup>31</sup> Welch v. Carlucci Stone Co., 215 Pa. 34; Miller v. Am. Bridge Co., 216 Pa. 559.

keep it so.<sup>32</sup> But the rule is too strict that he must warn the workman of every incidental danger as the work progresses. The employee is presumed to take notice of such dangers as are incidental to his employment.<sup>33</sup> But where the platform is unsafe the employer is responsible.<sup>34</sup>

Where the employment is dangerous in itself the ordinary risks are taken by the employee, but for the latent defects occasioned by the neglect of the employer to have them remedied, as they could have been done by due care and reasonable inspection, the employer is liable.<sup>35</sup> But the employer must own or control the thing which is the occasion of the injury.<sup>36</sup> Where the employee is entirely familiar with the condition of the floor and the manner in which it is kept, he cannot recover for an accident.<sup>37</sup> In the case of death from explosion of coal gas in a bituminous coal mine, caused by the neglect of the owner or operator to obey the law as to ventilation, the question of negligence as the proximate cause is for the jury.<sup>38</sup> Negligence will be inferred from one's rushing into obvious danger;<sup>39</sup> but where the danger is latent and unanticipated a different rule is applicable.<sup>40</sup> The inferences in such cases are for the jury.<sup>41</sup> Where there are known openings or hatch-ways, etc., in the floor the employer is not liable,<sup>42</sup> unless they have been suddenly left open and unguarded without warning, especially where the light is poor;<sup>43</sup> but even then, if all the workmen know of such opening, they are charged with a higher degree of care and are not excused for walking into it, although the light be dim.<sup>44</sup> But as to an out of the way opening, seldom used, the employee takes the risks if he wanders there.<sup>45</sup> If an employee enters a dark place, knowing of its dangers, without a light, he is himself negligent.<sup>46</sup> The same is true if he leaves the premises by an unsafe passageway, having choice of safe ones.<sup>47</sup>

<sup>32</sup> *Clegg v. Seaboard, Etc., Co.*, 34 Supr. C. 63.

<sup>33</sup> *Schneider v. Phila. Quartz Co.*, 220 Pa. 548.

<sup>34</sup> *Hollis v. Widener*, 221 Pa. 72.

<sup>35</sup> *Combs v. Del., Etc., Co.*, 218 Pa. 440; *McCoy v. Ohio, Etc., Co.*, 213 Pa. 367; *Lamb v. Phila., Etc., R. Co.*, 217 Pa. 564; *Towner v. Public Ledger*, 215 Pa. 624; *Bardsley v. Gill*, 218 Pa. 56; *Delaney v. Penn., Etc., Co.*, 30 Supr. C. 387; *Kaylor v. Cornwall, Etc., R. Co.*, 216 Pa. 134.

<sup>36</sup> *Politowski v. Burnham*, 214 Pa. 165.

<sup>37</sup> *Sheridan v. Gray's Ferry Ab. Co.*, 214 Pa. 115.

<sup>38</sup> *Saylor v. Chartiers Coal Co.*, 31 Supr. C. 447.

<sup>39</sup> *Hahn v. Roach*, 7 Northam. 21; *Wanamaker v. Burke*, 111 Pa. 423.

<sup>40</sup> *Connolly v. Faith*, 190 Pa. 553.

<sup>41</sup> *Breuninger v. R. Co.*, 9 Supr. C. 461.

<sup>42</sup> *Kupp v. Rummel*, 199 Pa. 90; *Hurley v. Lukens, Etc., Co.*, 186 Pa. 187; *Nemier v. Riter*, 179 Pa. 557.

<sup>43</sup> *Johnson v. Bruner*, 61 Pa. 58; *Smith v. Oil City Tube Co.*, 183 Pa. 485; *Hoffman v. Clough*, 132 Pa. 636.

<sup>44</sup> *Pawling v. Hoskins*, 132 Pa. 617.

<sup>45</sup> *Rick v. Cramp*, 22 W. N. C. 79.

<sup>46</sup> *Ingram v. Lehigh, Etc., Co.*, 148 Pa. 177.

<sup>47</sup> *Collins v. Second Ave., Etc., Co.*, 7 Supr. C. 318; *Cambria Iron Co. v. Shaffer*, 8 Atl. 204.

### 12. Rule of duty of employer.

Meztrezat, J., recently laid down this rule:<sup>48</sup>

"An employee has a right to suppose that his employer has provided such guards and means of protection from injury in the use of the machinery, tools and appliances, as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. If the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risks of dangers of the existence of which he has no knowledge. In the case of young persons, it is the duty of the employer to take notice of their age and ability and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed."

If the duty to provide a safe place is delegated to another, he becomes a vice-principal and his neglect is that of the employer.<sup>1</sup> Whether the conditions and appliances are safe or unsafe is a question for the jury.<sup>2</sup>

### 13. Safe appliances and materials.

"As between master and servant there is a presumption that the master will not send the servant into extraordinary danger without assuming the risk of it;<sup>3</sup> and the master has a right to presume that the servant is qualified for his employment.<sup>4</sup> The servant takes all the ordinary risks of his employment, and if there are defects in the implements or machinery, of which he knows, and he continues in the employment, without complaint or protest, he is presumed to have taken the risks incident thereto.<sup>5</sup> However, the master need not furnish the very newest and best appliances, etc., but they must be reasonably safe, suitable and in good repair."<sup>6</sup> As to whether the machinery was in such condition is ordinarily a question for the jury.<sup>7</sup> Where an employee is taken from his usual

<sup>48</sup> Doyle v. Pitts. Waste Co. (No. 1) 204 Pa. 618.

<sup>1</sup> Schiglizzo v. Dunn, 211 Pa. 253; Lillie v. Am., Etc., Co., 209 Pa. 161; New v. Milligan, 27 Supr. C. 516; Lininger v. Westinghouse, Etc., Co., 210 Pa. 62. (As to oily, wet or slippery condition of the floor and unsafe elevator, see New v. Milligan, 27 Supr. C. 516; Gallagher v. Snellenberg, 210 Pa. 642.)

<sup>2</sup> Hickey v. Solid, Etc., Co., 212 Pa. 255; O'Rourke v. Alphons, Etc., Co., 21 Supr. C. 52.

<sup>3</sup> Royer v. Tinkler, 16 Supr. C. 457; Bierly on Presumptions of Law and of Fact, p. 53.

<sup>4</sup> Jones v. Mfg. Co., 92 Maine, 565.

<sup>5</sup> Lonzer v. R. Co., 196 Pa. 610; Cunningham v. Bridge Works, 197 Pa. 625; Bruce v. Bridge Co., 197 Pa. 439; Velas v. Coal Co., 197 Pa. 380; Reese v. Clark, 198 Pa. 312.

<sup>6</sup> Rummel v. Dilworth, 111 Pa. 343. (See Doyle v. Pitts. Waste Co., *supra*; McGregor v. Penna. R. Co., 212 Pa. 482, as to automatic signals in a switching yard; Calhoun v. Holland Laundry, 208 Pa. 139; Levy v. Rosenblatt, 21 Supr. C. 543.)

<sup>7</sup> Wholeben v. Warren Mica Co., 203 Pa. 234; Wallace v. Henderson, 211 Pa. 142; Finnerty v. Burnham, 205 Pa. 305.

place to assist others, it is a question for the jury whether an improper and unsafe method was used, causing injury;<sup>8</sup> also when the injury occurs to one regularly employed in the work.<sup>9</sup> But where the accident results from the workman's own error or neglect, he cannot recover in any event;<sup>10</sup> so also as to workman's miscalculation of a dynamite fuse, when injured or killed by a delayed explosion;<sup>11</sup> or the mislaying of a key to an ironing machine, which regulated the pressure, and by which means the operator's hand might have been released and less injury done.<sup>12</sup>

#### 14. Rule of safety.

The rule as to the measure of safety in appliances is stated *supra*. It does not require the employer to furnish the latest, safest and best machinery and appliances.<sup>13</sup> It is sufficient if they be such as are commonly in use and with which the employees are familiar, and are presumed to adjust themselves to, with ordinary care, in the operation thereof.<sup>14</sup> In such cases the court should either direct a verdict for the defendant;<sup>15</sup> or, on ordering a nonsuit refuse to take it off.<sup>16</sup>

Except where required by statute the employer is not bound to use safety devices, unless ordinary care raises the duty to use them,<sup>17</sup> which applies to minors as well as adults.<sup>18</sup> But when such device is installed, the duty is imposed to keep it in a safe operating condition as well.<sup>19</sup> Its removal is not negligence, if such device is not in common use and the employee knows how to use the machine without it.<sup>20</sup> The substitution of appliances, unless accompanied with danger and inefficiency is not negligence.<sup>21</sup> The customary use of machinery and ordinary care are for the jury,<sup>22</sup> but the jury must

<sup>8</sup> Escher v. Southwark Mills Co., 221 Pa. 180.

<sup>9</sup> McGeehan v. Hughes, 217 Pa. 121; Laubach v. Coplay Cement Mfg. Co., 217 Pa. 361.

<sup>10</sup> Stitzel v. A. Wilhelm Co., 220 Pa. 564.

<sup>11</sup> Wilson v. Atlantic, Etc., Co., 219 Pa. 245.

<sup>12</sup> Calhoun v. Holland Laundry Co., 220 Pa. 281.

<sup>13</sup> Payne v. Reese, 100 Pa. 301; Drew v. Gaylord Coal Co., 4 Atl. 214; Augerstein v. Jones, 139 Pa. 183.

<sup>14</sup> Del., Etc., Works v. Nuttall, 119 Pa. 149; Keenan v. Waters, 181 Pa. 247.

<sup>15</sup> Service v. Shoneman, 196 Pa. 63; Fick v. Johnson, 3 Supr. C. 378; Dooner v. Del., Etc., Co., 171 Pa. 581; Lehigh, Etc., Co. v. Hayes, 128 Pa. 294.

<sup>16</sup> Keenan v. Waters, 181 Pa. 247; Purdy v. Westinghouse, Etc., Co., 197 Pa. 257; Higgins v. Fanning, 195 Pa. 599; P. & L. Dig., vol. 13, col. 21871.

<sup>17</sup> Schall v. Cole, 107 Pa. 1; Cunningham v. Ft. Pitt Bridge Works, 197 Pa. 625.

<sup>18</sup> Fick v. Jackson, 3 Supr. C. 378.

<sup>19</sup> De Grazia v. Piccardo, 15 Supr. C. 107.

<sup>20</sup> Reese v. Hershey, 163 Pa. 253. (See P. & L. Dig., vol. 13, cols. 21874-5.)

<sup>21</sup> Smith v. Phila. Tr. Co., 202 Pa. 54.

<sup>22</sup> Geist v. Rapp, 206 Pa. 411; Sweigert v. Klingensmith, 210 Pa. 565; Boop v. Laurelton Lumber Co., 212 Pa. 523.

have facts in evidence and cannot be allowed to guess as to a hypothesis of danger.<sup>23</sup>

Where a question raised is in dispute as to the use of a safety device and whether it is unsafe to do without it, it is for the jury.<sup>24</sup> It is not absolute safety but reasonable safety which is the standard and the inquiry should be confined to this proposition.<sup>25</sup>

#### 15. Warning, notice and instruction.

When an employer hires infants or minors to work for him a duty is put upon him, which he must see that it is discharged, to instruct them in the use of the machine and appliances and warn them of the dangers to be avoided;<sup>26</sup> and this duty he cannot avoid by delegation or otherwise.<sup>27</sup> The instruction must be sufficient reasonably to apprise the youth of the dangers incident to the employment and how to avoid them. A question of fact as to whether this has been done is for the jury,<sup>28</sup> and not for the trial judge.<sup>29</sup> But when instructed and he goes into obvious danger, or undertakes independent work, he is himself culpable and there can be no recovery.<sup>30</sup> The question is whether at the time of the injury he was engaged in the employment which he was hired for and customarily was required to do, by his employer.<sup>31</sup>

Where an employer, however, violates a law regulating the age limit, as the act of June 2, 1891, P. L. 176, he does so at his own risk, and cannot allege contributory negligence by way of defense.<sup>32</sup> The same holds as to the act of May 2, 1905, P. L. 352, fixing the minimum age at fourteen years<sup>33</sup> and the principle applies to a child under sixteen, also.<sup>34</sup>

Independently of this, a minor is entitled to instruction not only as to how to do his work and operate the machine, if any, but also to have the dangers incident thereto, pointed out to him;<sup>35</sup> as well as the dangers of machinery in proximity to his working place.<sup>36</sup> If new appliances are introduced, the same duty remains to instruct him as to these.<sup>37</sup> If he is directed to do something to remove an ob-

<sup>23</sup> *Brommer v. Phila., Etc., Co.*, 205 Pa. 432.

<sup>24</sup> *Greenan v. Eggeling*, 30 Supr. C. 253.

<sup>25</sup> *McKee v. Crucible Steel Co.*, 213 Pa. 333; *Sandt v. North, Etc., Co.*, 214 Pa. 215; *Raymer v. Standard Steel Works*, 216 Pa. 101.

<sup>26</sup> *Sheetram v. Trexler, Etc., Co.*, 13 Supr. C. 219; *Tagg v. McGeorge*, 155 Pa. 368; *Royer v. Tinkler*, 16 Supr. C. 457.

<sup>27</sup> *Smith v. Hillside, Etc., Co.*, 186 Pa. 28.

<sup>28</sup> *Welsh v. Butz*, 202 Pa. 59; *Brislin v. Kingston Coal Co.*, 20 Supr. C. 234; *Winters v. Boll* (No. 1), 204 Pa. 41; *Aitkin v. U. S., Etc., Co.*, 52 Pitts. L. J. 247; *Creachen v. Bromley, Etc., Co.*, 209 Pa. 6.

<sup>29</sup> *Noden v. Verlenden*, 211 Pa. 135; *Doyle v. Pittsburg Waste Co.*, 204 Pa. 618; *Dynes v. Bromley*, 208 Pa. 633.

<sup>30</sup> *Baldwin v. Urner*, 206 Pa. 459; *Michael v. Henry*, 209 Pa. 213; *Jones v. Scranton Coal Co.*, 211 Pa. 577; *Eisenberg v. Fraim*, 22 Lanc. L. R. 356.

<sup>31</sup> *Esher v. Mineral, Etc., Co.*, 28 Supr. C. 387.

<sup>32</sup> *Lenahan v. Pittston, Etc., Co.*, 218 Pa. 311.

<sup>33</sup> *Stehle v. Jaeger, Etc., Co.*, 220 Pa. 617.

<sup>34</sup> *Sullivan v. Hanover Cordage Co.*, 222 Pa. 40.

<sup>35</sup> *Greenan v. Eggeling*, 30 Supr. C. 253.

<sup>36</sup> *Medis v. Bentley*, 216 Pa. 324.

<sup>37</sup> *Staddon v. Chapman Mineral Co.*, 33 Supr. C. 475.

struction from the machine it will not be outside the line of his duty, so as to relieve the master from responsibility.<sup>38</sup> A boy twenty years old is presumed to know obvious danger when he sees it;<sup>39</sup> and this may be applied to one even younger.<sup>40</sup>

#### 16. Warning and instruction to adults.

The employer owes a duty, even to adults, who are inexperienced, to notify them and warn them of special risks and lurking dangers, which are known to him;<sup>41</sup> and if this duty is by him delegated to another, he must see that it is done.<sup>42</sup> If the employee complains of a condition and is told by the manager to go ahead, there is no danger, he is not guilty of contributory negligence.<sup>43</sup> Where the person represents herself as skilled there is no duty to instruct her.<sup>44</sup> One ignorant of electrical appliances must be instructed.<sup>45</sup> Where the danger is obvious an adult employee must take notice of it himself. No warning is necessary.<sup>46</sup> But as to an inexperienced employee, the duty is strictly required.<sup>47</sup>

If the danger of being drawn into the machine is so obvious that any one can see it, though inexperienced, the employee assumes the risk when he permits his hand to be drawn in.<sup>48</sup>

#### 17. Responsibility for negligence of fellow servant.

The doctrine of non-liability of employer for the negligence of co-employees or fellow-servants has been rudely jolted by both national and state laws. For the old rules of law reference is made to Pepper & Lewis' Digest of Decisions, vol. 13, col. 21935, *et seq.*, and the cross reference supplements.

The act of June 10, 1907, P. L. 523, modifies the defense against

<sup>38</sup> Creachen v. Bromley, Etc., Co., 214 Pa. 15; Dougherty v. Dobson, 214 Pa. 252.

<sup>39</sup> Dillman v. Hamilton, 14 Montg. Co. 92.

<sup>40</sup> Smith v. Keystone Silk Mills, 1 Lehigh, 190; Melchert v. Robert, Etc., Co., 140 Pa. 448; P. & L. Dig., vol. 13, cols. 21921, *et seq.*

<sup>41</sup> Davis v. Penna. R. Co., 5 C. C. 567; De Grazia v. Piccardo, 15 Supr. C. 107; Lavia v. Kountz Bros., 31 Supr. C. 481; Sweigert v. Klingensmith, 210 Pa. 565; Bartholomew v. Kemmerer, 211 Pa. 277; Esher v. Mineral, Etc., Co., 28 Supr. C. 387.

<sup>42</sup> Lebbering v. Struthers, 157 Pa. 312.

<sup>43</sup> Wagner v. Jayne Chemical Co., 147 Pa. 475; McCray v. Sterling Varnish Co., 7 Supr. C. 610.

<sup>44</sup> Keenan v. Waters, 181 Pa. 247; P. & L. Dig., vol. 13, col. 21932.

<sup>45</sup> Stapleton v. Citizens', Etc., Co., 5 Supr. C. 253.

<sup>46</sup> Sykes v. Packer, 99 Pa. 465, which states the law too broadly against the employee; also Bellows v. Penna., Etc., R. Co., 157 Pa. 51. (See P. & L. Dig., vol. 13, cols. 21933-4-5; Cracraft v. Bessemer Limestone Co., 210 Pa. 15; McGinnis v. Kerr, 204 Pa. 615; Gallagher v. Snellenburg, 210 Pa. 642.)

<sup>47</sup> Patterson v. Harrisburg Trust Co., 211 Pa. 173; Levy v. Rosenblatt, 21 Supr. C. 543; Brislin v. Kingston Coal Co., 20 Supr. C. 234; Wessel v. Jones, Etc., Co., 28 Supr. C. 332.

<sup>48</sup> Vant v. Roelofs, 217 Pa. 535; Best v. Williamsport Staple Co., 218 Pa. 202; Lightcap v. Mitchell, Etc., Co., 24 Montg. Co. 110; Myers v. Edison, Etc., Co., 25 Lanc. L. R. 345; Martin v. Niles, Etc., Co., 214 Pa. 616.

an employee by an employer on the ground of negligence by a fellow servant:

"Where the injury was caused or contributed to by any of the following causes; namely:

Any defect in the works, plant, or machinery of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the negligence of any person to whose orders the employee was bound to conform, and did conform, and, by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions or orders given by the employer, or any other person who has authority to direct the doing of said act."

#### 18. Agent of employer defined.

"Section 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act be held as the agent of the employer, in all suits for damages for death or injury suffered by employees."

#### 19. No presumption of negligence.

The general proposition of law is that negligence is not presumed.<sup>1</sup> The mere fact of an injury occurring does not raise a presumption of negligence.<sup>2</sup> But this rule does not apply to a common carrier of persons or property;<sup>3</sup> though sometimes a carrier may be exempt.<sup>4</sup>

Where goods are lost in transit by a common carrier, unless destroyed by the act of God or the public enemy, negligence will be presumed from the proof of their loss or non-delivery.<sup>5</sup> A carrier which also engages in the business of storing baggage is liable for the loss of it from the store-room and the limit of its liability in such case is not that fixed for baggage in transit as a common carrier, but the actual value of the baggage as stored and lost from its custody.<sup>6</sup>

And so a telegraph company is liable to the addressee of a

<sup>1</sup> Huey v. Gahlenbeck, 121 Pa. 238.

<sup>2</sup> Fearn v. Ferry Co., 143 Pa. 122; Fleming v. R. Co., 158 Pa. 130; Spees v. Boggs, 198 Pa. 112; P. & L. Dig., vol. 13, cols. 21877-82; Price v. Lehigh, Etc., Co., 202 Pa. 176; P. & L. sup., vol. 2, col. 3445; Hemscher v. Dobson, 220 Pa. 222; Clark v. A. G. F. Co., 219 Pa. 426; P. & L. sup., vol. 4, col. 1630.

<sup>3</sup> Sullivan v. R. Co., 30 Pa. 234; Meier v. R. Co., 64 Pa. 225; Frederick v. R. Co., 157 Pa. 103.

<sup>4</sup> R. Co. v. McKinney, 124 Pa. 462; Thomas v. R. Co., 148 Pa. 180; R. Co. v. Riordan, 119 Pa. 577.

<sup>5</sup> Steamer Niagara v. Cordes, 21 Howard (U. S.), 7; Grogan v. Express Co., 114 Pa. 523.

<sup>6</sup> Hufford v. N. Y. C. R. Co., 43 Supr. C. 303, cited in vol. 1, p. 483, with forms.



message, not in cipher, but intelligibly written out, for negligent transmission, to the amount of actual damages proved.<sup>7</sup>

## 20. Physicians' liability for malpractice.

A physician contracts, not to cure, but to treat the case with skill and diligence, as ordinarily exercised by the profession in its improved state.<sup>8</sup> In an action for malpractice, if the only medical witness called for the plaintiff testifies that the treatment was proper a nonsuit will be granted.<sup>9</sup> But if, in treating for one malady he neglects to notice another he will be liable for such damages as result.<sup>10</sup> A mere mistake in certifying that a patient is insane, is not actionable.<sup>11</sup> His refusal to accept other professional aid is not evidence of negligence.<sup>12</sup> The plaintiff or patient may by his neglect of counsel or precaution contribute to the results he complains of and thus cut off his right to recover.<sup>13</sup>

The malpractice must be the proximate cause of the injury.<sup>14</sup> On a *ca. sa.* for damages in such action the defendant may be discharged under the insolvent laws.<sup>15</sup> On the trial the plaintiff may exhibit the limb to the jury to illustrate the malpractice upon it.<sup>16</sup>

## 21. Form of action — Præcipe.

In trespass for negligence, a præcipe will be sufficient as follows:

John Doe	}	In the Court of Common Pleas of Philadelphia	
v.		County, No. —	— Term, 19—
Richard Roe.	}	No. —	—

Issue summons in trespass for negligence, returnable next —  
— —, [or *sec. reg.*]

\_\_\_\_\_,  
Attorney for plaintiff.

Date — —.

To — —, Esq.,  
Prothonotary.

The præcipe in Philadelphia leaves the number of the court blank, under the system of assignment of causes to the different courts, by the prothonotary, there in vogue.

## 22. Plaintiff's statement.

A statement in trespass for negligence is sufficient which avers with reasonable clearness and precision the facts of the accident, the injury to the plaintiff, the amount of damages he sustained thereby

<sup>7</sup> Bailey v. Western Union, Etc., 227 Pa. 522. (See this case for discussion of the duties of a telegraph company.)

<sup>8</sup> McCandless v. McWha, 22 Pa. 61; Haire v. Reese, 7 Phila. 138.

<sup>9</sup> Gottshall v. Emerick, 186 Pa. 418.

<sup>10</sup> Wohlert v. Seibert, 27 C. C. 125.

<sup>11</sup> Williams v. La Bar, 141 Pa. 149.

<sup>12</sup> Potter v. Warner, 91 Pa. 362.

<sup>13</sup> Richards v. Willard, 176 Pa. 181; Mertz v. Detweiler, 8 W. & S. 376; P. & L. Dig., vol. 16, col. 27109.

<sup>14</sup> Byles v. Hazlett, 11 W. N. C. 212.

<sup>15</sup> Drumm v. McTaggart, 3 D. R. 367.

<sup>16</sup> Fowler v. Sergeant, 1 Grant, 355.

and that the injury was caused by the negligence of the defendant. Under such a statement he may go into the details with his proof.<sup>17</sup> But the defendant must be connected with the injury complained of.<sup>18</sup> The statement need not negative by way of anticipation, the defense of contributory negligence.<sup>19</sup>

The injury need not be itemized;<sup>20</sup> unless ruled to file a bill of particulars, which is not a matter of right, but its allowance within the discretion of the court,<sup>21</sup> and which will not be given where the nature of the damages is specified;<sup>22</sup> or where the statement particularizes the injury.<sup>24</sup>

The time when the act was done causing the injury is important and must be stated with certainty;<sup>25</sup> also the place and other circumstances.<sup>26</sup> The particular facts which make out the ingredients of the trespass must be averred and it does no harm to use the language of the common law forms which have had the approval of the legal wisdom of centuries. Even since the act of 1806, above referred to, it has been held necessary to aver that the act was done *vi et armis et contra pacem*, i. e., with force and arms and against the peace.<sup>27</sup> In trespass *de bonis asportatis*, the articles taken should be specified clearly and precisely so that the defendant may justify, if he will, but lack of particularity has been held to be cured by the verdict,<sup>28</sup> and it must be averred that it was the property of the plaintiff at the time of the taking.<sup>29</sup>

### 23. Amendments.

The statement may be amended but the amendment showing the particulars must be sworn to.<sup>30</sup> An averment of an unlawful seizure will not be supported by evidence which shows a seizure under legal process, but an excessive levy. In such case the averment should be abuse of legal process.<sup>31</sup> A variance, however, must be material and go to the heart of the action, or it will be disre-

<sup>17</sup> Quigley v. R. Co., 210 Pa. 162.

<sup>18</sup> Kline v. Richards, 4 Lack. Jurist, 249.

<sup>19</sup> Klein v. R. Co., 4 Lack. Jurist, 325.

<sup>20</sup> Niden v. Wolfenden, 12 C. C. 398; Childs v. R. Co., 27 W. N. C. 510; Costello v. Bailey, 12 C. C. 422; Anderson v. Haig, 12 C. C. 450; Middleton v. Phila. Traction Co., 21 W. N. C. 528.

<sup>21</sup> Baker v. Hagey, 177 Pa. 128; Rife v. Middletown, 32 Supr. C. 68; Schnable v. Schmidt, 21 W. N. C. 153; Mallon v. Gay, 10 C. C. 109; Furbush v. Buchsbaum, 34 W. N. C. 147.

<sup>22</sup> Furbush v. Phillips, 2 W. N. C. 198; Glaser v. Lewis, 14 W. N. C. 228; Harding v. Bunnell, 14 C. C. 417; Smith v. Railroad Co., 14 Luz. L. R. 189.

<sup>23</sup> Peters v. Phila., 12 W. N. C. 51.

<sup>24</sup> Flisher v. Allen, 21 W. N. C. 509. (See vol. 1, p. 480, par. 84, for cases where a bill has been allowed.)

<sup>25</sup> Lindauer v. Van Kirk, 4 W. N. C. 324.

<sup>26</sup> Ickinger v. R. Co., 20 W. N. C. 333; Badman v. R. Co., 17 D. R. 983.

<sup>27</sup> Lindauer v. Van Kirk, 4 W. N. C. 324.

<sup>28</sup> Mayfield v. White, 1 Browne, 241.

<sup>29</sup> Cummings v. Jenkins, 2 Tr. & H. Pr. 63, n. 10.

<sup>30</sup> Ickinger v. R. Co., 20 W. N. C. 333.

<sup>31</sup> Lane v. Sayre Land Co., 211 Pa. 290.

garded.<sup>32</sup> Where plaintiff avers the establishment of a way for upwards of twenty-one years and its uninterrupted adverse user since, he is not precluded from showing a reservation of it by his predecessor in title.<sup>33</sup>

Amendments will be permitted as to particulars when the foundation of the complaint is not undermined. E. g., if the claim is for treble damages for mining coal it may be amended so as to specify the act of assembly under which the treble damages are claimed and also add further damages for negligence in the mining.<sup>34</sup>

Notwithstanding the limitation of the act of 1855 to one year for the bringing the suit has expired, the suit having been brought in time, the statement may be subsequently amended; as, e. g. to change the averment that plaintiff was an employee of defendant to the fact that he was employed by another.<sup>35</sup>

#### 24. Bill of particulars.

If the defendant is not satisfied with the averments of the plaintiff he may ask for a bill of particulars<sup>36</sup> or demand a more specific statement.<sup>37</sup> But a rule for a more specific statement may not be turned into a demurrer to the effect that the statement is insufficient in law to warrant a judgment.<sup>38</sup>

#### 25. Form of statement in trespass for injuries suffered at a negligently kept railroad crossing.

Henry C. Newman	}	In the Court of Common Pleas of Luzerne	
v.		County.	
The D. L. & W. R. Co.		No. 14.	Oct. T., 1898.
			Trespass.

#### *Plaintiff's Statement.*

Plaintiff, Henry C. Newman, by his attorney Paul J. Sherwood, complains of the D. L. & W. Railroad Company, the defendants, who have been summoned to answer the plaintiff in an action of trespass.

For that, whereas the plaintiff before and at the time of the grievances herein complained of, was a citizen of the state of Pennsylvania, residing in the village of Factoryville, County of Wyoming, said state, and is now a resident of the city of Wilkes-Barre, County of Luzerne, in said state;

And whereas the said defendants, before and at the time of the grievances herein complained of, were a railroad corporation, duly incorporated and doing business under the laws of the state of Pennsylvania;

<sup>32</sup> Curry v. Luzerne Boro', 24 Supr. C. 514; Stephenson v. R. Co., 20 Supr. C. 157; Cohn v. May, 210 Pa. 615.

<sup>33</sup> Neff v. R. Co., 202 Pa. 371; Kyper v. Sheaffer, 42 Supr. C. 277.

<sup>34</sup> Jackson v. Gunton, 26 Supr. C. 203; Harding v. Bonham, 11 Kulp, 118, for rule as to amendment; Winton v. Coal Co., 5 Lack. Jurist, 289.

<sup>35</sup> Herbstritt v. Lumber Co., 212 Pa. 495, citing R. Co. v. Decker, 84 Pa. 419; Iron Works v. Barber, 118 Pa. 6; Seipel v. Co., 129 Pa. 425; Fillman v. Ryon, 168 Pa. 484; Booth v. Dorsey, 202 Pa. 381.

<sup>36</sup> Tiffany v. Boro', 11 D. R. 601.

<sup>37</sup> Larkin v. Co., 9 Del. Co. 381.

<sup>38</sup> Caruthers v. Pierie, 13 D. R. 780.

And whereas, both before and at the time of committing the grievances herein complained of, said defendants were the owners of a certain railroad extending in a direction nearly south to north through the counties of Luzerne, Lackawanna and Wyoming counties, in said state, and were in the use and occupancy of the same;

And whereas, the said defendants were also at the same time the owners of a certain locomotive engine being propelled upon and over said railroad, which said locomotive engine was in the care, management and control of the servants of said defendants;

Said plaintiff avers that it then and there became and was the duty of said defendants to keep open, in a safe and passable condition, a certain public highway and crossing-on and over said railroad at a point thereon in said County of Lackawanna, between the villages of Factoryville and La Plume, said crossing being known as "Gardiner's Crossing," so that a person having occasion to pass over and along said public highway and crossing over said road might do so with safety and security; and it then and there became and was the duty of said defendants to keep said crossing free from objects likely to frighten road-worthy horses; and it then and there became and was the duty of said defendants to run their locomotive on and over said railroad and on and over said crossing with care and caution, so that all persons passing across said railroad at said crossing, might do so with safety; and it then and there became and was the duty of said defendants to so guard said crossing as to make it reasonably safe for the passage of the traveling public on and over said highway and across said crossing.

Plaintiff avers that on the 17th day of February, 1898, he was traveling lawfully upon the said public highway, driving a horse hitched to a wagon, and as such he did lawfully and with due care attempt to cross over the said railroad at said crossing, but the said defendants not regarding their duties in the premises did before and at the time, so carelessly, negligently and defectively construct said crossing, and then and there so negligently leave the said crossing unguarded, and without proper care, and did then and there by their servants, so negligently drive said locomotive engine, and drove the same with such excessive speed, that by reason thereof the said locomotive engine was driven against said plaintiff, by means whereof the plaintiff's arm was broken, five of his ribs were broken, and plaintiff's nervous system shocked and he was otherwise torn, bruised, and severely injured, his horse killed and his wagon and harness were destroyed.

Plaintiff avers that he has been thereby subjected to great expense by reason of the loss of said horse, wagon and harness, and that he has been subjected to great expense for surgical, medical and nurse treatment in and about his endeavors to have his said wounds properly treated and that he has been caused permanent injuries and pain in his mind and permanent injuries and great pain and suffering in his body, and also been completely and permanently disabled from the performance of any kind of labor, thereby completely destroying his earning powers, and that he has suffered permanent injuries to his voice.

Wherefore the plaintiff has been greatly damaged to the extent

of thirty thousand dollars (\$30,000) and therefore he brings this suit.

Paul J. Sherwood,  
Attorney for Plaintiff.

June 6, 1908.

**26. Rule for a bill of particulars.**

[Caption same as above.]

Luzerne County, ss:

H. W. Palmer, being duly sworn saith that he is attorney for defendants and that he is not informed by the plaintiff's declaration what specific negligence he charges upon the defendants.

That in order to understandingly defend the said case, he needs to know:

1. In what respect Gardiner's Crossing was carelessly, negligently and defectively constructed.

2. What crossing guards the plaintiff claims were omitted by the defendants.

3. In what the negligence in driving the locomotive over the crossing consisted aside from excessive speed.

On behalf of defendants he therefore petitions the court for an order on the plaintiff to file a bill of particulars giving them specific information upon the points stated.

H. W. Palmer.

Sworn to and subscribed before me, etc.

[Seal]

Mary L. Trescott,  
Notary Public.

**27. Answer to rule.**

[Title as above.]

In response to the rule granted defendant on the 10th day of September, 1898, upon plaintiff to show cause why he should not file a bill of particulars explaining his declaration in above stated case, by his attorney, Paul J. Sherwood, he hereby sets forth his answer:

1. In response to the 1st and 2nd inquiries of defendant we allege that said crossing was negligently constructed and guarded in that the defendants had constructed an alarm bell at the crossing which was out of repair and failed to operate and was not of a reasonably safe character, nor did the said company have safety gates or a flagman or other proper guards at said crossing, which would have been a reasonable precaution under the circumstances of this case.

2. In response to defendant's 3d inquiry we allege that defendants drove their engine with excessive speed and without giving proper warnings by bell or whistle.

Paul J. Sherwood,  
Attorney for plaintiff.

Nov. 2, 1898.

Oct. 6, 1900, defendant pleads "not guilty."

**28. Compulsory nonsuit.**

The compulsory nonsuit, moved for by defendant's counsel granted and a rule entered in usual form to take it off.

**29. Exception.**

Exception by plaintiff's counsel and a request that the stenographer be directed to transcribe the notes of testimony and that this be made a part of the record.

Motion to take off compulsory nonsuit denied.

Exceptions to plaintiff and bill sealed.

Reversed by Supreme Court, the questions being for the jury. (203 Pa. 530.)

**30. Form of statement of claim for negligence of railroad company in not protecting its passengers in its station.**

F. J. Troutman } In the Court of Common Pleas of Jefferson  
v. } County.  
The Penna. R. Co. } No. 3.

August Term, 1909.

Jefferson County, ss:

F. J. Troutman, the plaintiff, comes into court by his attorneys W. L. McCracken, A. L. Ivory and J. H. Longwell and complains of the defendant, which has been summoned to answer the plaintiff in an action of trespass: For that, whereas the defendant now is and on the 19th day of March, 1909, was a corporation operating a steam passenger railway as the owner and lessee thereof, among other places, in the counties of Jefferson and Armstrong in the state of Pennsylvania; that the defendant maintains, and did at the date of the bringing of this suit maintain an office in the borough of Brookville in charge of its agent H. W. Black, upon whom the summons in this case was served by the sheriff of Jefferson County; also an office at Mosgrove in Armstrong County in charge of its agent, F. L. Ditty; that on the aforesaid 19th day of March, 1909, the plaintiff desired to travel from Mosgrove, Pa., to Ford City, Pa., over the railroad of the defendant, and for this reason had entered the defendant's station and ticket office at Mosgrove, and had purchased from the aforesaid agent, F. L. Ditty, the person in charge of the defendant's station and ticket office, a passenger's ticket permitting him to travel from Mosgrove to Ford City as aforesaid, and paid the said agent F. L. Ditty the price or sum demanded therefor; and thereupon he took a seat in the waiting room of said station to await the arrival of his train, which, according to the defendant's schedule, was due to arrive at 8 o'clock and nine minutes P. M.; That while the plaintiff was thus awaiting the arrival of his train, two men named George Clough and S. L. Campbell, engaged in a quarrel, disturbance and breach of the peace in the aforesaid waiting room; that the said quarrel, disturbance and breach of the peace could have been quickly and easily quieted by the aforesaid agent of the defendant in charge of said waiting room had he desired to do so. But instead of keeping the peace and quieting the disturbance, as he was bound to do, he negligently, carelessly, wantonly and wilfully allowed the same to proceed without making an effort to stop the same; that while said quarrel, disturbance and breach of the peace was in progress the plaintiff realized that there was imminent danger of his being injured and in the presence of such danger he appealed to the aforesaid F. L. Ditty, agent of the defendant as aforesaid, for protection, as he had a right to do, saying that he, the plaintiff was in poor health, that he had only that day been

discharged as a patient from the Punxsutawney hospital; that he was weakened, sick and still suffering from the effects of a very serious operation performed while he was in said hospital and was unable to protect himself from the rough and lawless conduct of those quarreling as aforesaid, and at the same time appealed to said agent to admit him into another room or apartment of said station house or waiting room, which apartment was then occupied by said agent, where the plaintiff would be safe and beyond the reach of those lawless persons engaged in fighting as aforesaid. And although the plaintiff often repeated his request and appealed, over and over again, to said agent for protection, yet it is that the said agent in total disregard of his duties in the premises, negligently and insolently acting for said defendant, wilfully and wantonly refused and neglected to protect the plaintiff, or to exercise his power, or perform his duty in quieting said disturbance and keeping the peace, for the protection of the plaintiff or other patrons of the defendant in the waiting rooms aforesaid, as was his duty to do; so that the plaintiff, on account of the wilful and wanton negligence of the aforesaid agent to keep the peace in the aforesaid waiting room as he had the power to do and as was his duty to do, after retreating to the wall as far as he could and after using all the power and means at his command to protect himself from injury at the hands of those engaged in the aforesaid quarrel and breach of the peace, wantonly and negligently suffered and permitted to go on by the aforesaid agent of the defendant, when it was within his power and duty to prevent it, was unlawfully then and there assaulted, beaten, struck, kicked and pounded into a state of unconsciousness, and otherwise grievously beaten, wounded and abused, so much so, that from the 19th day of March, and ever since that date and up to the time of filing this statement he has suffered and he still continues to suffer great inconvenience, bodily injury and pain as well as mental suffering; that up to the time of receiving said injury the plaintiff was lately rapidly recovering from the effects of a surgical operation made necessary by an attack of appendicitis. His operation had been successful and four weeks' treatment in said hospital had so far improved his condition that he was able to leave the hospital. He was rapidly recovering and, in a short time, would have regained his former health and vigor; but in consequence of said injury he was compelled to return to said hospital where he was obliged to remain for a period of several weeks taking treatment made necessary thereby. That prior to said injury, aside from his weakened condition due to his said operation, he was of robust health, capable of doing the hardest kind of manual labor. He was forty-three years old and there was nothing in his condition of health to indicate impairment short of old age. By occupation he was an assistant in a hardware store and was capable of earning and did earn sixty-five dollars per month, and were it not for the aforesaid injuries he received, on account of the wanton negligence of the defendant he would still be earning that amount of money for his labor. Nevertheless, in consequence of the aforesaid injuries inflicted upon him by and through the wilful, wanton and careless negligence of the aforesaid F. L. Ditty, agent of the defendant company, while acting within the scope of his employment as such agent, he has been severely and

permanently injured in body and mind; having thereby, since the 19th day of March, 1909, been totally disabled from following any kind of manual or mental labor, is permanently injured and never will be able to follow any kind of manual labor or mental pursuit, or earn or receive any money therefor.

That he has ever since the date of said injuries suffered great inconvenience, agony of mind and bodily pain and still continues so to suffer and his condition is such that he will continue so to suffer the remainder of his life; and that his life will be thereby materially shortened. In addition thereto he has suffered and still suffers great inconvenience and expense in consequence of said injuries, in his efforts to obtain relief and for medical aid and treatment both in and out of the hospital, all to the damage of the said plaintiff, viz.: in the sum of ten thousand dollars, and thereupon he brings this suit.

Date —, —.

W. L. McCracken,	} Plaintiffs
A. L. Ivory,	
J. H. Longwell,	
	Attorneys.

**31. Statement in joint suit for negligence, by father and child under the Act of May 12, 1897, P. L. 62.**

The act of 1895, P. L. 54, provides for joint suit by husband and wife for injuries to the wife,<sup>39</sup> and similar practice was adopted for parent and child by act of May 12, 1897, P. L. 62.<sup>40</sup>

Following is a form of statement carefully drawn under the latter act:

Charles Fetzer, in his own right and as father and next friend of George Fetzer, a minor,	} In the Court of Common Pleas of Elk County, Pennsylvania. No. 44. October Term, 1909.
v.	
W. V. Harvey & Daniel Collins, trading as Harvey & Collins.	

**PLAINTIFF'S STATEMENT.**

The plaintiff hereby states his cause of action as follows:

The plaintiff, Charles Fetzer, is the father of George Fetzer, a minor, who was born on the 18th day of November, A. D. 1889, and who was at and before the time of the suffering of the injuries, hereinafter complained of, a physically vigorous young man and in good health. The defendants were at the time of the accident, hereinafter complained of, and for a long time prior thereto, engaged in the operation of a sawmill at Austin, Pennsylvania, in which mill sawed lumber was manufactured by the use of machinery propelled by motive power; and various machinery placed in the said mill had the power transmitted to it by revolving shafts.

The said George Fetzer was on the 9th day of December, 1908, employed by the defendants as a laborer in said mill; and being so employed was on the said 9th day of December, 1908, actively en-

<sup>39</sup> Vol. 1, p. 374.

<sup>40</sup> Vol. 1, p. 374.



gaged in the performance of his duties as such laborer in the said mill, which was then and there in operation and conducted by the said defendants, who were personally engaged in the operation and management of the said mill. That it was then and there the duty of the said defendants to furnish appliances and machinery reasonably safe, suitable and in good repair, and also to furnish the said George Fetzer a reasonably safe place to work.

That the said defendants disregarding the duty they owed to the said George Fetzer of affording him a reasonably safe place to work and of providing reasonably safe and suitable machinery, and of keeping the same in good repair, and in violation of the laws of this commonwealth, did permit the machinery in said mill to be in a dangerous condition and did negligently expose the said George Fetzer to an unknown danger arising therefrom, to-wit,—a projecting set screw upon a revolving shaft. That about said shaft was placed an iron or steel collar firmly fastened to the shaft by a set screw and that from said revolving shaft through the collar the said set screw extended for three-quarters of an inch or more from the outer circumference of the collar, so that both collar and shaft revolved together; that the said set screw was not enclosed by a box or covering or protected or guarded in any manner whatsoever; and that it was one of the duties which the defendants owed the said George Fetzer to have guarded the said set screw by some covering or protection.

The said George Fetzer had never worked on or about this particular shaft before and had no knowledge of how the said collar or the said shaft was constructed; that owing to the rapid revolving of the collar and the shaft, with the set screw extending therefrom, at the time the said George Fetzer was placed to work in this part of the mill and at the time, and during all the time, he was so working, prior to the injuries hereinafter complained of, the said George Fetzer was unable to ascertain the manner in which the said set screw was placed or to acquire any knowledge of its projecting beyond the collar.

The said shaft, with the collar enclosing same, and said set screw projecting therefrom, was so located that, in the discharge of his duties as laborer upon said mill, and in the performance of his regular employment, the said George Fetzer came in contact with the said set screw projecting beyond the surface of the revolving shaft and collar, and the set screw caught the clothing of the said George Fetzer who was dragged about by the revolving shaft and suffered great bodily injury; that his left leg was broken in two places; that the muscles and flesh were torn from his lower limbs; that more than two hundred square inches of skin was entirely torn from his abdomen and limbs; that his testicles were torn entirely from his body and that he was otherwise maimed, injured and disabled; that these injuries were of such an extent as to endanger his life, subject him to great pain and suffering, and to permanently mutilate, maim and disable him. That all the said injuries and the permanent mutilation resulting therefrom were the result of the negligence of the said defendants and of their violations of the duties owed by them to the said George Fetzer, and of the regulations prescribed by the laws of the commonwealth for the safety of laborers and employees.

The plaintiff alleges that the defendants, therefore, were negligent in that the defendants did not provide the said George Fetzer reasonably safe and suitable machinery with which to work, and did not provide the said George Fetzer a reasonably safe and suitable place to work; and also that it was negligent of the defendants to compel the said George Fetzer to work on or around said exposed shaft while the machinery was in motion and that the said defendants were negligent in compelling the said George Fetzer to work around the said shaft and collar with the projecting set screw for the reason that the said exposed set screw was a hidden and latent danger unknown to the said George Fetzer; that the said George Fetzer had no opportunity to become informed thereof and, therefore, it was negligence of the defendants not to notify the said George Fetzer of the construction of such set screw and collar before he was put to work near and around said revolving shaft and set screw projecting therefrom.

And the plaintiff further alleges that he, as father of the said minor, has suffered damages in the premises for doctor bills, medicine and medical services, necessarily incurred for the treatment of the said George Fetzer, as a result of the said injuries, and paid for the same in the amount more than three hundred dollars; that he has incurred, become liable for, and paid a hospital bill of two hundred forty-eight dollars, and that he has further lost the value of the said minor's services from the date of the said accident to this date, to the amount of five hundred dollars, and that the said George Fetzer has suffered damages by reason of the great pain and suffering endured and by reason of permanent injury and mutilation from the date of his said accident to this date and for the remainder of his life in the amount of nine thousand dollars. For the recovery of said damages this suit is brought.

Wherefore the said Charles Fetzer, suing in his own right and also as father and next friend of the said George Fetzer, minor, brings this suit to recover damages above stated.

D. J. Driscoll, } Plaintiff's  
Singleton Bell, } Attorneys.

Date August 1, 1910.

**32. Form of statement for trespass for injury resulting in death (U. S. C. C.) against citizen of another state.**

Statement of legal representative in U. S. Circuit Court, to recover damages against a corporation of West Virginia, according with the laws of the state of New York, where the injury was done.

Nina Crispell, administratrix  
of Ziba Crispell,  
deceased,

v.

The Fenwick Lumber  
Company.

In the Circuit Court of the United  
States,  
For the Middle District of Penn-  
sylvania,  
No. 130. January Term, 1908.  
Trespass for negligently killing  
Ziba Crispell.

*Plaintiff's Statement.*

Plaintiff, Nine Crispell, administratrix of Ziba Crispell, deceased, by her attorney, Paul J. Sherwood, complains of the defendant, The Fenwick Lumber Company, and sets forth her cause of action in trespass as follows:

Said plaintiff is a citizen of the state of Pennsylvania and a resident citizen of the township of Lake, Luzerne County, Pennsylvania, within the judicial district in which this action is brought, and is the administratrix of Ziba Crispell, deceased, who was killed by the wrongful act, neglect and default of said defendant, on the 17th day of June, 1907, under the circumstances and in the manner hereinafter set forth, and who left surviving him a widow (wife) and two children (next of kin).

Said defendant is a citizen and corporation of the state of West Virginia, being duly incorporated under the laws of said state, and is engaged in business within the said state of Pennsylvania, where it has, in compliance with an act of assembly of said state of Pennsylvania designated as its agent upon whom service of process may be made within said state of Pennsylvania and this judicial district, one J. C. Tennant, with office at No. 502 Bennett Building, Wilkes-Barre, Luzerne County, Pennsylvania.

Said plaintiff avers that the matter in dispute in this action exclusive of interest and costs, exceeds the sum and value of \$2000.

On the said date and for a long time prior thereto, said defendant, in the line of its privileges, was engaged in the business of manufacturing lumber in and upon the Catskill mountains in Green County, New York, where by its agents and employees, it felled trees, cut them into logs, hauled them to a peak of one of said mountains called Hunter's Peak, a height of about 4250 feet above sea level, and there piled them into immense piles on skidways from which they were loaded upon cars, and then lowered by means of certain machinery and appliances, consisting of a drum with hand brakes and small wire cable attached to the car and unrolling from said drum by way of a crooked, varying, irregular, rolling, pitching, precipitous alleged railway, from the top of the mountain to the bottom, being a perpendicular fall of nearly two thousand feet, over a railroad about one and one-half miles in length, to the sawmill in the valley at the base of the mountain.

Said Ziba Crispell on said date and for a long time prior thereto was an employee in the service of said defendant in connection with said operations as an engineer, whose place of duty was on the top of said Hunter's Peak, where he was in charge of the stationary engines of said defendant there situate and also of the drum and brakes which were intended to control the lowering of the cars as aforesaid by means of said cable down the said mountain.

It then and there became and was the duty of said defendant to furnish said Ziba Crispell with a reasonably safe place in which to work and reasonably safe appliances with which to work, and perform his said duties.<sup>1</sup>

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<sup>1</sup> Garrity v. Co., 17 Supr. C. 623; Patterson v. R. Co., 76 Pa. 393; Reese v. Clark, 198 Pa. 319; Trainor v. R. Co., 137 Pa. 159; Durst v. Steel Co., 173 Pa. 162.

Yet, said defendant, well-knowing its said duty in said premises, did wholly disregard and neglect the same, and did, on said date, carelessly, wrongfully and negligently fail to provide said Ziba Crispell with fit and adequate machinery with which to perform his said duties and safely handle the loads fastened upon said cable, and did unlawfully and negligently provide him with improperly constructed, imperfect, incomplete, defective, worn out and inadequate machinery and appliances for said purpose, and with machinery so negligently set up and constructed, that neither said machinery and appliances with which said Ziba Crispell was provided, nor the place where he was located when operating, was reasonably safe for the purposes for which they were designed, nor reasonably safe to perform the burdens and sustain the strain and weight to which said machinery and appliances were subjected.

Whereby and because of which, while said Ziba Crispell, on said date, was at his designated post of duty and in the due performance of his said duties, endeavoring to control by means of the hand brakes the load of logs being then lowered down said mountain side, the brake band on said hand brake gave way and flew off the drum, the wooden blocks thereof gave way and were burned and ground into splinters, the control of the loaded car, down the mountain side was lost and the machinery, owing to the unsafe place into which said Ziba Crispell was put to work and the said unsafe character of the machinery and appliances, was hurled from its connection and a part thereof struck said Ziba Crispell in the forehead, staving in the front portion of his head and killing him instantly.

Whereby and because of which said plaintiff has been damaged: in the expenses incurred and caused by said defendant's negligence; in the loss of the value of his services and companionship to his family; in the sum of \$25,000 and said plaintiff therefore brings this action to recover therefor.

Paul J. Sherwood,  
Attorney for Plaintiff.

### 33. Who must sue for personal injuries when death ensues.

By the act of April 15, 1851 (section 18), P. L. 674, the action for damages for personal injuries was saved from abatement by death as was the case at the common law. The personal representatives may be substituted and prosecute the cause to final judgment.<sup>1</sup> In case of assignment the right passes not to the assignee but to the personal representative.<sup>2</sup>

Section 19 of the act of 1851, *supra*, as amended by the act of April 26, 1855, P. L. 309, provides:

"Whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured, during his or her life, the husband, widow, children or parents of the deceased and no other relative may maintain an action for and recover damages for the death thus occasioned; and the sum recovered shall go to them in the proportion they would take his or her

<sup>1</sup> Brown v. R. Co., 19 Phila. 372; Haggerty v. Boro', 17 Supr. C. 151; Birch v. R. Co., 165 Pa. 339; Taylor's Est., 179 Pa. 254.

<sup>2</sup> McCafferty v. R. Co., 193 Pa. 339.

personal estate in case of intestacy and that without liability to creditors."

Under this act, when a husband is killed the right of action is in his widow alone and she should set forth in her statement the persons entitled to damages in case of recovery. The children, if any, should not be joined.<sup>3</sup> The claim being for unliquidated damages cannot be assigned before verdict.<sup>4</sup> The remarriage of a woman does not bar her right to recover for her minor son's death under act of June 2, 1891, P. L. 176.<sup>5</sup>

But the parties are entitled in the order in which named in the act. "The right is limited in all cases to the family: first to the husband or widow; second to the children; and last to the parents. Where the deceased left children his parents have no right, nor have they where he left a widow and no children."<sup>6</sup> Where the children, then, have left home, severed the family relation, on recovery by the widow, they cannot intervene after judgment and claim a share, as if on distribution.<sup>7</sup> The right of the widow in distribution is joint with the children of the deceased, if such there be,<sup>8</sup> and among those who are entitled the distribution is, as under the intestate laws, which places the children of deceased though by a former wife, and one over age, in line of sharing the verdict.<sup>9</sup>

While it is not the practice to join the children as plaintiffs, where a husband or wife survives they should all be named in the statement.<sup>10</sup> It was not the practice to join the children where the husband sued.<sup>11</sup>

Under the New Jersey law the administrator alone can bring the action, and it has been decided that he may also sue in Pennsylvania without taking out ancillary letters here.<sup>12</sup> The rights of the parties will be enforced under comity of states.<sup>13</sup> Whatever is the law of that state will be enforced here,<sup>14</sup> and the widow cannot sue in her name here although her husband died in this state from a negligent act in New Jersey;<sup>15</sup> nor can her name be amended to administratrix after the statute of limitations has run, on the pretext that this would introduce a new cause of action.<sup>16</sup> Although the accident occurred in New Jersey from a boiler which should have been inspected in the round house in Pennsylvania and the man died in Pennsyl-

<sup>3</sup> *Haughey v. Pittsburg R. Cos.*, No. 2, 210 Pa. 367; *Lewis v. Hunlocks, Etc.*, Co., 203 Pa. 511.

<sup>4</sup> *Marsh v. Western, Etc.*, R. Co., 204 Pa. 229.

<sup>5</sup> *Gulla v. Lehigh, Etc.*, Co., 28 Supr. C. 11.

<sup>6</sup> *Lehigh Iron Co. v. Rupp*, 100 Pa. 95.

<sup>7</sup> *Lewis v. Hunlocks, Etc.*, Co., 203 Pa. 511.

<sup>8</sup> *Huntingdon, Etc.*, R. Co. v. *Decker*, 84 Pa. 419; *South Easton Boro' v. Reinhart*, 13 W. N. C. 389.

<sup>9</sup> *Allison v. Powers*, 179 Pa. 531.

<sup>10</sup> *Phila., Etc.*, R. Co. v. *Conway*, 112 Pa. 511; *Kauffman v. Manor Twp.*, 11 C. C. 304.

<sup>11</sup> *R. Co. v. Jones*, 128 Pa. 308.

<sup>12</sup> *Boulden v. Penna. R. Co.*, 205 Pa. 264.

<sup>13</sup> *Knight v. West Jersey R. Co.*, 108 Pa. 250; *Patton v. Pub'g, Etc.*, Co., 96 Pa. 169.

<sup>14</sup> *Usher v. West Jersey R. Co.*, 126 Pa. 206.

<sup>15</sup> *Derr v. Lehigh Valley R. Co.*, 158 Pa. 365.

<sup>16</sup> *La Bar v. N. Y., Etc.*, R. Co., 218 Pa. 261.

vania, his widow can sue here on the pretext of proximate cause in Pennsylvania.<sup>17</sup>

When a widow brings suit for herself and the use of her children, their right attaches and she cannot discontinue without their consent.<sup>18</sup>

A statement is defective which avers that the action is brought for the benefit of the next of kin but does not state that deceased left such as are entitled under the law.<sup>19</sup> The action in case of death must be brought within one year and the statement must show who are the parties entitled to damages. If the children are not named they may be added to the statement even after a year;<sup>20</sup> and the record may be amended to this effect even in the appellate court.<sup>21</sup> It was said that a non-resident alien could not maintain a suit for the death of her son in Pennsylvania, this being *obiter dictum* in the case;<sup>22</sup> but since then the question has been squarely ruled notwithstanding a subject of Italy, by treaty, has the same standing in the United States courts as a subject of Great Britain,<sup>23</sup> who is protected by Lord Campbell's act, which establishes a comity between nations. The court here holds that the parties must be resident.

The father and mother may join in a suit for the death of a child,<sup>24</sup> and the record may be amended by adding the mother even after the statute of limitations has run, as this does not change the cause of action;<sup>25</sup> and the amendment may be made after verdict.<sup>26</sup> Both parents must join and appear in the declaration.<sup>27</sup> The failure to join both parents has been held cured by the verdict which found a sum in full for all damages "for the parents."<sup>28</sup> If the father is dead the mother alone may sue;<sup>29</sup> or where he has deserted her.<sup>30</sup>

When the father has commenced a suit and dies the mother may subsequently be added and may discontinue.<sup>31</sup> It was held years ago that the mother of an illegitimate child could not recover for its death;<sup>32</sup> but that was in the days when the barbarism "*nullius filius*" still obtained. Now a woman may have damages for the death of her husband who was injured before he married her, but died later presumably from such injuries and not the marriage.<sup>33</sup> The widow of

<sup>17</sup> *Hoodmacher v. Lehigh V. R. Co.*, 218 Pa. 21, reversing itself after re-argument.

<sup>18</sup> *Styles v. Co.*, 2 Dauphin Co. 257.

<sup>19</sup> *Davidow v. R. Co.*, 85 Fed. R. 943.

<sup>20</sup> *Huntingdon, Etc., R. Co. v. Decker*, 84 Pa. 419; *Co. v. Carroll*, 89 Pa. 374.

<sup>21</sup> *Hughes v. Williams*, 17 Supr. C. 229.

<sup>22</sup> *Deni v. Penna. R. Co.*, 181 Pa. 525.

<sup>23</sup> *Maiorano v. B. & O. R. Co.*, 216 Pa. 402.

<sup>24</sup> *Penna. R. Co. v. Zebe*, 37 Pa. 420.

<sup>25</sup> *Holmes v. Penna. R. Co.*, 220 Pa. 189.

<sup>26</sup> *Bracken v. Penna. R. Co.*, 32 Supr. C. 22.

<sup>27</sup> *Davis v. Penna. R. Co.*, 34 Supr. C. 388.

<sup>28</sup> *Waltz v. Penna. R. Co.*, 216 Pa. 165, affirming 31 Supr. C. 286.

<sup>29</sup> *Penna. R. Co. v. Bantam*, 54 Pa. 495.

<sup>30</sup> *Kerr v. Penna. R. Co.*, 169 Pa. 95.

<sup>31</sup> *Doran v. Avoca Coal Co.*, 9 Kulp, 479.

<sup>32</sup> *Harkins v. Phila. R. Co.*, 11 W. N. C. 120.

<sup>33</sup> *Gross v. Elec. Tr. Co.*, 180 Pa. 99.

a minor takes precedence of the parents.<sup>84</sup> Children who have left the parental home must establish some pecuniary loss to recover for the death of their mother.<sup>85</sup>

#### 34. Damages — How estimated.

In estimating damages under this law the jury may consider the expenses incident to the injury, loss of time, permanent injury to his earning capacity, bodily and mental suffering endured and probable to continue, as a part of the consequences of his hurts,<sup>1</sup> and for wages lost,<sup>2</sup> or likely to be lost from impairment of his earning capacity.<sup>3</sup> The anguish and mental suffering which are permitted to enter into the calculation are such as arise directly from the injury itself, and not from subsequent conditions of disappointment, etc.<sup>4</sup> As to earning capacity some latitude is allowed the jury.<sup>5</sup> There are cases in which a jury may allow punitive damages.<sup>6</sup> The limitation of amount which the act of 1868 imposed upon juries was annulled by the constitution of 1874, which in the interest of the Pennsylvania R. Co. was doubted could be done, but it was done, nevertheless.<sup>7</sup>

#### 35. Joint actions by husband and wife.

The act of May 8, 1895, P. L. 54, enabled husband and wife to redress their wrongs in one suit,<sup>8</sup> and is constitutional.<sup>9</sup> These rights may be consolidated by amendment, more than two years after the wrong.<sup>10</sup> The jury is presumed to properly separate the damages which each is entitled to.<sup>11</sup> Their verdict of adjustment will not be easily disturbed on appeal.<sup>12</sup>

A husband's measure of damages for the loss of his wife's services, which is the matter he would be entitled to sue for separately, is what her services are worth to him, and medical care and attendance.<sup>13</sup>

<sup>84</sup> *Lehigh, Etc., Co. v. Rupp*, 100 Pa. 95.

<sup>85</sup> *Schnatz v. R. R. Co.*, 160 Pa. 602.

<sup>1</sup> *R. Co. v. Allen*, 53 Pa. 276; *R. Co. v. Books*, 57 Pa. 339; *Canal Co. v. Graham*, 63 Pa. 290; *R. Co. v. Donahue*, 70 Pa. 119; *R. Co. v. Frantz*, 127 Pa. 297; *Baker v. Co.*, 142 Pa. 503; *Smedley v. R. Co.*, 184 Pa. 620; *Bamford v. Tr. Co.*, 194 Pa. 17; *Schenkel v. Tr. Co.*, 194 Pa. 182; *Machen v. R. Co.*, 13 Supr. C. 642.

<sup>2</sup> *Glenn v. Tr. Co.*, 206 Pa. 135; *Burns v. Penna. R. Co.*, 219 Pa. 225.

<sup>3</sup> *R. Co. v. Coyle*, 55 Pa. 396; *R. Co. v. Dale*, 76 Pa. 47; *R. Co. v. Lauderbach*, 4 Penny. 406; *Malone v. R. Co.*, 152 Pa. 390; *Goodhart v. R. Co.*, 177 Pa. 1; *Wallace v. R. Co.*, 195 Pa. 127; *Olin v. Bradford*, 24 Supr. C. 7.

<sup>4</sup> *Linn v. Boro'*, 204 Pa. 551.

<sup>5</sup> *Simpson v. R. Co.*, 210 Pa. 101.

<sup>6</sup> *R. Co. v. Rosenzweig*, 113 Pa. 519; *R. Co. v. Lyon*, 123 Pa. 140; *R. Co. v. Taylor*, 104 Pa. 306; *Tr. Co. v. Orbann*, 119 Pa. 37.

<sup>7</sup> *R. Co. v. Bowers*, 124 Pa. 183, following *Johnson v. Crow*, 87 Pa. 184; *R. Co.'s Ap.*, 102 Pa. 123; *Christ Church v. Phila.*, 24 Howard, 300.

<sup>8</sup> *Rockwell v. Tr. Co.*, 187 Pa. 568.

<sup>9</sup> *Donoghue v. Tr. Co.*, 201 Pa. 181.

<sup>10</sup> *Madara v. R. Co.*, 192 Pa. 542.

<sup>11</sup> *Helsel v. Tr. Co.*, 14 Supr. C. 420.

<sup>12</sup> *Machen v. R. Co.*, 13 Supr. C. 642.

<sup>13</sup> *Boro' v. Warne*, 106 Pa. 373; *Readdy v. Boro'*, 137 Pa. 98; *Henry*

He is however entitled to more than this when he is deprived of her aid, society and comfort,<sup>14</sup> and in case of her death, said Sterrett, J., it is not necessary to prove special damages as in the case of a horse or other animal.<sup>15</sup>

But for expenses during the illness of the wife, such as the daughter's nursing, there can be no recovery.<sup>16</sup>

### 36. Joint action of parent and child.

A similar act joining parent and child was passed May 12, 1897, P. L. 62, relating to injuries to a minor child. Either can join in a suit brought by the other.<sup>17</sup> The father's right to recover extends only to loss of services and expenses of illness.<sup>18</sup> The earnings during minority belong to the father.<sup>19</sup>

Where the parents sue for the death of a son the damages are compensatory only; no punitive damages will be allowed for death.<sup>20</sup> The jury should be instructed to assume of a child under sixteen that his parents would have been compelled by law to send him to school until he was sixteen.<sup>21</sup> Where a minor is his father's salesman, it was held error to instruct the jury that he was entitled to all the commissions. The measure of damages was the value of the son in carrying on the business.<sup>22</sup> Where the children sue for the loss of their father, the measure is their loss of maintenance and education during minority.<sup>23</sup>

If the accident does not result in death, the mother has no right to damages, nor can she be substituted for the father after his death.<sup>24</sup> Where the husband sues for damages to his wife, not resulting in death, he must prove the pecuniary loss to him in dollars and cents.<sup>25</sup>

### 37. Fire set by sparks from an engine.

In a case where a house was burned, in which there had been no fire, proof that a railroad company's engine, whose number was designated passed shortly before the fire broke out, and that the engine had cast large sparks on that day and for several days before, notwithstanding it was equipped with a spark arrester and guard, is sufficient to carry the case to the jury upon averment of negligent operation of the engine, so as to set the fire. The defendant is not

v. Kloppe, 147 Pa. 178; Kelly v. Twp., 154 Pa. 440; Platz v. Twp., 178 Pa. 601; Standen v. R. Co., 214 Pa. 189.

<sup>14</sup> Reagan v. Harlan, 24 Supr. C. 27.

<sup>15</sup> R. Co. v. Jones, 128 Pa. 308.

<sup>16</sup> Walker v. Phila., 195 Pa. 168; Dormer v. Co., 16 Supr. C. 407.

<sup>17</sup> Cook v. Tr. Co., 20 Lanc. L. R. 317.

<sup>18</sup> R. Co. v. Kelly, 31 Pa. 372; R. Co. v. Fielding, 48 Pa. 320; McGee v. R. Co., 33 W. N. C. 15; Reese v. Hershey, 163 Pa. 253; Woeckner v. Motor Co., 182 Pa. 182.

<sup>19</sup> Tr. Co. v. Orbann, 119 Pa. 37.

<sup>20</sup> Palmer v. Phila., Etc., R. Co., 218 Pa. 114.

<sup>21</sup> Bracken v. Penna. R. Co., 32 Supr. C. 22.

<sup>22</sup> Holmes v. Penna. R. Co., 220 Pa. 189.

<sup>23</sup> Delahunt v. United, Etc., Co., 215 Pa. 241.

<sup>24</sup> Kelly v. Pittsburg, Etc., Co., 204 Pa. 623.

<sup>25</sup> Reagan v. Harlan, 24 Supr. C. 27.



called upon to meet a presumption of law in such case, but affirmative evidence from which negligence is a fair inference.<sup>1</sup> It devolves upon the plaintiff to prove by a preponderance of evidence that the fire was communicated by sparks or cinders from the railway engines, but it need not be shown that any particular engine was at fault. It will be sufficient if it is proved to have been set by any engine passing over defendant's railway, and the evidence may be wholly circumstantial; as, first, that it was possible for a fire to reach the plaintiff's property from the defendant's engines; and, second, facts tending to show that it probably originated from that cause and no other."<sup>2</sup> It is the rule of law in nearly every jurisdiction that when a fire is set in propinquity to a railroad the burden of proof that the fire was not set by the passing engines of the railroad company is upon it. It will require a binding statute in Pennsylvania to enforce this rule; and the passage of such a law comes within the police powers of the state to preserve its forests and the property of the citizens from devastating fires.

It is the duty of those who use these hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every invention to lessen the danger to others.<sup>3</sup> It is their duty to provide sufficient spark arresters.<sup>4</sup>

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<sup>1</sup> *Badman v. Penna. R. Co.*, 42 Supr. C. 531.

<sup>2</sup> *Henderson v. R. Co.*, 144 Pa. 461, citing *Byers v. B. & O. R. Co.*, 222 Pa. 547; *Elder Twp. v. Penna. R. Co.*, 26 Supr. C. 112; *Hancock Ice Co. v. Perkiomen R. Co.*, 224 Pa. 74; *Haverly v. R. Co.*, 135 Pa. 50; *Stevenson v. R. Co.*, 20 Supr. C. 157; *Van Steuben v. Central R. Co.*, 178 Pa. 367; *Penna. Co. v. Watson*, 81 \* Pa. 293.

<sup>3</sup> *Frankford, Etc., Co. v. Phila., Etc., R. Co.*, 54 Pa. 345; *Thomas v. N. Y., Etc., R. Co.*, 182 Pa. 538.

<sup>4</sup> *R. Co. v. Latshaw*, 93 Pa. 449; *Albert v. N. C. R. Co.*, 98 Pa. 316.

## LX.

### TRESPASS FOR NUISANCE.

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23. Matters of defense — prescriptive right.
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26. Continuance of nuisance.
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30. Damages from nuisances.

#### 1. Torts affecting health and comfort.

The great English Commentator defined injuries to the health to be where "by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution."<sup>1</sup> Chitty specifies: "The health of an individual may be injured by a public or private nuisance, as by breaking quarantine, by sale of unwholesome food, by want of care in medical practitioners, or by sudden alarms affecting the nervous system." A butcher or a victualler or liquor merchant who knowingly sells edibles and potables which produce deleterious effects to health is liable in damages for special harms suffered.

#### 2. Nuisances.

Nuisances are either public or private; the first is such as does "damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others;"<sup>2</sup> the second may be to the person or property of another; it may be partly a discomfort and annoyance to his neighbor and partly cause depreciation of the value of his property. For a public nuisance the public has a remedy by indictment and abatement. For a private nuisance the individual affected may have an action at law or by

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<sup>1</sup> 3 Blackstone, 122.

<sup>2</sup> 4 Inst. 261.

bill in equity to abate. Not everything which may seem to be a nuisance, is, however, a public nuisance; as, for example, the pealing of bells.<sup>3</sup> For special injuries from a public nuisance the one suffering may sue. The test depends somewhat on the locality, the customs and habits of the community and mode of life. What might be a "discomfort" in a circle of cultured and fastidious people might not be noticeable among the plain work-a-day folks of a manufacturing or rural district. Unless there be an element of tort in the matter complained of the law will consider it a mere trifle. But, even trifles, if tinged with malice, may become annoyance, and if repeated oft become a nuisance.

### 3. Private nuisance.

Realty may be trespassed upon by undermining it, by taking away its lateral support, owing by the adjoining tenement, or by erecting a private nuisance adjacent.

A private nuisance is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, as if one erect a smelting house for lead so near the land of another that the vapor and smoke kill his corn and grass and damage his cattle therein.<sup>4</sup>

### 4. Duty to one's neighbor.

"Every man is bound to use his own property in such a manner as not to injure that of his neighbors; the law, however, does not regard trifling inconveniences, and therefore the injury to be actionable must be such as visibly to diminish the value of the complainant's property and the enjoyment of it; and all the circumstances adduced in evidence, including those of time and locality, ought to be considered by the jury."<sup>5</sup>

### 5. Landlord, when liable.

The owner of land which he has sub-let may defend against a charge of nuisance upon the premises that it was created by the tenant and not himself while in possession. But if he let the land for the purposes of a noxious trade or illegal business, knowing it, he is liable, for he has violated the rule: "*Sic utere tuo, ut alienum non laedas.*"<sup>6</sup>

For a nuisance caused by the defective condition of the premises when the tenant went into possession, the landlord himself is liable;<sup>7</sup> as a defective sewer.<sup>8</sup> The tenant may be jointly liable with the landlord if he contributes to the nuisance.<sup>9</sup>

<sup>3</sup> *Soltan v. De Held*, 2 Sim. N. S. 133; *Aldred's Case*, 9 Rep. 57b; *Atty. Genl. v. Co.*, 3 De Gex., M. & G. 304.

<sup>4</sup> 3 Blackstone, 316.

<sup>5</sup> *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Ca. 642; *Cavey v. Led-bitter*, 13 C. B. N. S. 470 (106 E. C. L. R.); *Bamford v. Turnley*, 3 B. & S. 62 (113 E. C. L. R.) (See *Coal Co. v. Sanderson*, 113 Pa. 145, and compare.)

<sup>6</sup> *Collins v. Chartiers, Etc., Co.*, 131 Pa. 143; *Sullivan v. Jones, Etc., Co.*, 208 Pa. 540.

<sup>7</sup> *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489.

<sup>8</sup> *Ward v. Gardner*, 2 Atl. 867.

<sup>9</sup> *Fow v. Roberts*, 108 Pa. 489.

But for the acts which are alone the tenant's in the creation of the nuisance, the tenant alone is responsible and not the landlord.<sup>10</sup>

#### 6. Definitions and elements.

The common law definitions and distinctions have been given, *supra*. Our courts have varied these some to adjust them to different phases of life and business pursuits. It has been said, "Whatever worketh hurt, inconvenience or damage is a nuisance,"<sup>11</sup> but this is very general in application, as to relative rights of property. "Continuous hurtful acts" have been held a nuisance;<sup>12</sup> "that which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."<sup>13</sup> Said Judge Clayton: "The great difficulty in defining a nuisance is to describe the degree of annoyance necessary to cause the actionable injury."<sup>14</sup> The injury inflicted by a nuisance is consequential, hence the old form of action was case.<sup>15</sup> Negligence is not a necessary element in nuisance, though it cause one.<sup>16</sup> The exercise of care in conducting the nuisance is no defense to an action against maintaining the nuisance itself, no matter where it is.<sup>17</sup>

The legislature has by various acts declared what are nuisances in cities and has conferred powers upon municipalities to regulate nuisances and abate them. And thus it may declare things to be nuisances which are not at the common law such.<sup>18</sup> It does so in the exercise of the police powers of the state.<sup>19</sup> Being a nuisance the doctrine of *damnum absque injuria* should not be applicable, any more than the question of negligence or care. Once made out that it is a nuisance and works injury to the plaintiff, his right to action follows logically.<sup>20</sup> Any other doctrine is a special pretext and a subterfuge. Negligence in the use of property which one has a right to use on his own land may cause a nuisance and fructify an action at law.<sup>21</sup>

Wilful maintenance is not a necessary element but may enhance

<sup>10</sup> Wunder v. McLean, 134 Pa. 334; Cleveland v. Stoddart, 1 Phila. 464; Somer's Ap., 6 W. N. C. 441; Stitzman v. Heikel, 10 D. R. 673; Comth. v. Switzer, 134 Pa. 383.

<sup>11</sup> Lancaster Turnpike Co. v. Rogers, 2 Pa. 114.

<sup>12</sup> Sparhawk v. Union Pass. R. Co., 54 Pa. 401.

<sup>13</sup> Tuckachinsky v. Lehigh, Etc., Coal Co., 199 Pa. 515.

<sup>14</sup> Crawford v. Atglen, Etc., Co., 1 Chester Co. 412.

<sup>15</sup> Frazier v. Pennypack, Etc., Co., 17 Montg. Co. 105.

<sup>16</sup> Haugh's Ap., 102 Pa. 42; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Hauck v. Tidewater, Etc., Co., 153 Pa. 366; Rogers v. Phila. Tr. Co., 182 Pa. 473; Gavigan v. Atlantic Ref'g Co., 186 Pa. 604.

<sup>17</sup> Strawbridge v. Phila., 2 Penny. 419; Comth. v. Armstrong, 24 C. C. 442; Evans v. Reading, Etc., Co., 160 Pa. 209; Whaley v. Citizens' Natl. Bank, 28 Supr. C. 531.

<sup>18</sup> Pittsburg v. Keech, 21 Supr. C. 548.

<sup>19</sup> See Bierly on Police Power, Penna. 1907.

<sup>20</sup> Carpenter v. Lancaster, 212 Pa. 581; Farver v. Am., Etc., Co., 24 Supr. C. 579; Campbell v. Bessemer, Etc., Co., 23 Supr. C. 374.

<sup>21</sup> D. & H. Canal Co. v. Goldstein, 125 Pa. 246; Keiser v. Mahanoy, etc., Co., 143 Pa. 276; Hartman v. Pittsburg, Etc., Co., 159 Pa. 442; P. & L. Dig., vol. 14, col. 23895.

the damages if proven.<sup>22</sup> Nor need the plaintiff prove actual damages. He is entitled to nominal damages on proof of the existence of the nuisance.<sup>23</sup>

#### 7. Sic utere tuo, etc., v. *damnum absque injuria*.

As old as the civil law, more ancient than the common law, stands the maxim of relative right in the use of one's property, "*so to use thine that it shall not harm another's.*"<sup>24</sup> And this has been confronted, not with a maxim but a dictum, that when a man uses his own commercial, upon his own land, in the natural course, the harm he does his neighbor is a harm without legal wrong,<sup>25</sup> for which his neighbor may die from pollution and yet have no remedy. The two coal cases so decided upon the exigency of the special interest and great industry, and not upon any legal logic, have firmly imbedded this doctrine in Pennsylvania.<sup>26</sup> It boots nothing to discuss it further here, as practice alone is the purpose of this work. It is sufficient to state the case and warn the attorney to be certain of his barque before he sails into court where the rock *damnum sine injuria* lurks. In later cases there is a manifest effort to limit and restrict the doctrine in *Penna. Coal Co. v. Sanderson*.<sup>27</sup> These hold that where the injury could have been anticipated and averted by ordinary means, damages will be recoverable.<sup>28</sup> But an instruction to the jury that if defendant could by any other device have avoided the injury was held to be too exacting;<sup>29</sup> and if he could have avoided it at "slight expense," was too liberal. The admission is made that every case must stand on its own facts;<sup>30</sup> and where a coke company erected ovens on its own land and cast smoke and dust upon its neighbor's to the ruin of his crops, *Penna. Coal Co. v. Sanderson*, *supra*, was not allowed to cover the nuisance;<sup>31</sup> neither so where a stream of water was polluted by washing the coal used in the ovens.<sup>32</sup> This last case comes near undermining *Penna. Coal Co. v. Sanderson*, but the court saved the hoary case by distinguishing it, viz.: In *Penna. Coal Co. v. Sanderson* the stream was polluted by washing coal produced from the land where washed and it thence ran off into its neighbor's abode; whereas in this case the manufacture of

<sup>22</sup> *Stephenson v. Brown*, 147 Pa. 300; *Elder v. Lykens Valley Coal Co.*, 157 Pa. 490.

<sup>23</sup> *Alexander v. Kerr*, 2 Rawle, 83; *D. & H. Canal Co. v. Torrey*, 33 Pa. 143; P. & L. Dig., vol. 14, col. 23897.

<sup>24</sup> "*Sic utere tuo, ut alienum non laedas.*"

<sup>25</sup> "*Damnum absque injuria.*"

<sup>26</sup> *Wheatley v. Baugh*, 25 Pa. 528; *Sanderson v. Penna. Coal Co.*, 113 Pa. 126, overruling same, 86 Pa. 401. (See, also, *Penna. Coal Co. v. Sanderson*, 94 Pa. 302; 102 Pa. 370.)

<sup>27</sup> *Collins v. Chartiers Gas Co.*, 131 Pa. 143; 139 Pa. 111; *Comth. v. Russell*, 172 Pa. 506.

<sup>28</sup> *Elder v. Lykens Val. Coal Co.*, 157 Pa. 490; *Hindson v. Markle*, 171 Pa. 138; *Glenn v. Christie*, 17 Montg. Co. 202; *Harvey v. Susq. Coal Co.*, 201 Pa. 63; *Stevenson v. Ebervale Coal Co.*, 201 Pa. 112.

<sup>29</sup> *Harvey v. Susq. Coal Co.*, 201 Pa. 63.

<sup>30</sup> *Pfeiffer v. Brown*, 165 Pa. 267.

<sup>31</sup> *Robb v. Carnegie*, 145 Pa. 324.

<sup>32</sup> *Lentz v. Carnegie*, 145 Pa. 612.

coke on his own land had "no natural connection with the soil or the subjacent strata."

#### 8. Distinction between public and private nuisances.

Public and private nuisances at the common law have been defined, *supra*. It was said that anything wrongfully done or permitted which annoys the public in the enjoyment of its legal rights is a public nuisance.<sup>33</sup> "Whatever openly outrages decency, or is injurious to the public morals or to the public health and comfort is a common nuisance at common law."<sup>34</sup> "A private nuisance is one where the injury to the party complaining is personal to himself or his property. It must differ in degree and kind from the injury which the people generally in that vicinity suffer from."<sup>35</sup> The pollution of a public stream is a public nuisance and the pollution of a private stream is a private nuisance.<sup>36</sup> A public stream is one declared by law to be a public highway. But, if a private stream be taken by a water company under eminent domain to supply water to the public, a pollution of such stream might be a public nuisance.<sup>37</sup> If the poisonous gases and vapors of a factory kill one person, that of itself is not sufficient to constitute a public nuisance.<sup>38</sup>

A city which adopts a water course as a sewer is bound to keep it open and free from filth and is liable in damages to the riparian owner.<sup>39</sup>

#### 9. Right of action.

Where the nuisance is a public one an individual cannot maintain an action for damages unless he avers and proves a special injury to himself, not suffered by the public in general.<sup>40</sup> Such special injuries are those that affect his health and comfort and the reasonable enjoyment of his property,<sup>41</sup> and the nuisance must have been the proximate cause of the special damage claimed.<sup>42</sup> This volume is not concerned with the subject of abatement of nuisances, nor with injunctions to restrain them, which will fall under injunctions in Vol. IV. It will be confined to actions for nuisance, in the common law form.

#### 10. Liability, joint and several.

Where a nuisance is the joint act of several the plaintiff may elect

<sup>33</sup> *Comth. v. Armstrong*, 24 C. C. 442; *Wishart v. Newell*, 4 C. C. 141.

<sup>34</sup> *Comth. v. Rush*, 11 Lanc. L. R. 97.

<sup>35</sup> *Brunner v. Schaffer*, 1 D. R. 646; *Alexander v. Kerr*, 2 Rawle, 83.

<sup>36</sup> *Comth. v. Lyon*, 1 Pitts. 466; *Comth. v. Yost*, 197 Pa. 171, reversing 11 Supr. C. 323; *Comth. v. Soulas*, 16 Phila. 525.

<sup>37</sup> *Comth. v. Yost*, 197 Pa. 171.

<sup>38</sup> *Price v. Grantz*, 118 Pa. 402.

<sup>39</sup> *Glasgow v. Altoona*, 27 Supr. C. 55.

<sup>40</sup> *Brunner v. Schaffer*, 1 D. R. 646; *Hughes v. Heiser*, 1 Binney, 463; *Phila. v. Collins*, 68 Pa. 106; *Gallagher v. Phila.*, 4 Supr. C. 60; *Phila. v. Gilmartin*, 71 Pa. 140; *Knowles v. Penna. R. Co.*, 175 Pa. 623; *Penna. Etc., Co. v. Graham*, 63 Pa. 290; *P. & L. Dig.*, vol. 14, col. 23911.

<sup>41</sup> *Gavigan v. Atlantic Refining Co.*, 186 Pa. 604; *Price v. Grantz*, 118 Pa. 402.

<sup>42</sup> *Fairbanks v. Kerr*, 70 Pa. 86; *Allegheny v. Zimmerman*, 95 Pa. 287; *Pittsburg v. Scott*, 1 Pa. 309.

which he will sue.<sup>1</sup> But if the acts are independent a joint action will not lie,<sup>2</sup> and a release to one will not operate to relieve the others.<sup>3</sup> A municipality as well as an individual is liable for acts constituting a nuisance;<sup>4</sup> as, by diverting water from its natural course upon an abutting owner's land.<sup>5</sup> But it is not liable for an increased flow of water caused by an increase in buildings;<sup>6</sup> nor for waters collected on land in an adjoining township during freshets;<sup>7</sup> nor for the act of a member of council who orders the change of a natural water course, the doctrine of *respondeat superior* not applying in such a case.<sup>8</sup> But it will be liable for creating a nuisance by using a water course as a sewer;<sup>9</sup> or discharging sewage into a dock adjoining a private wharf,<sup>10</sup> but not when it is so authorized by an act of assembly.<sup>11</sup> A railroad company clothed with the power of eminent domain is liable for nuisance created by it.<sup>12</sup> A nuisance gains no right by lapse of time.<sup>13</sup>

## 11. Obstruction of public highways.

Obstructions to the streets or foot walks in a municipality, although temporarily permitted, are nuisances and the one injured thereby may have his action against the one responsible.<sup>14</sup> A paper grade is not sufficient to warrant one to elevate his sidewalk above the natural grade, in the absence of an ordinance.<sup>15</sup> There are numerous cases upon nuisances on highways which lay down the law. As these are generally commonwealth cases, reference is made to Pepper & Lewis' Digest, vol. 14, col. 23939 *et seq.*, for the same. But not every obstruction is a nuisance; as, for example, shade trees, or a "liberty pole."<sup>16</sup>

Building materials may temporarily be left on the streets if properly guarded, and ordinances observed as to time and manner;<sup>17</sup>

<sup>1</sup> Phila. v. Collins, 68 Pa. 106; Gallagher v. Phila., 4 Supr. C. 60.

<sup>2</sup> Little, Etc., Co. v. Richards, 57 Pa. 142; Seely v. Alden, 61 Pa. 302.

<sup>3</sup> Gallagher v. Kemmerer, 144 Pa. 509.

<sup>4</sup> Shuter v. Phila., 3 Phila. 228; Briegel v. Phila., 135 Pa. 451; Strawbridge v. Phila., 2 Penny. 419.

<sup>5</sup> Torrey v. Scranton, 133 Pa. 173; West Bellevue Boro' v. Huddleston, 23 W. N. C. 240; Scranton's Ap., 121 Pa. 97; Broomall v. Chester, 1 W. N. C. 228.

<sup>6</sup> Brunhouse v. York, 5 York, 164.

<sup>7</sup> West Bellevue v. Huddleston, 23 W. N. C. 240.

<sup>8</sup> Allebrand v. Duquesne Boro', 11 Supr. C. 218.

<sup>9</sup> Good v. Altoona, 162 Pa. 493.

<sup>10</sup> Butchers', Etc., Co. v. Phila., 156 Pa. 54; Harris v. Phila., 155 Pa. 76.

<sup>11</sup> Malone v. Phila., 2 Penny. 370.

<sup>12</sup> Penna. R. Co. v. Lippincott, 116 Pa. 472; Hartman v. Pittsburg Incline Plane Co., 11 Supr. C. 438; 159 Pa. 442.

<sup>13</sup> McNerny v. Reading, 150 Pa. 611.

<sup>14</sup> Brown v. White, 202 Pa. 297.

<sup>15</sup> Kittanning Bor' v. Thompson, 211 Pa. 169.

<sup>16</sup> Allegheny v. Zimmerman, 95 Pa. 287; otherwise if it became rotten and dangerous (Norristown v. Moyer, 67 Pa. 355).

<sup>17</sup> Smith v. Simmons, 103 Pa. 32, following Comth. v. Passmore, 1 S. & R. 217; Wood v. McGrath, 150 Pa. 451.

but if not so left and guarded the city is liable;<sup>18</sup> street lamps, fire plugs and safety gates at railroad crossings are not nuisances;<sup>18a</sup> or scaffolding erected for display of fireworks.<sup>19</sup> But an open area way in front of a saloon is,<sup>20</sup> also loungers who obstruct a highway;<sup>21</sup> also cutting ice and piling it up on a prescriptive winter way across the ice;<sup>22</sup> also keeping hacks standing an unreasonable time before a hotel.<sup>23</sup> Public ways are only for transit, and stoppage only as long as necessity, accident or ordinary exigency requires.<sup>24</sup> The right of stoppage must be reasonably exercised.<sup>25</sup> The use of steam engines and power vehicles upon the public cartways may be so conducted as to render them nuisances at common law and common sense.<sup>26</sup> So individuals gathering in a rout or boisterous crowd on the public highways commit a nuisance;<sup>27</sup> also an auctioneer who causes the crowd to block the passage in front of his place.<sup>28</sup>

To set up or establish a railway in a street where there is no sufficient authority to sanction it is to set up that which is *per se* a nuisance, because it is an invasion of the right of the public; it becomes a *purpresture* by making exclusive to one that which ought to be in common to everyone."<sup>29</sup> *Purpresture* is an invasion of the right of domain of the sovereign, which is here the people. But when legally authorized by the sovereign it is not, unless it transgresses the limit of its authorization in any way or manner.<sup>30</sup> If it takes a highway on condition to construct a new one and fails to do so it is guilty of nuisance in failing to construct the other and *autrefois acquit* as to the first will not avail it.<sup>31</sup> It may be guilty of nuisance in so constructing a bridge as to obstruct the public passage.<sup>32</sup>

## 12. Obstruction of public streams, etc.

Mooring of boats at a landing on a navigable stream is not a public nuisance;<sup>33</sup> but withdrawing water for other than domestic uses, so

<sup>18</sup> Koch v. Williamsport, 195 Pa. 488.

<sup>18a</sup> Rosenbaum v. P. & R. R. Co., 19 C. C. 666.

<sup>19</sup> Heidenwag v. Phila., 168 Pa. 72.

<sup>20</sup> McNerny v. Reading, 150 Pa. 611.

<sup>21</sup> Norristown v. Moyer, 67 Pa. 355.

<sup>22</sup> Comth. v. Christie, 13 C. C. 149.

<sup>23</sup> Goodwin v. Hamilton, 6 D. R. 705; Lancaster v. Reiser, 14 Lanc. L. R. 193.

<sup>24</sup> Norristown v. Moyer, 67 Pa. 355.

<sup>25</sup> Patterson v. Pittsburg, 8 Kulp, 530.

<sup>26</sup> Comth. v. Allen, 148 Pa. 358.

<sup>27</sup> Barker v. Comth., 19 Pa. 412; Fairbanks v. Kerr, 70 Pa. 86; Comth. v. Spratt, 14 Phila. 365.

<sup>28</sup> Comth. v. Passmore, 1 S. & R. 217; Comth. v. Miliman, 13 S. & R. 403.

<sup>29</sup> Allison, J., in Attorney General v. Lombard, Etc., R. Co., 10 Phila. 352. (See numerous cases in accord, P. & L. Dig., vol. 14, col. 23963.)

<sup>30</sup> Thomas v. Inter-County, Etc., R. Co., 167 Pa. 120; Comth. v. Erie, Etc., R. Co., 27 Pa. 339; P. & L. Dig., vol. 14, cols. 23965-6-7-8.

<sup>31</sup> Comth. v. Allegheny Val. R. Co., 14 Supr. C. 336.

<sup>32</sup> Comth. v. Northern C. R. Co., 7 Supr. C. 234.

<sup>33</sup> Baker v. Lewis, 33 Pa. 301.



as to injure navigation is;<sup>34</sup> also the erection of a wall so as to obstruct passage and increase the danger from floods;<sup>35</sup> and the deposit of slag and refuse from steel works in a public stream;<sup>36</sup> a building upon a public wharf or landing;<sup>37</sup> a dock upon a public landing by an individual,<sup>38</sup> but not so by a city.<sup>39</sup> A street railway company which undertook to lay its tracks upon a county bridge without authority of the county commissioners, under the act of May 14, 1889, P. L. 211, was guilty of a nuisance.<sup>40</sup> A public square is a highway for purposes of the law.<sup>41</sup> So is a turnpike road though owned by a corporation.<sup>42</sup>

### 13. Pollution of potable waters.

A manufacturer who permits waters impregnated with acids dangerous to health or life to escape from his grounds into a stream of water used for drinking, cooking and other domestic purposes is guilty of a nuisance at the common law.<sup>43</sup> If the stream is a private one and the corporation a private one the nuisance is not a public but a private one,<sup>44</sup> although a whole city is poisoned by it.

The rule is universal that one man has no right to use or apply the water running through his lands so as to corrupt or befoul the same and render it unwholesome and unfit to be used by the land owner on the stream below him, for domestic purposes.<sup>45</sup> The pollution of a stream the right to use which has been acquired by prescription is a nuisance.<sup>46</sup> A water company charged with the duty of furnishing potable waters to a large community may complain against an upper riparian owner if he so use the water as to pollute it, although such use is the inevitable consequence of the natural development of his own land.<sup>47</sup>

### 14. Diversion or other interference with waters.

The diversion of a stream or ancient water course is a nuisance. It may be restrained by injunction before *res acta* and when threat-

<sup>34</sup> Phila. v. Collins, 68 Pa. 106; Phila. v. Gilmartin, 71 Pa. 140; Gallagher v. Phila., 4 Supr. C. 60.

<sup>35</sup> Comth. v. Stevens, 178 Pa. 543.

<sup>36</sup> Scranton v. Scranton Steel Co., 154 Pa. 171.

<sup>37</sup> Rees v. Western, Etc., Soc., 2 C. C. 385; 12 Atl. 427; Pittsburg v. Epping-Carpenter Co., 194 Pa. 318.

<sup>38</sup> Reighard v. Flinn, 189 Pa. 355.

<sup>39</sup> Reighard v. Flinn, 194 Pa. 352.

<sup>40</sup> Larue v. Oil City, Etc., Co., 170 Pa. 249.

<sup>41</sup> Comth. v. Bowman, 3 Pa. 202.

<sup>42</sup> Nor. Cent. R. Co. v. Comth., 90 Pa. 300.

<sup>43</sup> Rarick v. Smith, 5 D. R. 530; Comth. v. Emmers, 33 Supr. C. 151; Bierly on Police Power, p. 73.

<sup>44</sup> Comth. v. Yost, 197 Pa. 171, reversing 11 Supr. C. 323.

<sup>45</sup> McCallum v. Germantown Water Co., 54 Pa. 40. This was said by Read, J., long before Penna. Coal Co. v. Sanderson and the sewer systems of the state, by which every large city and town befouls the stream for the next riparian town below.

<sup>46</sup> Wheatley v. Christman, 24 Pa. 298.

<sup>47</sup> Comth. v. Russell, 172 Pa. 506, notwithstanding Penna. Coal Co. v. Sanderson, *supra*.

ened;<sup>1</sup> but when done, the action is trespass for damages.<sup>2</sup> Special damages need not be alleged, for they are an intendment of the law, and it is sufficient if the plaintiff was at the time "seised in his demesne as of fee."<sup>3</sup> Under eminent domain an upper riparian owner may, however, take all the water from the lower, since he makes compensation for the permanent deprivation,<sup>4</sup> even though the stream originates in a spring on the land of the party.<sup>5</sup> It is a question for the jury where an upper owner detains the water from a lower owner, whether he detained it longer than necessary for the ordinary useful purposes.<sup>6</sup> He cannot materially diminish it in volume.<sup>7</sup>

#### 15. Flooding adjacent lands.

Except in extraordinary floods, the owner of a dam is responsible for all the injury caused to his neighbors, contiguous or adjacent from the overflow, during ordinary freshets.<sup>8</sup> He is bound to construct his dam with a view to provide for such floods. But having done so, he will not be held for extraordinary floods. If the backing of water is due to some cause for which the owner is not responsible he is not liable.<sup>9</sup> Where there is a body of water in a gully, not a flowing stream, the question of damages from an alleged nuisance was left to the jury and their verdict for the plaintiff was sustained.<sup>10</sup> When a railroad company builds an embankment and a bridge across a stream it must provide a sufficient outlet for the water in ordinary high floods to escape without flooding the lands of adjacent owners.<sup>11</sup>

#### 16. Surface water and percolations.

The natural and undirected flow of surface water from an upper to a lower owner's land is not a harm for which an action will lie.<sup>1</sup> But if the owner above drains it in artificial cuts or furrows upon the lower owner's land, or if the lower owner by embankments dams it back upon the former, it is a nuisance.<sup>2</sup> If, however, there is a natural basin or course through which these waters by nature flowed, the upper owner may drain into that, but he cannot construct a new ditch or channel for the purpose, and if he does the lower owner may erect an embankment against it.<sup>3</sup>

<sup>1</sup> *Hough v. Doylestown*, 4 Brewster, 433.

<sup>2</sup> *Whetstone v. Bowser*, 29 Pa. 59; *Hart v. Evans*, 8 Pa. 13.

<sup>3</sup> *Hart v. Evans*, 8 Pa. 13.

<sup>4</sup> *Penna. R. Co. v. Miller*, 112 Pa. 34; *Clark v. Penna. R. Co.*, 145 Pa. 438; *P. & R. R. Co. v. Pottsville Water Co.*, 182 Pa. 418.

<sup>5</sup> *Lord v. Meadville Water Co.*, 135 Pa. 122.

<sup>6</sup> *Hoy v. Sterrett*, 2 Watts, 327.

<sup>7</sup> *Miller v. Miller*, 9 Pa. 74; *Wheatley v. Chrisman*, 24 Pa. 298; *Penna. R. Co. v. Miller*, 112 Pa. 34.

<sup>8</sup> *McCoy v. Danley*, 20 Pa. 85; *Bell v. McClintock*, 9 Watts, 119; *Casebeer v. Mowry*, 55 Pa. 419.

<sup>9</sup> *Thatcher v. Baker*, 109 Pa. 22.

<sup>10</sup> *Kislinski v. Gilboy*, 19 Supr. C. 453.

<sup>11</sup> *Brown v. Pine Creek R. Co.*, 183 Pa. 38.

<sup>12</sup> *Sowers v. Lowe*, 20 W. N. C. 76.

<sup>13</sup> *Whitney v. Sanders*, 3 Pitts, 226.

<sup>14</sup> *Kauffman v. Griesemer*, 26 Pa. 407; *Martin v. Riddle*, 26 Pa. 415; *Plank Road Co. v. McCloy*, 11 Atl. 318; *Miller v. Laubach*, 47 Pa. 154.

While this is the rule as to agricultural and rural lands, a different rule is applied to cities and towns where each owner is obliged to take care of the water falling on his premises or from his roof, so that it does no damage to his neighbor.<sup>4</sup> The rule as to percolations beneath the surface from a noxious plant, as a privy, contaminating a neighbor's well, is the same.<sup>5</sup> But the mere percolation of water from natural causes is not actionable.<sup>6</sup> Where the character of the percolation is dubious, the facts are for the jury.<sup>7</sup> A man may dig a well on his own land although the effect is to impair a spring on the same land the right to have water from which had been granted to a lower owner.<sup>8</sup>

#### 17. Noise and other incidents of business.

In respect to whether the noise, odors, vibrations, smoke, etc., which are natural incidents of lawful business enterprises, constitute a nuisance, there seems to be no general rule. It is a matter determinable wholly by the circumstances of the case and the locality. As already stated, what might be considered a nuisance in a fashionable and fastidious residential place might not be so considered in a plain work-a-day, hammer and tongs vicinity where noises, etc., are hailed as evidences of thrift, prosperity and happiness. A Pittsburg judge, for illustration, would measure a nuisance by the latter standard;<sup>9</sup> whilst a Philadelphia judge, accustomed to the serene, Quaker quietude of the stately residential portions of his city, might measure a nuisance from the causes above stated by the former standard.<sup>10</sup> It has been held that no one has a right to carry on a noisy business late at night, which interferes with sleep;<sup>11</sup> and particularly when it is accompanied with noisy concussions,<sup>12</sup> shattering windows and audible for miles distant;<sup>13</sup> or where pieces of rock from the blasts were thrown upon the public road and upon plaintiff's premises;<sup>14</sup> or where a street railway so negligently operates its power house, as to cause violent concussions and injuries.<sup>15</sup> It must be productive of substantial annoyance, and not mere discomfort, unless it is shown to injure health or property.<sup>16</sup> If it is in a manufacturing district

<sup>4</sup> Bentz v. Armstrong, 8 W. & S. 40; Kohn v. Moore, 4 Leg. Gaz. 46; Whitney v. Sanders, 3 Pitts. 226; Young v. Leadour, 67 Pa. 351.

<sup>5</sup> Haugh's Ap., 102 Pa. 42; Hieskell v. Gross, 7 Phila. 317.

<sup>6</sup> Mirkil v. Morgan, 134 Pa. 144.

<sup>7</sup> Carson v. Bromley, 184 Pa. 549.

<sup>8</sup> Lybe's Ap., 106 Pa. 626.

<sup>9</sup> Bennington v. Klein, 6 W. N. C. 281. (See, "Eminent Domain.")

<sup>10</sup> Wallace v. Auer, 10 Phila. 356; Ladies', Etc., Ap., 22 W. N. C. 75; Rodenhause v. Craven, 141 Pa. 546; Schandain v. Bach, 11 W. N. C. 202; Crawford v. Altglen, Etc., Co., 1 Chester Co. 412; Rhodes v. Dunbar, 57 Pa. 274.

<sup>11</sup> Dennis v. Eckhardt, 3 Grant, 390; Burke v. Myers, 10 W. N. C. 481.

<sup>12</sup> Frazier v. Pennypack, Etc., Co., 17 Montg. Co. 105.

<sup>13</sup> Payne v. McGranor, 49 Pitts. L. J. 96.

<sup>14</sup> Sayen v. Johnson, 4 C. C. 360.

<sup>15</sup> Rogers v. Phila. Traction Co., 182 Pa. 473.

<sup>16</sup> Scott v. Hout, 8 Kulp, 42; McCaffney's Ap., 105 Pa. 253; Correll v. Snyder, 2 Northam. 98; Farver v. Am., Etc., Co., 24 Supr. C. 579; Sullivan v. Jones, Etc., Co., 206 Pa. 540.

the noises fairly incident to the business are not a nuisance.<sup>17</sup> The noise of street cars running on Sunday is not actionable;<sup>18</sup> though the ringing of church bell chimes except a few minutes on Sunday has been held so.<sup>19</sup> Whether the beating of a S. A. drum on the streets is a nuisance depends on the local police regulations;<sup>20</sup> so also of spitting on the sidewalks and elsewhere.

A bowling alley may be a nuisance from the manner of its operation.<sup>21</sup> Offensive odors and stench, although proceeding from a lawful business, may become a nuisance; such as steam from a laundry;<sup>22</sup> nauseating stenches from a fertilizer warehouse,<sup>23</sup> unwholesome stench and dust from a carpet cleaning establishment;<sup>24</sup> manufactory of fertilizer from the carcasses of animals;<sup>25</sup> accumulation of garbage at a disposal plant, if not immediately incinerated.<sup>26</sup> Whether a nuisance actually exists is for the jury to decide.<sup>27</sup> There are many cases where under the circumstances the matter was held not to be a nuisance. See P. & L. Dig., vol. 14, col. 24,000.

Poisonous fumes from lead smelting works were held to be a nuisance;<sup>28</sup> but odors from gas works and waste discharged into a small stream were not.<sup>29</sup> If the injury affects health it is a nuisance.<sup>30</sup> The rule is stated by Agnew that to determine when a nuisance shall be restrained depends upon "the customs of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place wherein it is called upon to exercise its power."<sup>31</sup> This certainly allows sufficient latitude for judicial discrimination.

Where an automobile frightened a horse on a narrow highway, by emitting a noxious gaseous vapor in passing the owner was held liable for damages.<sup>31a</sup>

#### 18. Explosives and dangerous enterprises.

A powder magazine if planted near a public road and residences

<sup>17</sup> *Hafer v. Guynan*, 7 D. R. 21; *Straus v. Barnett*, 140 Pa. 111; *Miller v. Schindle*, 15 C. C. 341; *Robinson v. Gerrity*, 7 Lack. L. N. 383; *Raub v. Tamany*, 5 Luz. L. R. 114.

<sup>18</sup> *Sparhawk v. Union Pass. R. Co.*, 54 Pa. 401.

<sup>19</sup> *St. Mark's Church's Ap.*, 34 Leg. Int. 222; 17 Phila. 87, 97.

<sup>20</sup> *Comth. v. Krubeck*, 8 D. R. 521; *Wilkes-Barre v. Garebed*, 9 Kuip, 273.

<sup>21</sup> *Briggs v. Vottler*, 4 W. N. C. 272.

<sup>22</sup> *Warwick v. Wah Lee*, 10 Phila. 160.

<sup>23</sup> *Weiser's Ap.*, 3 York, 103.

<sup>24</sup> *Rodenhausen v. Craven*, 141 Pa. 546.

<sup>25</sup> *Evans v. Reading Chemical, Etc., Co.*, 160 Pa. 209.

<sup>26</sup> *Fisher v. Am. Reduction Co.*, 189 Pa. 419.

<sup>27</sup> *Comth. v. Miller*, 139 Pa. 77.

<sup>28</sup> *Penna. Lead Co.'s Ap.*, 96 Pa. 116.

<sup>29</sup> *Keiser v. Mahanoy City Gas Co.*, 143 Pa. 276.

<sup>30</sup> *Price v. Grantz*, 118 Pa. 402.

<sup>31</sup> *Huckenstine's Ap.*, 70 Pa. 102.

<sup>31a</sup> *Reed v. Snyder*, 38 Sup. C. 421. If not licensed by the state such a machine would be a nuisance *per se* on the highway. This case holds the duties on the highway are reciprocal under the act of April 19, 1905, P. L. 217.

is a nuisance;<sup>32</sup> but if in a sparsely settled region it is not.<sup>33</sup> The handling of dynamite comes in the same rule.<sup>34</sup> The circumstances must largely determine the question.<sup>35</sup> Oil works are not a nuisance because of the danger from fire, explosion or pollution of wells.<sup>36</sup> But this may be regulated by ordinance the same as slaughter houses or any other dangerous or noxious business.<sup>37</sup> The location of steam boilers in a densely populated region is not *per se* a nuisance.<sup>38</sup>

It is a question for the jury whether a wooden building erected in Philadelphia contrary to an ordinance is a nuisance.<sup>39</sup>

#### 19. Nuisances against the public health.

Pig-sties in cities, as well as slaughter houses, are pronounced nuisances *per se*, as affecting the public health;<sup>40</sup> but in boroughs it depends upon the local ordinance, and the question may be submitted to a jury.<sup>41</sup> A bone boiling establishment in a populous place is a nuisance *per se*,<sup>42</sup> but a dry bone mill is not.<sup>43</sup>

A garbage crematory may be so constructed and operated as to become a nuisance,<sup>44</sup> but if the garbage be moved as fixed by ordinance it is not a nuisance.<sup>45</sup> A livery stable may be so negligently conducted as to become a nuisance, the question being for the jury.<sup>46</sup> Under the act of April 20, 1899, P. L. 66, it became unlawful "to establish or maintain any additional hospital, pest house or burial ground in the built-up portions of cities."<sup>47</sup> A long-established mill dam is not a nuisance,<sup>48</sup> although a city has grown up around it. The dam of the state's public works is not a nuisance,<sup>49</sup> but a canal company may so manage its works as to create a nuisance.<sup>50</sup>

<sup>32</sup> Wier's Ap., 74 Pa. 230, approving Rhodes v. Dunbar, 57 Pa. 274.

<sup>33</sup> Dilworth's Ap., 91 Pa. 247; Daw v. Enterprise, Etc., Co., 160 Pa. 479.

<sup>34</sup> McDonough v. Roat, 8 Kulp, 433.

<sup>35</sup> Feltz v. Del., Etc., Co., 5 Lack. L. N. 150; Tuckachinsky v. Lehigh, Etc., Co., 199 Pa. 515.

<sup>36</sup> Young v. Elkins, 15 Phila. 27; Shaw v. Natl. Transit Co., 4 C. C. 363; Rechar v. Brunhouse, 12 York, 105; Alexander v. Reading, Etc., R. Co., 11 D. R. 131; P. & L. Dig., vol. 14, col. 24010.

<sup>37</sup> Scranton v. Jermyn Oil Co., 5 Lanc. L. R. 277.

<sup>38</sup> Carpenter v. Cummings, 2 Phila. 74.

<sup>39</sup> Fields v. Stokley, 99 Pa. 306.

<sup>40</sup> Comth. v. Van Sickle, 4 Clark, 104; Comth. v. Wescott, 4 C. P. R. 58; Comth. v. McCormick, 5 D. R. 535; Smith v. Cummings, 2 Parsons, 92.

<sup>41</sup> Woodington v. Bates, 7 Montg. Co. 173.

<sup>42</sup> Czarniecki's Ap., 35 Pitts. L. J. 153.

<sup>43</sup> Mitchell v. Evans, 5 Kulp, 485.

<sup>44</sup> Deysher v. Reading, 18 C. C. 611.

<sup>45</sup> Phila. v. Lyster, 3 Supr. C. 475.

<sup>46</sup> Fischer v. Sanford, 12 Supr. C. 435; Rodenhausen v. Craven, 141 Pa. 546.

<sup>47</sup> Comth. v. Charity Hospital, 198 Pa. 270. (See Mason v. Presbyterian, Etc., 47 Pitts. L. J. 359.)

<sup>48</sup> New Castle v. Raney, 130 Pa. 546.

<sup>49</sup> Comth. v. Reed, 34 Pa. 275.

<sup>50</sup> Del., Etc., Co. v. Comth., 60 Pa. 367.

## 20. Other causes of nuisances.

A barbed wire fence, on account of its danger, has been held to be a nuisance *per se*, when erected in a populous locality.<sup>1</sup> A common scold is a nuisance *per se*;<sup>2</sup> so is base-ball playing on Sunday in a public place, causing noise and disturbance;<sup>3</sup> profane swearing in public to the annoyance of others.<sup>4</sup> The keeping of vicious dogs or other animals at large is a nuisance;<sup>5</sup> and upon being bitten by such dog, the person is justified in abating the nuisance by killing the dog.<sup>6</sup> The circulating of false reports alarming to the public is a nuisance.<sup>7</sup> The unlicensed sale of liquor is a nuisance under the act of May 13, 1887, P. L. 108.<sup>8</sup>

## 21. Obstruction of ancient lights, etc.

The erection of a building so as to darken the windows of an adjoiner, which right to light was established either by contract or ancient possession, is a private nuisance;<sup>9</sup> but if the shadow is but slight, it is different.<sup>10</sup> Windows overlooking others of an adjoiner are not a nuisance.<sup>11</sup> The abuse of a right of drainage is actionable.<sup>12</sup>

## 22. Form of statement in trespass for nuisance in the pollution of private waters by mining operations.

Joseph Stevenson, }  
v. } Court of C. P., Luzerne Co.  
Ebervale Coal Co. } 657.

May T., 1896.

[After stating the parties to the action.]

On the 30th of April, 1896, the plaintiff was the owner of a tract of farming land in the township of Nescopeck, county of Luzerne, of about one hundred acres, on which was erected a mill for the purpose of manufacturing yarns, flannels, blankets, etc. Through this land there flowed a stream of water known as the Nescopeck creek; that said mill was operated by the water furnished from said stream. That the water of said stream had a capacity for mill purposes equal to one hundred and twenty horse power. That on said day last mentioned and from thence up to this time, the said defendants have washed the coal from their coal operations into said stream, thus discoloring the water therein and filling the

<sup>1</sup> Bower v. Watson town Boro', 1 D. R. 116.

<sup>2</sup> Comth. v. Mohu, 52 Pa. 243; James v. Comth., 12 S. & R. 236, in which the ducking stool and other ancient modes of punishment are discussed by Duncan, J., holding that the Duke of York's law was repealed.

<sup>3</sup> Comth. v. Meyers, 8 C. C. 435; Comth. v. Rothrock, 2 Northam. 249.

<sup>4</sup> Comth. v. Linn, 158 Pa. 22; Comth. v. Spratt, 14 Phila. 365; Comth. v. Mohu, 52 Pa. 243.

<sup>5</sup> King v. Kline, 6 Pa. 318; Mann v. Weiland, 81 \* Pa. 243; Quigley v. Adams Express Co., 27 Supr. C. 116.

<sup>6</sup> Bowers v. Fitzrandolph, Addison, 215.

<sup>7</sup> Comth. v. Cassidy, 6 Phila. 82.

<sup>8</sup> Wishart v. Newell, 4 C. C. 141.

<sup>9</sup> Sutcliff v. Isaacs, 1 Parsons, 494; Foster v. Smith, 10 Kulp, 380.

<sup>10</sup> Biddle v. Ash, 2 Ashmead. 211.

<sup>11</sup> Shell v. Kemmerer, 13 Phila. 502.

<sup>12</sup> Kiefer v. Graham, 17 C. C. 361; Bryn Mawr Hotel Co. v. Baldwin, 12 Montg. Co. 145.

bed thereof with culm and coal dirt, thereby totally destroying the entire water power of said stream on plaintiff's property, and rendering it impossible to operate said mill for the purposes aforesaid, and thus causing damage to the plaintiff in the sum of seventy-five thousand dollars.

Joseph Stevenson.

Sworn to and subscribed.

### 23. Matters of defense — Prescription.

As already noted a public nuisance gains no right by lapse of time. There can be no right by prescription to maintain a public nuisance;<sup>13</sup> but one who alleges special injury from it may be barred by his laches in asserting his right to it.<sup>14</sup> The lapse of time may be considered by the jury in determining whether a legitimate industry was considered a nuisance at all.<sup>15</sup> But, on the other hand, what might have been a private nuisance may ripen into an easement by an uninterrupted, exclusive use for twenty-one years, as, e. g., the diversion of water for irrigation;<sup>16</sup> or to obstruct the flow of water; but the proof must be clear and definite as to the precise user and the continued acquiescence to raise the presumption of a grant.<sup>17</sup> Such prescriptive right is measured by the extent of its enjoyment, as originally exercised.<sup>18</sup> So if one has a deed for an easement, specific in purpose, he may get a right by prescriptive use for another purpose.<sup>19</sup> Short of twenty-one years, one who claims such a right must show actual assent and not mere acquiescence by silence.<sup>20</sup> But this period may be made up by tacking together acquiescence of preceding owners and the present owner.<sup>21</sup> Whether the stream to which the lower riparian owner claims the right by prescription be natural or artificial he cannot be deprived of it.<sup>22</sup> To confer title by prescription the exercise must be continuous, uniform and adverse. There must be something to call the attention of the owner to the adverse claim.<sup>23</sup> It must be adverse as

<sup>13</sup> *Pittsburg v. Daub*, 32 Pitts. L. J. 24; *Pitts., Etc., Bridge Co. v. Comth.*, 8 Atl. 217; *Walsh v. Olyphant Boro'*, 7 C. C. 124; *Phila.'s Ap.*, 78 Pa. 33; *Harrisburg's Ap.*, 10 Atl. 787; *Renig v. Shoreburger*, 2 Watts, 23; *Comth. v. Alburger*, 1 Wharton, 469; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318; *Comth. v. Yost*, 11 Supr. C. 323.

<sup>14</sup> *Cox's App.*, 11 W. N. C. 571.

<sup>15</sup> *Comth. v. Miller*, 139 Pa. 77; *Comth. v. Pittston, Etc., Co.*, 148 Pa. 621; *Comth. v. Rush*, 11 Lanc. L. R. 97.

<sup>16</sup> *Strickler v. Todd*, 10 S. & R. 63; *Messinger's Ap.*, 109 Pa. 285.

<sup>17</sup> *Jones v. Crow*, 32 Pa. 398; *Hoy v. Sterrett*, 2 Watts, 327.

<sup>18</sup> *Darlington v. Painter*, 7 Pa. 473; *Mertz v. Dorney*, 25 Pa. 519; *Hogg v. Bailey*, 5 Supr. C. 426; *McCallum v. Germantown Water Co.*, 54 Pa. 40; *Chestnut Hill, Etc., Co. v. Piper*, 77 Pa. 432; *Irving v. Media Boro'*, 10 Supr. C. 132; 194 Pa. 648.

<sup>19</sup> *Wheatley v. Chrisman*, 24 Pa. 298.

<sup>20</sup> *West Bellevue Boro' v. Huddleston*, 23 W. N. C. 240.

<sup>21</sup> *McKillip v. McIlhenny*, 4 Watts, 317.

<sup>22</sup> *Miller v. Miller*, 9 Pa. 74; *Hughesville Water Co. v. Person*, 182 Pa. 450.

<sup>23</sup> *Williams, J.*, in *Hughesville Water Co. v. Person*, *supra*; *Cooper v. Smith*, 9 S. & R. 26; *Demuth v. Amweg*, 90 Pa. 181.

against an owner who is in life or *sui juris*; so a lunatic or one under disability is not affected by adverse possession and user.<sup>24</sup>

#### 24. License as a defense.

The defendant may set up a parol license by the former owner.<sup>25</sup> An executed parol license to cover the land with backwater by a dam binds all the successors and cannot be revoked after execution.<sup>26</sup> It bars the right to recover for injury for all the time prior to its revocation.<sup>27</sup> A license at a certain annual sum is revocable.<sup>28</sup> Business reasons, such as convenience, necessity and custom, do not justify a nuisance;<sup>29</sup> or that the enterprise cannot be carried on without it<sup>30</sup> or has been established at great expense and gives employment to many people.<sup>31</sup> But where there is an issue of fact as to whether it constitutes a nuisance or not, it is error to withdraw from the jury such facts as here stated.<sup>32</sup> The existence of one nuisance furnishes no valid excuse for another.<sup>34</sup>

#### 25. Estoppel.

Failure to remonstrate against the erection of a nuisance will not work an estoppel,<sup>35</sup> although the plaintiff had notice of it;<sup>36</sup> and he need not notify the defendant not to do the act complained of as a nuisance.<sup>37</sup> Not every one is presumed to know the law; but every one is in duty bound to ascertain what it is and obey it.

#### 26. Continuance of nuisance.

Where there has been a recovery for a nuisance and the defendant continues the same an action will lie for its continuance and the plea of former recovery will not avail as against the continuation of the nuisance.<sup>1</sup> All the plaintiff need to do is to offer the record of the former judgment, which is conclusive as to the fact that there was a nuisance, to prove that it remains unabated or in an aggravated form and the damages.<sup>2</sup> This is amendable.<sup>3</sup> In this

<sup>24</sup> Reimer v. Stuber, 20 Pa. 458.

<sup>25</sup> McKillip v. McIlhenny, *supra*.

<sup>26</sup> McKillip v. McIlhenny, *supra*.

<sup>27</sup> Thatcher v. Baker, 109 Pa. 22.

<sup>28</sup> Gilmore v. Wilson, 53 Pa. 194.

<sup>29</sup> Smith v. Phillips, 8 Phila. 10; Jacobs v. Worrell, 15 Leg. Int. 139; Haugh's Ap., 102 Pa. 42; Bencoter v. Huntingdon, Etc., Assn., 10 Kulp, 355; Phila. v. Collins, 68 Pa. 106; Comth. v. Van Sickle, 4 Clark, 104.

<sup>30</sup> Del., Etc., Co. v. Torrey, 33 Pa. 143; Biddle v. McCracken, 13 W. N. C. 514.

<sup>31</sup> Penna. Lead Co.'s Ap., 96 Pa. 116.

<sup>32</sup> Comth. v. Miller, 139 Pa. 77.

<sup>33</sup> Weiser's Ap., 3 York, 103.

<sup>34</sup> Burt v. Smith, 3 Phila. 363; Alexander v. Kerr, 2 Rawle, 83; Penna. Lead Co.'s Ap., 96 Pa. 116.

<sup>35</sup> Smith v. Phillips, 8 Phila. 10.

<sup>36</sup> Penna., Etc., R. Co. v. Reading Paper Mills, 149 Pa. 18.

<sup>1</sup> Smith v. Elliott, 9 Pa. 345; Ellis v. Am. Academy of Music, 120 Pa. 608; Fell v. Bennett, 110 Pa. 181.

<sup>2</sup> Smith v. Elliott, 9 Pa. 345.

<sup>3</sup> Ellis v. Am. Academy, etc., *supra*.



action the court will not reach back and allow the former recovery to be traversed;<sup>4</sup> unless the plaintiff by his pleading waives his rights and instead of replying to an answer of license, goes to trial on that issue.<sup>5</sup> The ownership of the defendant in the former recovery will be presumed to continue unless it be shown as a matter of defense that it has changed.<sup>6</sup> A corporation by its charter is not exempt from answering for a nuisance which it may create or maintain.<sup>7</sup> A second suit should not be commenced while a motion for a new trial is still pending on the first, if plaintiff wishes to avail himself of the record as conclusive.<sup>8</sup> In the second suit the plea of *res judicata* will not avail as against continuance of the nuisance.<sup>9</sup> Defendant in the first suit, must show that there is no nuisance, that being the issue. He may show then that the business is lawful and not noxious and that the machinery makes no unnecessary noise and all that contradicts the charge of hurt and annoyance.<sup>10</sup> One who by a trespass diverted a water course cannot defend that he cannot abate the nuisance without being liable to the owner of the soil.<sup>11</sup>

#### 27. *Damnum absque injuria.*

There still remains something to be said about the very *ultra* defense above entitled. Section 8 of article 16 of the Constitution provides that:—

“Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.”

This placed corporations on the same plane as individuals, and where a railroad company used its own ground for a lawful purpose in a lawful manner, the owner of adjacent property could maintain no action for alleged nuisance.<sup>12</sup> But where it so exercised its rights as to obstruct an adjacent property owner in the use of the highway, it was liable<sup>13</sup> and subject to the new constitution, with or without acceptance. The word “injury” (or “injured”), *supra*, means such a legal wrong as would be the subject of an action for damages at common law.”<sup>14</sup> So the ordinary noise, smoke, dust, etc.,

<sup>4</sup> *Shaeffer v. Landis*, 1 S. & R. 449; *McCoy v. Danley*, 20 Pa. 85; *Gilmore v. Wilson*, 53 Pa. 194; *Long v. Trexler*, 8 Atl. 620; *Hartman v. Incline Plane Co.*, 2 Supr. C. 123; 11 Supr. C. 438; 159 Pa. 442.

<sup>5</sup> *Kilheffer v. Herr*, 17 S. & R. 319.

<sup>6</sup> *Hartman v. Pittsburg Inclined Plane Co.*, 23 Supr. C. 360.

<sup>7</sup> *Pottstown Gas Co. v. Murphy*, 39 Pa. 257.

<sup>8</sup> *Casebeer v. Mowry*, 55 Pa. 419.

<sup>9</sup> *Amrhein v. Quaker City Dye Works*, 192 Pa. 253.

<sup>10</sup> *Alexander v. Stewart Bread Co.*, 21 Supr. C. 526.

<sup>11</sup> *Smith v. Elliott*, 9 Pa. 345.

<sup>12</sup> *Penna. R. Co. v. Lippincott*, 116 Pa. 472; *Dooner v. Penna. R. Co.*, 142 Pa. 36.

<sup>13</sup> *Penna. R. Co. v. Duncan*, 111 Pa. 352, affirmed by U. S. Supreme Court, 129 Pa. 181.

<sup>14</sup> *Penna. R. Co. v. Marchant*, 119 Pa. 541; *Pitts., Etc., R. Co. v. Jones*, 111 Pa. 204; *City of Reading v. Althouse*, 93 Pa. 400.

of using a railroad and its engines, without negligence, are not actionable.<sup>15</sup> But the imposition of a new and added servitude upon the street entitles the land owner to compensation.<sup>16</sup> Where the owner of land makes an excavation upon it at such distance from the highway that in order to reach it a person must become a trespasser, and one so falls into it, the owner is not liable.<sup>17</sup> It is purely *damnum absque injuria*.<sup>18</sup>

But where there is a private alley from a public street, and a dangerous opening or trap is left in this passage way, the owner is liable for the injury to a child six years old which falls into it.<sup>19</sup> A child of tender years is not considered a trespasser, but this principle does not apply where a boy eight years old falls into a pit in a field used as a part of abandoned brick works.<sup>20</sup> Where one has reason to apprehend danger from the peculiarly unguarded condition of his property and the liability to danger, as a frail wall on an alley, it is a question for the jury, whether it was a nuisance.<sup>21</sup> Even a trespassing infant may be so negligently ejected from the platform of a moving car as to make it actionable.<sup>22</sup> The same rule applies to the ejection of any passenger from a car.<sup>23</sup> The doctrine of *Penna. Coal Co. v. Sanderson*, reversing same, which was up for the fourth time,<sup>24</sup> was this:

"Damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*."

The ground on which this decision was based, was that if the first decision was adhered to, "results of a serious character must follow to the mining and other industrial interests of the country."<sup>25</sup>

#### 28. *Damnum fatalae*.

The doctrine of "inevitable accident," *Vis Major*, is fully discussed by Chief Justice Lowrie<sup>26</sup> in a case where the contract provided for delivery of goods by steamboat to the destination safely and in good order, "the unavoidable dangers of the river navigation and fire excepted." A novel application was given to "inevitable accident" recently where a customer in a Philadelphia department

<sup>15</sup> *Penna. R. Co. v. Lippincott*, 116 Pa. 472; *Penna. R. Co. v. Marchant*, 119 Pa. 541.

<sup>16</sup> *Jones v. Erie, Etc., R. Co.*, 151 Pa. 30.

<sup>17</sup> *Gramlich v. Wurst*, 86 Pa. 74.

<sup>18</sup> *Knight v. Abert*, 6 Pa. 472; *P. & R. R. Co. v. Hummel*, 44 Pa. 375; *Gillis v. Penna. R. Co.*, 59 Pa. 129.

<sup>19</sup> *Hydraulic Works Co. v. Orr*, 83 Pa. 332.

<sup>20</sup> *Gillespie v. McGowan*, 100 Pa. 144; *Knight v. Abert*, 6 Pa. 472.

<sup>21</sup> *Schilling v. Abernethy*, 112 Pa. 437.

<sup>22</sup> *Biddle v. Hestonville R. Co.*, 112 Pa. 551. This principle extends to even a dog (*Vere v. Lord*, 11 East, 568), or a hog (*Kerwhacker v. Co.*, 3 Ohio, 172), or an ass (*Davies v. Mann*, 10 M. & W. 545). (See *Pitts., Etc., R. Co. v. Caldwell*, 74 Pa. 421.)

<sup>23</sup> *Arnold v. Penna. R. Co.*, 115 Pa. 135, following *Lake Shore, Etc., R. Co. v. Rosenzweig*, 113 Pa. 519.

<sup>24</sup> *Penna. Coal Co. v. Sanderson*, 113 Pa. 126; *Mercur, Gordon and Trunkay*, dissenting.

<sup>25</sup> *Paxson* in dissenting in the first case.

<sup>26</sup> *Hays v. Kennedy*, 41 Pa. 378.

store was struck by an employee, who stumbled over a roll of matting in a poorly lit passage way.<sup>26a</sup>

#### 29. Obstruction of the right to fish.

"At the common law fresh water rivers belong to the owners of the soil adjacent so that the owners of the one side have, of common right, the property to the soil, and consequently, the right of fishing *usque ad filum* [medium] *aquæ*, and the owners of the other side, the right of soil or ownership and fishing unto the *filum* [medium] *aquæ* on their side; and if a man be owner of the land on both sides, in common presumption he is the owner of the whole river and hath the right of fishing according to the extent of his land in length; but these rivers, as well as those which flow and reflow, are under these two servitudes, viz.: one of prerogative, belonging to the king, and another of public interest, or belonging to the people in general." Again: "At the common law nothing is better settled, than that the owners of the banks of a river, like the Schuylkill, which, though a common highway, is not technically navigable, are owners *ad filum medium aquæ* and have several fisheries opposite to their respective shores." . . . "The term navigable is technical and applies only to those rivers which are arms of the sea and denominated royal rivers, to determine the character of which, the ebb and flow of the tide are the only criterion." Upon such a river the owner of a fishery was not entitled to damages for the injury sustained by the erection of a dam under the act of March 8, 1815, incorporating the Schuylkill Navigation Company.<sup>27</sup> So, when by act of May 29, 1901, P. L. 302, the legislature provided that public fishing shall exist in all waters within land owned by the commonwealth; all waters and parts of waters that have been or may be declared navigable by acts of assembly or public by common law and such other waters made public by its owners by grant or usage," it must have had in view the common law as to the right to fish open streams as it then existed. Moreover, section 25 of the same law provided that the public might fish all streams "excepting small spring runs tributary to public or free waters," in which fish were planted by the State; "Provided, That nothing in this section shall be so construed as to permit any person fishing in such waters from the banks thereof, without the permission of the owners or lessees." This section clearly means that such private streams might be fished by wading them, as was done in the case of the Lackawaxen river, to which allusion is here made. When the act of April 14, 1905, P. L. 169, was passed it is fair to presume no one thought of making that a trespass which was expressly licensed by the act of 1901. Being a penal statute, providing for a summary conviction, it must be construed to operate within the narrowest limits possible and consistent with the law as it then stood, with the reservations therein specified in favor of a common law right, which everyone has, to fish in waters open to the public, the right of property in the fish attaching to him who can

<sup>26a</sup> Wall v. Lit, 195 Pa. 375; Arzt v. Lit, 198 Pa. 519. (But see the exception in favor of a lame woman. Polenske v. Lit, 18 Supr. C. 474.)

<sup>27</sup> Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71.

take them regardless of who may be the owner of the subjacent land. In private waters the owner of the land owns the fishes whilst on his land, but being fugacious, when they enter another's land they belong to him if he can take them. But in public waters the right to fish is a common right and everyone has a property in the fishes as soon as he can take them.<sup>28</sup> It is not, therefore, to be wondered at, that the conclusions reached in *Comth. v. Foster*<sup>29</sup> excited comment and astonishment. The decision in this case was not based on any Pennsylvania authorities, but wholly upon the encyclopedic theory of *Vermont v. Theriault*, 43 L. R. A. 290, which has no relativity to the right to fish in public waters in Pennsylvania, under the common law and statutes.

### 30. Damages from nuisances.

Having established in one action that there is a nuisance, although only nominal damages are given, the plaintiff may recover actual damages in the suit for the continuation,<sup>30</sup> from the time of the beginning of the first suit to the impetration of the writ in the second suit.<sup>31</sup> The general rule as to damages for nuisance is compensation for the injury.<sup>32</sup> If it consists of injury to property the measure is the cost of remedying it, unless that exceeds the value of the property, when the value of the property is the measure<sup>33</sup> and in addition, the loss of rentals or use meantime.<sup>34</sup> The rule in eminent domain is inapplicable to nuisance.<sup>35</sup> Where the nuisance is removable as from a highway, the measure is the cost of abating it and the actual damages;<sup>36</sup> and where it may be abated, as the pollution of a stream, which also injured the freehold, the cost of removing it if less than the difference between the value of the land before and after its deposit; if greater, the difference of value.<sup>37</sup> Where the nuisance consists of polluting a stream with coal washing and refuse the rule is the same.<sup>38</sup>

In case of permanent injury the rule has been applied to be the difference in the market value before and after.<sup>39</sup> Where the injury by a foundry company affects health and comfort of the plaintiff he may recover such damages as the jury may award.<sup>40</sup> For flooding land, the uses for which it was adapted may be shown as an ele-

<sup>28</sup> *McCready v. Virginia*, 94 U. S. 391.

<sup>29</sup> 36 Supr. C. 433.

<sup>30</sup> *Casebeer v. Mowry*, 55 Pa. 419.

<sup>31</sup> *Smith v. Elliott*, 9 Pa. 345; *Schuylkill Nav. Co. v. Farr*, 4 W. & S. 362.

<sup>32</sup> *Hart v. Evans*, 8 Pa. 13.

<sup>33</sup> *Lentz v. Carnegie*, 145 Pa. 612; *Eshelman v. Martie Twp.*, 152 Pa. 68; *Stevenson v. Ebervale Coal Co.*, 201 Pa. 112.

<sup>34</sup> *Ward v. Gardner*, 2 Atl. 867; *Harvey v. Susq. Coal Co.*, 201 Pa. 63.

<sup>35</sup> *Robb v. Carnegie*, 145 Pa. 324; *Lentz v. Carnegie*, 145 Pa. 612.

<sup>36</sup> *Mellick v. Penna. R. Co.*, 203 Pa. 457.

<sup>37</sup> *Seely v. Alden*, 61 Pa. 302; *Bailey v. Mill Creek Coal Co.*, 20 Supr. C. 186.

<sup>38</sup> *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316; *Glasgow v. Altoona*, 27 Supr. C. 55.

<sup>39</sup> *Carpenter v. Lancaster*, 212 Pa. 581.

<sup>40</sup> *Farver v. Am. Car, Etc., Co.*, 24 Supr. C. 579.

ment.<sup>41</sup> But the trouble of the plaintiff in maintaining his action is not an item for compensation.<sup>42</sup> The life tenant may recover the rental value where the premises are rendered untenable by the nuisance.<sup>43</sup> It seems personal injuries to plaintiff and family from noxious gases and odors are not recoverable in an action by the husband alone. The injuries of the wife she may sue for in a joint action with her husband.<sup>44</sup>

Where a mill-site has fallen into disuse it is error to base the damages upon the rental value of the mill-site, for diversion of the water.<sup>45</sup> The rule is that the damages caused by the diversion of water consist of what it would cost to supply the water for his ordinary and immediate uses while the diversion continued.<sup>46</sup> To prove the loss to a mill he may show how many customers were turned away.<sup>47</sup> The loss by obstructing the water for a sawmill may be estimated from the various circumstances;<sup>48</sup> or any mill depending on water power.<sup>49</sup>

A nuisance in a livery stable may be estimated by the difference in rental value of adjoining property, sickness and cost of removal of the family.<sup>50</sup> The jury should not be allowed to conjecture where a hotel keeper sues a gas company for noisome odors causing sickness in his family. The facts must be shown from which the loss may be fairly computed.<sup>51</sup> The court should state the measure of damages to the jury.<sup>52</sup> Where there are actual damages shown the court errs in charging the jury that they may find nominal damages.<sup>53</sup> Where the nuisance is continued and the evidence shows wantonness vindictive damages may be given.<sup>54</sup>

<sup>41</sup> *McGroarty v. Lehigh, Etc., Co.*, 212 Pa. 53.

<sup>42</sup> *Good v. Mylin*, 8 Pa. 51.

<sup>43</sup> *Herbert v. Rainey*, 162 Pa. 525.

<sup>44</sup> *Gavigan v. Atlantic Ref. Co.*, 3 Supr. C. 628. (See, same case, 186 Pa. 604.)

<sup>45</sup> *Clark v. Penna. R. Co.*, 145 Pa. 438.

<sup>46</sup> *Hogg v. Connellsville Water Co.*, 168 Pa. 456; *Standard, Etc., Co. v. Butler Water Co.*, 5 Supr. C. 563; *Irving v. Media Boro'*, 10 Supr. C. 132; 194 Pa. 648.

<sup>47</sup> *Ehrgood v. Moscow Water Co.*, 4 Lack. L. N. 151.

<sup>48</sup> *Horton v. Hall*, 1 Penny. 159.

<sup>49</sup> *Little, Etc., Co. v. French*, 81 \* Pa. 366; *Keppel v. Lehigh, Etc., Co.*, 200 Pa. 649.

<sup>50</sup> *Fischer v. Sanford*, 12 Supr. C. 435.

<sup>51</sup> *Keiser v. Mahanoy City Gas Co.*, 143 Pa. 276; *Robb v. Carnegie*, 145 Pa. 324; *Hartman v. Pitts. Incline Plane Co.*, 159 Pa. 442.

<sup>52</sup> *Stephenson v. Brown*, 147 Pa. 300.

<sup>53</sup> *Craig v. Shippensburg Boro'*, 7 Supr. C. 526.

<sup>54</sup> *Reynolds v. Clark*, 1 Pitts. 9.

## CHAPTER LXI.

### TRESPASS Q. C. F. AND PLEADINGS — DAMAGES.

1. Trespass *quare clausum fregit*.
2. The *præcipe*.
3. The plaintiff's statement.
4. Form of statement *q. c. f.*
5. Form of statement *vi et armis*.
6. Form of amicable action to try title.
7. Form of statement for cutting timber.
8. Form of *præcipe* for official misfeasance.
9. Form of statement for official misfeasance.
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26. Costs in trespass *q. c. f.*
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28. Practice on appeal.
29. Form of exceptions to charge.
30. Form of assignments of error.
31. Form of notice of appeal.
32. Form of affidavit of appellant.
33. Certificate of judge.
34. Form of agreement as to supersedeas.
35. Form of bond on appeal.
36. Certificate of stenographer.
37. Form of remittitur.

#### 1. Trespass *quare clausum fregit*.

Although the distinctions in forms of trespass are abolished in practice there still remains a distinction in substance, as has been pointed out in a preceding chapter, and where a man's realty is trespassed upon, in whatsoever manner, it is still a breaking and entering of the plaintiff's close from which we have the words of the Law Latinists:

"*Quare clausum querentis fregit*." It is usual to combine with trespass *de bonis asportatis*, also *quare clausum fregit* and the averment of *vi et armis*.

#### 2. The *præcipe*.

In any form of trespass, now the *præcipe* is sufficient if it demand a summons in trespass, though it is more scientific if it specify for what kind of trespass, though the attorney should be sure of his distinction. For example, trespass *vi et armis* cannot be sustained when the proof is that the property sold was a crop in the ground a mile away from the sale and there was no interference with or disturbance of the property.<sup>1</sup> So unless, sure of his

<sup>1</sup> *Myers v. White*, 9 Lanc. Bar, 149.

proofs, the plaintiff's attorney is safest to demand a summons in trespass without qualification.

### 3. The plaintiff's statement.

Since the act of 1887, *supra*, the plaintiff's declaration "shall consist of a concise statement of the plaintiff's demand, as provided by the fifth section of the act of the twenty-first day of March, Anno Domini, one thousand eight hundred and six."<sup>2</sup> So under this dubious reference and conjunction, it has been assumed generally that in trespass, a plaintiff's statement similar to the one required in assumpsit is sufficient.

But, as will be seen, there is reason to doubt whether a neophyte would remain long in court with his plaintiff's statement consisting of a "concise demand," when he failed to lay the cause of action in its particular essentials and ingredients. "*Felix qui potuit rerum cognoscere causas*," as saith Virgil, the Bucolic Philosopher. No general statement will suffice in trespass of any character. The particular acts and facts in each case which give rise to the plaintiff's cause of action must be concisely set forth.

### 4. Form of statement for trespass quare clausum fregit.

John Strohm }  
v. } In the Court of Common Pleas of Centre County.  
Keefe Votz. } No. \_\_\_\_\_. \_\_\_\_\_ Term, 19—.

The plaintiff John Strohm claims of the defendant Keefe Votz the sum of five hundred dollars which is justly due and payable to the said plaintiff by the said defendant on the following cause of action to-wit:

For that the said defendant Keefe Votz did on the \_\_\_\_ day of \_\_\_\_, A. D. 19—, at the county aforesaid, with force and arms and against the peace and dignity of the Commonwealth of Pennsylvania, break and enter in and upon the close of the said plaintiff, at the county aforesaid, to-wit, a certain field of grain, grass and herbage situate in the township of Miles, County of Centre and State of Pennsylvania, being a part of a messuage and tenement of said plaintiff then and there lying, and did wilfully and with force and arms and against the peace, then and there trample down and destroy said grain, to-wit wheat, and said grass, to-wit clover and said herbage then and there standing and growing, being the property of the plaintiff and other wrongs then and there did to said plaintiff to the damage of five hundred dollars.

Whereupon he brings suit.

John Strohm,  
By his Attorney.

### 5. Form of statement in trespass for assault and battery.

Bat Nelson }  
v. } In the Court of Common Pleas of \_\_\_\_ County.  
Ad Wolgast. } No. \_\_\_\_\_. \_\_\_\_\_ Term, 19—.

The plaintiff Bat Nelson claims of the defendant Ad Wolgast the

<sup>2</sup> See vol. 1, p. 389, par. 4, for this section which only refers to actions *ex contractu*.

sum of three hundred dollars which is justly due and payable to the plaintiff by the defendant on the following cause of action, to-wit:

For that defendant on the — day of —, D. D. 19—, at the county aforesaid, with force and arms and against the peace and dignity of the Commonwealth of Pennsylvania, did violently assault, beat, wound and ill treat said plaintiff with [name weapon if such used] and inflict upon his person great bodily harm [lay such other injuries as were done and the damages and outlay] to the damage of said plaintiff three hundred dollars.

Whereupon he brings suit.

Bat Nelson,

By his Attorney, — —.

Sept. 1, 1910.

#### 6. Amicable action.

If the parties wish to try the title in this form they can do so by an amicable action. Following is a form:

##### *Form of Amicable Action of Trespass.*

Commonwealth of  
Pennsylvania

v.

Adam S. Bierly.

} In the Court of Common Pleas of Snyder County.

Now, Nov. 9, 1906, it is agreed by the Commonwealth of Pennsylvania, the plaintiff by her attorney, Frederick E. Bower, Esq., and A. S. Bierly by his attorney A. W. Potter, Esq., that an amicable action in trespass be entered in said court, with the same force and effect as though a summons had been regularly issued and returned lawfully served, for the purpose of determining the right, title and ownership of 138 acres and 11½ perches, more or less, of land in West Beaver Township, Snyder County, Pennsylvania, the plaintiff to file a declaration with an abstract of the plaintiff's title within ten days from this date, and the defendant to file his plea with an abstract of his title within five days thereafter. This case to be placed on the Trial List for December Term, 1906.

Frederick E. Bower, attorney for the Commonwealth of Pennsylvania.

A. W. Potter, attorney for A. S. Bierly.

Entered and filed Nov. 9, 1906.

G. M. Shindel, Prothonotary.

#### 7. Form of plaintiff's declaration in trespass for cutting timber.

[Title of case as above.]

Snyder County, ss:

The Commonwealth of Pennsylvania, the plaintiff in this suit, by Frederick E. Bower, her attorney, complains of A. S. Bierly, the defendant in this suit, for that, whereas the said defendant, heretofore, to-wit, on the third day of May, 1906, with force and arms, broke and entered the close of the said plaintiff, at the county aforesaid, that is to say, upon certain unseated lands of the plaintiff, situate in West Beaver Township, Snyder County, State of



Pennsylvania, the said being included within the lines of [here describe the land particularly] and did then and there unlawfully cut down one white oak tree of the value of fifty dollars and one maple tree of the value of fifty dollars, to the damage of the said plaintiff one hundred dollars and therefore she brings this suit.

Frederick E. Bowers,  
Attorney for Plaintiff.

Nov. 26, 1906.

Abstract of plaintiff's title filed.

Abstract of defendant's title filed.

Defendant pleads "not guilty" and estoppel.

#### 8. Form of præcipe in trespass for official misfeasance.

Oliver Tool

v.

Simon Yeager,

bailiff and constable. 211 March T., 1878.

To William Follmer, Esq., Prothonotary:

Issue summons in trespass [on the case] for official misfeasance, etc., returnable next return day.

W. R. Bierly,  
Plaintiff's Attorney.

#### *Statement of Claim.*

Plaintiff claims from the defendant the sum of \$46.85 and interest on the same from the 22nd of August, 1877, with costs and damages for the defendant's neglect and refusal to pay to plaintiff out of the proceeds of a constable's sale the amount of \$46.85 demanded, as the statute required him to do.

W. R. Bierly,  
Plaintiff's Attorney.

#### 9. Form of declaration.

Same

v.

Same.

} No. 211.

March T., A. D., 1878.

Lycoming County, ss:

Simon Yeager, constable, etc., above named, late of said county, is summoned to answer Oliver Tool, the plaintiff above named in a plea of trespass [on the case] for official misfeasance, and thereupon the said plaintiff, by his attorney, W. R. Bierly, complains for that, whereas:

Heretofore, to-wit, on the 26th day of August, A. D. 1877, by virtue of a certain landlord's warrant from the Savings Institution of Williamsport, plaintiff against John Odell, defendant, he being engaged in the manufacture of woolen goods at Ball's Mills in the county aforesaid and having leased the woolen factory from the said Savings Institution, the said Simon Yeager, defendant in this suit, did as bailiff levy upon and distrain and as a duly qualified constable of the said county, sell the goods of the said John Odell, lessee, then in and about the factory premises and connected therewith for the sum of three hundred and fifty dollars. And the plaintiff in this suit had been employed by the said Odell prior and up to said sale as a laborer or operator in said woolen factory,

and prior to and immediately before the said sale there was due him the said plaintiff and he was justly, and legally entitled to receive from the said Odell the sum of forty-six dollars and eighty-five cents as wages for labor done by him for said Odell, as operator in said factory, within six months immediately preceding said sale.

And before the actual sale of said Odell's goods, levied on as aforesaid the said plaintiff, together with other laborers in said factory, by their attorneys did give a notice of their claims and the amounts thereof, in writing to said defendant (the officer executing said writ), which notice, though addressed to Peter Weisel, deputy of said defendant, was served on the defendant himself before the sale and is in language as follows, to-wit:

"Savings Institution }

v.

John Odell.

To Peter Weisel, Deputy Constable:

Take notice that the following claims for labor at the woolen mill operated by John Odell, within six months last past are made upon the proceeds of the sale of the property levied upon by you, and the respective parties claim their respective amounts out of the proceeds:

Oliver Tool, amount, \$46.85.

Edward Newcomer, amount, \$69.96.

Wm. F. Ball, amount, \$68.00.

Daniel Turner, amount, \$14.00.

Clark Gossner, amount, \$11.23.

Allen & Gamble, Attorneys.

Aug. 22, 1877."

And the said plaintiff in all respects has conformed to the provisions of an act of assembly of the State of Pennsylvania for the protection of laborers' wages, approved April 9, 1872, which reads in part as follows:

"Section 1. All moneys that may be due, or hereafter become due, for labor and services rendered by any miner, mechanic, laborer or clerk, from any person or persons or chartered company, etc. [the remainder of this section and section 2].

And after the said sale he demanded from the said defendant payment of the said claim out of the proceeds of said sale. Nevertheless, the said Simon Yeager, defendant as aforesaid, well knowing the premises and that the statute above recited expressly commanded him to pay to the plaintiff his just demand, but wrongfully contriving the said plaintiff to oppress and from him to withhold his lawful dues, neglected and refused and yet neglects and refuses to pay to him the said plaintiff the amount of money he was justly and legally entitled to receive, to the damage of the said plaintiff one hundred and fifty dollars and therefore he brings suit.

W. R. Bierly,

Attorney for Plaintiff.

March 1, 1878.

**10. Appearance and plea.**

Title of case.

April 2, 1878, I appear for defendant in the above case and plead  
 "not guilty."

Henry W. Watson,  
 Attorney for Defendant.

**11. Form of statement in trespass by negligence of agent.**

Blanche E. Neumiller	}	In the Court of Common Pleas of Berks County, Pennsylvania.
v.		
The Acme Motor Car Co.		

No. 15.

April Term, 1908.

*Plaintiff's Statement.*

This action is brought by Blanche E. Neumiller, plaintiff, against the Acme Motor Car Company, defendant, to recover damages for injuries sustained by the said plaintiff through the negligence and carelessness of said defendant, whereof the following is a statement:

The said defendant is a company incorporated under the state laws of the state of Pennsylvania, with head offices at Reading, Pa. That its business among other things is the manufacture, sale, repairing and furnishing for hire of automobiles.

That on July 5, A. D. 1907, the defendant company contracted and agreed to furnish one Clara S. English and her party with an automobile together with a chauffeur to operate same, for which said Clara S. English agreed to pay said defendant company the sum of four dollars per hour for the use and hire of said automobile and its chauffeur as aforesaid. That in accordance with said agreement the said automobile with chauffeur reported for duty at the Mansion house, Reading, and the said Clara S. English then and there entered said automobile together with her said party, Blanche E. Neumiller, the plaintiff, who was then and there accepted as a passenger, and directed said chauffeur to drive her and her party to Wanamaker, Pa., and return.

That as said automobile was proceeding on its journey, and while it was passing through Kutztown, Pa., on its return it was so negligently, carelessly and recklessly driven by said chauffeur that it was allowed to plunge against the curb and against a tree at the side of the street, so that plaintiff was thrown with great force and violence to the street, whereby she was cut about the head, bruised, wrenched and twisted in various parts of her body. She was severely and permanently injured and her nervous system was severely and permanently shocked and injured. That it was the duty of said defendant company, through its agent and employee, the said chauffeur, to run said automobile in a safe and careful manner, so that passengers riding in same might do so in safety, and without injury to their persons, but the said defendant company, wholly failing in its duty in this behalf, supplied the said automobile with a chauffeur who exhibited gross carelessness and incompetency and a heedless regard for the safety of the occupants of said automobile, with the result that the plaintiff was injured as above set forth, and she has sustained damages to the extent of fifteen thousand dollars, hence this suit.

Blanche E. Neumiller,  
 Plaintiff.

Blanche E. Neumiller, being duly sworn according to law, deposes and says that the facts set forth in the foregoing statement of claim are true to the best of her knowledge and belief.

Blanche E. Neumiller.

Sworn to and subscribed, etc.

Ellwood H. Deysher,  
Plaintiff's Attorney.

*Appearance, de bene esse.*

I hereby enter my appearance *d. b. e.* for the defendant in the above entitled case.

Cyrus G. Derr,  
Attorney for Defendant.

March 31, 1908.

Plea of not guilty filed April 29, 1908.

Same day case put at issue *sec. reg.*

**12. Form of notice of claim of damages to time of trial.**

Edward M. McIntosh	}	In the Court of Common Pleas of Butler County.
and Addie McIntosh		
v.		
Daniel Dierken.	No. 92.	September Term, 1907.

To Daniel Dierken, Defendant:

Sir: This is to give you notice that in the action of the above stated case on the list for trial January 16, 1908, for the recovery of damages for injury done to the lands of the plaintiffs, we propose to claim damages up to the date of the trial of said case.

John M. Greer,  
John B. Greer,  
Thomas H. Greer,  
Attorneys for Plaintiffs.

*Acceptance of notice.*

Now, December 26, 1907, we accept notice of the above and acknowledge the receipt of a copy thereof.

T. C. Campbell,  
P. W. Lowry,  
F. J. Forquer,  
Murrin & Murrin,  
Attorneys for Defendant.

**13. Damages — Measure of.**

The measure of damages is one of the most important subjects in the present status of practice and courts are not always in harmony on this question. The rule is that where there is no evidence of malice or aggravation the measure is compensation — what is the actual loss caused by the injury.<sup>1</sup> Where more damages than this are allowed they are called exemplary or vindictive damages and the jury may assess such damages where the trespass is aggravated.<sup>2</sup>

But unless there are aggravating circumstances it is error to

<sup>1</sup> Nagle v. Mullison, 34 Pa. 48.

<sup>2</sup> Porter v. Seiler, 23 Pa. 424; Robison v. Rupert, 23 Pa. 523.

instruct the jury that they may give vindictive damages.<sup>3</sup> In trespass *q. c. f.* it is error to allow exemplary damages unless the trespass was wilful and reckless and the facts so stated in the complaint.<sup>4</sup> Although the damages recoverable are regarded as compensatory, except where the law allows punitive damages, courts will not scan too closely the verdicts of juries to see whether by a legal microscope they may discern the various particles of loss entering into the sum total. When one suffers from crookedness, the person who is guilty thereof must not only pay the loss but be warned to have a care in the future that he deals straightly.<sup>5</sup>

#### 14. Rules as to particular cases.

The rules laid down by the courts, as stated above, fix damages upon a compensatory basis. Some of these are here briefly stated:

Trespass for taking goods—their value;

Digging in a man's soil and carrying it away—what it was worth at the time;

Trover, the value of the goods at the time of conversion; but if there be a re-delivery, the actual loss sustained;

Mere breach of duty, nominal damages unless special loss is laid and proved;

Negligence by attorney or physician, the loss sustained;

Injury to the reversioner, the actual damage to the freehold which reverts;

Injury to lands, damages to the extent of the plaintiff's interest;

Unlawful distress by landlord, value of the goods at the taking and damages for deprivation of them;

Tenant who replevies a distress costs and damages; but if the landlord recovers, amount of rent due and costs;

In replevin, generally, the value of the property.

The maxim in estimating the damages is that all things are presumed against the tortfeasor.

Juries have not much compassion on trespassers and are not bound to "weigh in golden scales" the harm done by their torts.<sup>6</sup>

In the classes of injuries tinged with malice exemplary damages are allowable under the highest authorities. Such are seduction, false arrest, etc. The motive of the tort may have weight in estimating the damages, and all the circumstances connected with it as of the *rerum gestarum* are fairly for the jury to consider and weigh.

If punitive damages are claimed in trespass on land, the statement is sufficient to found the claim if the facts as set forth show wantonness or malice as elements.<sup>7</sup> This also applies in an action for negligent construction by a railroad company so as to injure the

<sup>3</sup> *Amer v. Longstreth*, 10 Pa. 145.

<sup>4</sup> *Blair, Etc., v. Lloyd*, 3 W. N. C. 103; *Greeny v. Water Co.*, 29 Supr. C. 136; *Nagle v. Mullison*, 34 Pa. 48; *Traction Co. v. Orbann*, 119 Pa. 37; *R. Co. v. Lyon*, 123 Pa. 140; *Rhodes v. Rogers*, 151 Pa. 634; *Huling v. Henderson*, 161 Pa. 553.

<sup>5</sup> *Pratt, Ch. J.*, in *Wilkes v. Wood*, 19 Howard's State Trials, 1153.

<sup>6</sup> *Alderson, B.*, in *Lockly v. Pye*, 8 M. & W. 135 (Eng.).

<sup>7</sup> *Kennedy v. Erdman*, 150 Pa. 427; *Mellick v. R. Co.*, 17 Supr. C. 12; *Rose v. Storey*, 1 Pa. 190; *Amer v. Longstreth*, 10 Pa. 145.

land.<sup>8</sup> The amount claimed in the statement sets the limit to the verdict. The jury can give no more.<sup>9</sup>

#### 15. Damages, general or special.

Damages are either general or special. General are such as the law presumes; special are such as were really suffered. The damages need not be described in the statement, but they must be claimed and the amount fixed if it can be done. Where special damages for a particular wrong are asked the statement should aver them with particularity, and if claimed as consequential, the immediate relations of the facts from which they follow, so that he may not be confronted on the trial with a defense that they are too remote or that there is no proximate cause. The damages laid must be such as naturally flowed from the tortious act or conduct averred.<sup>10</sup> Courts have sometimes been puzzled to decide between cases where an individual is entitled to his action without proving special damages for an illegal act and where damages follow immediately upon proof of the illegal act. For example in libel and slander there are words actionable *per se*, and here no damages need be proved; but when the words uttered are not actionable *per se* special damages must be shown.

An individual has no cause of action for a public wrong for any damages suffered in common with all others, but he has for such special damages resulting to him from that wrong, as he can prove by competent evidence. So where there is a misfeasance or malfeasance in public office, a public wrong is committed, but if that results in harm to the rights of A. especially, he can bring his action *ex delicto*.

This subject is a much broader one than the scope of this work will warrant details upon. Reference is made to Pepper & Lewis Dig., vol. 21, col. 37583 *et seq.*, and to the supplemental C. R. A., vol. 2, col. 4207, and vol. 4, col. 2473.

#### 16. Damages by motor vehicles.

Section 11 of the act of April 23, 1903, P. L. 270, provides for the recovery of damages for injuries done by automobiles or motor-vehicles on the highways. It reads as follows:

"All civil actions for damages arising from the use and operation of any motor-vehicle as aforesaid, shall be brought in the city or county in which the alleged damages were sustained, and service of process shall be made by the sheriff, in person or by deputy, in any part of this commonwealth, in like manner as process may now be served in the proper county."

"If the driver of an automobile failed to do what an ordinarily prudent driver would have done under like circumstances a jury would be warranted in finding that he was negligent, and if his negligence was the cause of the plaintiff's injury he should be held liable therefor."<sup>11</sup>

<sup>8</sup> Quigley v. R. Co., 208 Pa. 238.

<sup>9</sup> Gerber v. Co., 20 Lanc. L. R. 238.

<sup>10</sup> Walker v. Goe, 4 H. & N. 350.

<sup>11</sup> Whissler v. Walsh, 165 Pa. 352.

Under the act of April 19, 1905, P. L. 217, the duties of the driver of an automobile and a horse on the highway are reciprocal; and where a nervous and sensitive horse is frightened and offended by the noxious vapors of the machine, to emit the same is negligence though the driver stopped.<sup>12</sup>

#### 17. Damages from the sale of intoxicants.

The act of May 8, 1854, P. L. 663, assuming that an intoxicated person becomes an involuntary nuisance to society and himself, provided that it should not only be a misdemeanor to sell or furnish intoxicating liquor to a person of known intemperate habits but it also provided that "any person furnishing intoxicating drinks to any other person, in violation of any existing law or provisions of this act shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such person so furnishing."

Under this act as well as the act of April 12, 1875, P. L. 40, the relatives, the wife or children may recover from the person, licensed or unlicensed, any damages which may result from that cause; and the intoxicated person himself may recover from the saloon keeper.<sup>13</sup>

Where the cause of the injury is in dispute the question is for the jury.<sup>14</sup> Under the act of May 24, 1871, P. L. 1108, as to Mercer County, the wife may sue alone.<sup>15</sup>

Section 7 of the act of 1875, P. L. 40, gives the husband, wife, parent, child or guardian the right to notify in writing any person not to sell or deliver intoxicating liquor to a person who has "the habit of drinking intoxicating liquor to excess," and if he so sells or delivers, the penalty is not less than fifty nor more than five hundred dollars, as may be assessed by the court or judge as damages." And a married woman may sue in her own name. The right to action survives against the legal representatives of the wrong doer.

The act of May 25, 1897, P. L. 93, recognizes the prior laws.<sup>16</sup>

The person himself may recover the principle "*volenti non fit injuria*" not applying.<sup>17</sup> The widow may maintain it;<sup>18</sup> or the widow and minor children;<sup>19</sup> but the father cannot recover for a single adult son, although a member of the household.<sup>20</sup> The furnishing of the liquor must be shown to have been the proximate cause of

<sup>12</sup> Reed v. Snyder, 38 Superior C. 421, following Obold v. Traction Co., 19 Supr. C. 326. Law is simply "right reason, commanding what is just and prohibiting what is wrong." A horse is more alarmed at the noxious smell of the machine than its form or noise.

<sup>13</sup> Cody v. Sullivan (Westmoreland Co., C. P. 1910).

<sup>14</sup> Temme v. Schmidt, 210 Pa. 507.

<sup>15</sup> Stewart v. Hanson, 2 Leg. Op. 146.

<sup>16</sup> Comth. v. Terry, 15 Supr. C. 608.

<sup>17</sup> Littell v. Young, 5 Supr. C. 205.

<sup>18</sup> Fink v. Garman, 40 Pa. 95.

<sup>19</sup> Elkin v. Buschner, 1 Mona. 359; Davies v. McKnight, 146 Pa. 610; Bradford v. Boley, 167 Pa. 506.

<sup>20</sup> Yeon v. Creaton, 138 Pa. 48.

the injury.<sup>21</sup> The action cannot be defeated by the claim of contributory negligence in drinking the liquor.<sup>22</sup>

In the action under the act of 1854, no notice is a prerequisite,<sup>23</sup> as is required for the penalty under the act of 1875,<sup>24</sup> which is constitutional. The widow and children can recover damages only for pecuniary loss and not for mental affliction.<sup>25</sup> The earnings deceased might have won during his lifetime are the measure of such loss.<sup>26</sup>

#### 18. Answer equivalent to plea of general issue.

Although no answer is required in trespass, if the defendant sees fit to file one, it will be equivalent to a plea of "not guilty," as where it categorically denies each and every averment of the plaintiff's statement. This is the same as if "not guilty" had been entered and puts the cause at issue.<sup>16</sup>

Though in form *assumpsit*, although really in tort, as for negligence, an affidavit of defense is not required.<sup>16a</sup>

#### 19. Pleas.

The act of 1887, *supra*, provides that there shall be but one plea "not guilty," which is and always was the general issue. It was formerly customary to qualify by adding "with leave to justify," which was a special plea<sup>17</sup> and justification could not be given in evidence under the general issue. A license to enter could not be shown under the general issue in trespass *quare clausum fregit*,<sup>18</sup> in which form also the plea of *liberum tenementum* was allowed.<sup>19</sup> A judgment upon the latter plea had the effect of estopping the party against whom it was rendered and all in privity with him, from putting the title in question in a subsequent action of trespass,<sup>20</sup> but not in an action of ejectment for the same land.<sup>21</sup> It was the practice to admit all proximate and related circumstances in evidence, under this plea, by way of mitigation of damages, when in the character of excuse or provocation.<sup>22</sup> Under the plea of "not guilty" the defendant may show that the injuries complained of resulted from *Vis Major*, or an extraordinary flood and not by his fault;<sup>23</sup> and in trespass to land he may show title.<sup>24</sup>

<sup>21</sup> *Roach v. Kelly*, 194 Pa. 24.

<sup>22</sup> *Davies v. McKnight*, 146 Pa. 610.

<sup>23</sup> *Elkin v. Buschner*, 1 Mona. 359.

<sup>24</sup> *Mardorf v. Hemp*, 6 Atl. 754.

<sup>25</sup> *Fink v. Garman*, 40 Pa. 95; *Bradford v. Boley*, 167 Pa. 506.

<sup>26</sup> *Elkin v. Buschner*, 1 Mona. 359.

<sup>16</sup> *Siegfried v. South Bethlehem Boro'*, 27 Supr. C. 456.

<sup>16a</sup> *Cosgrove v. Pitta., Etc., R. Co.*, 16 D. R. 161. (See *Ridgway Grain Co. v. Penna. R. Co.*, 17 D. R. 967.)

<sup>17</sup> *Aiken v. Stewart*, 63 Pa. 30.

<sup>18</sup> *Demick v. Chapman*, 11 Johnson, 132.

<sup>19</sup> *Fisher v. Morris*, 5 Wharton, 358, citing *Lambert v. Strother*, Willes, 218.

<sup>20</sup> *Stevens v. Hughes*, 31 Pa. 381.

<sup>21</sup> *Sabins v. McGhee*, 36 Pa. 453.

<sup>22</sup> *Robison v. Ruperts*, 23 Pa. 523.

<sup>23</sup> *B. & O. R. Co. v. Sulphur Springs Sch. Dist.*, 96 Pa. 65; *Helbling v. Allegheny Cemetery Co.*, 201 Pa. 171.

<sup>24</sup> *Edwards v. Woodruff*, 25 Supr. C. 575.



### 20. Nol. pros. as to some defendants.

Where several defendants were joined and it appeared that only some were liable, the old rule was to enter a *nol. pros.* as to those shown by the evidence not to be liable.<sup>25</sup> But recently this rule, like many another has been severely jolted and cases in which the practice was allowed have been reversed<sup>26</sup> with scant notice of the venerable doctrine of *stare decisis*. Pertinent to this the words of Chief Justice Gibson are instructive:<sup>27</sup>

"Want of stability in the law, is a public calamity which ought to be averted by almost any concession of opinion; yet, in building up a new system in part on the model of an old one, it is better to incur the reproach of inconsistency than to perpetuate a false principle."

In case of conspiracy a judgment as to one or some has been sustained.<sup>28</sup>

Trespasses committed by more than one are joint and several as to remedy. The injured party may sue one or all, but can have but one satisfaction. A recovery against one, if the judgment is not satisfied does not bar a suit against the others.<sup>29</sup> If only one has pleaded, going to trial on that plea, is equivalent to a *nol. pros.* as to the rest.<sup>30</sup> An irregularity as to parties may be cured by entering a *nol. pros.*<sup>31</sup> even in the Supreme Court.

### 21. Disclaimer by defendant.

Section 3 of the act of March 27, 1713, 1 Sm. L. 76, provides as follows:

"In all actions of trespass *quare clausum fregit* hereafter to be brought, wherein the defendant or defendants shall disclaim, in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass, before the action brought; whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; and if the said issue be found for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same."

### 22. Damages to property.

Where injuries are to the freehold the owner may recover, notwithstanding a tenant is in possession.<sup>1</sup> The damages are in all cases for the jury upon oral testimony.<sup>2</sup> Where the damages are

<sup>25</sup> Durkin v. Co., 171 Pa. 193. (See vol. 1, p. 380, par. 25.)

<sup>26</sup> Dutton v. Boro', 198 Pa. 563; Wiest v. Co., 200 Pa. 148.

<sup>27</sup> Mitchell v. Hamilton, 8 Pa. 486.

<sup>28</sup> Fillman v. Ryan, 168 Pa. 484. (See vol. 1, p. 380 n. 49.)

<sup>29</sup> Kennedy v. Philippy, 13 Pa. 408.

<sup>30</sup> Breidenthal v. McKenna, 14 Pa. 160.

<sup>31</sup> Ward v. Taylor, 1 Pa. 240.

<sup>1</sup> Green v. Sun Co., 32 Supr. C. 521.

<sup>2</sup> Canole v. Allen, 222 Pa. 156.

greater than the verdict, although punitive damages are awarded, it will not be disturbed.<sup>3</sup> If the declaration alleges damages for seizure on unlawful process and it is shown that the process was lawful, the plaintiff cannot recover for malicious abuse by an excessive levy. He should have thus declared.<sup>4</sup>

In trespass for unlawful eviction all the direct and consequential damages may be proved and recovered.<sup>5</sup> And where the trespass is malicious and wanton numerous authorities hold that punitive or exemplary damages are justified.<sup>6</sup>

In a class of cases where the injury is capable of being repaired the measure of damages is the cost of restoration or repair,<sup>7</sup> unless the cost is greater than the value of the land, in which case, it is the latter.<sup>8</sup> Where only negligence is laid wanton negligence cannot be submitted to the jury.<sup>9a</sup>

The damages for laying water pipes permanently are measured by the difference in value before and after the digging and laying;<sup>9</sup> for unlawful seizure of goods, the actual loss, as determined by the market value at the time of taking. Damages for loss of business must be proved;<sup>10</sup> for deposits on land, the cost of removal and restoration.<sup>11</sup> The measure of damages against a wrong-doer who by mistake or under color of title takes minerals from lands of another is their value in place which is ascertained by deducting from the market price the cost of mining. This rule is limited to cases where there is no intentional or wilful trespass.<sup>12</sup>

### 23. Measure of damages for taking oil from land.

For taking oil out of the land the measure of damages is "the net value of the oil in the pipe lines taken and in arriving at that sum we have taken what the oil sold for in the market and from this deducted the cost of production."<sup>13</sup> The usual royalty for drilling is one-eighth of the oil, in the locality.<sup>14</sup>

Oil being a mineral product is part of the realty.<sup>15</sup> In a recent case it was held that where a joint plaintiff was estopped it defeated recovery by any.<sup>16</sup> The natural and reasonable method of estimating damages, in any case, must be pursued.<sup>17</sup> Where dam-

<sup>3</sup> *Greeney v. Penna. Water Co.*, 29 Supr. C. 136.

<sup>4</sup> *Lane v. Sayre Land Co.*, 211 Pa. 290.

<sup>5</sup> *Behrens v. Mountz*, 37 Supr. C. 326.

<sup>6</sup> *Sperry v. Seidel*, 218 Pa. 16.

<sup>7</sup> *Linton v. Armstrong Water Co.*, 29 Supr. C. 172; *Downey v. Penna. R. Co.*, 219 Pa. 32; *Brobst v. Evans*, 35 Supr. C. 610.

<sup>8</sup> *Bigham v. Pitts. Con. Co.*, 29 Supr. C. 86.

<sup>9a</sup> *Weir v. Haverford, Etc., Co.*, 221 Pa. 611.

<sup>9</sup> *Linton v. Armstrong Water Co.*, 29 Supr. C. 172.

<sup>10</sup> *Imber v. Farmers', Etc., Co.*, 14 Lanc. L. R. 339.

<sup>11</sup> *Howell v. Natl. Cement Co.*, 9 Northam. Co. 319.

<sup>12</sup> *Scott, J. Howell v. Natl. Cement Co.*, *supra*.

<sup>13</sup> *Mellvaine, J.*, affirmed, *Crawford v. Forest Oil Co.*, 208 Pa. 5.

<sup>14</sup> *Crawford v. Forest Oil Co.*, *supra*.

<sup>15</sup> *Stoughton's Ap.*, 88 Pa. 201; *Marshall v. Mellon*, 179 Pa. 371; *Blakely v. Marshall*, 174 Pa. 425.

<sup>16</sup> *McIntosh v. Dierken*, 222 Pa. 612.

<sup>17</sup> *Rogers v. Bemus*, 69 Pa. 432; *Bare v. Hoffman*, 79 Pa. 71.

ages are claimed for flooding land, any present or proximate use to which the land might presently have been put is an item for the jury to consider, though not itself a criterion of value.<sup>18</sup>

#### 24. Interest.

Damages in the shape of interest for detention will not be allowed, where the detention was due to the act of the plaintiff.<sup>19</sup> Where the jury assess treble damages, as under the act of 1824, they should not add interest.<sup>20</sup>

#### 25. Costs.

Under the English statute in force in Pennsylvania<sup>20a</sup> where the trespass is to the person or to real property if the plaintiff recovers under 40 shillings<sup>21</sup> he shall recover no more costs than damages, unless the defendant justifies the trespass.<sup>22</sup> This does not apply to personal property damaged; but where real and personal property were joined, full costs were allowed because the court could not separate the damages.<sup>23</sup>

If the plaintiff claim more than \$100 and the verdict is for less he may have his costs although he filed no affidavit at the commencement of the action.<sup>24</sup> The defendants, or any of them who recover a verdict against the plaintiff are entitled to costs.<sup>25</sup> It was held that the statute of 22d and 23d Charles II does not apply to trespass *q. c. f.*<sup>26</sup>

#### 26. Costs in trespass *q. c. f.*

By statute of 22 and 23 Car. 2 ch. 9 (Roberts' Digest 138) in force in Pennsylvania (3 Binney 624; Winger v. Rife, 101 Pa. 160), if the verdict is not more than 40 shillings in Pennsylvania currency there cannot be a recovery for more costs than damages, unless the judge at the trial of the cause shall certify under his hand, upon the back of the record, that \* \* \* the full freehold or title of the land mentioned in the plaintiff's declaration was chiefly in issue."<sup>27</sup>

#### 27. Damages for a minor.

Where an attorney acts as *prochein ami*, and receives the damages due a minor, the latter is bound by such payment.<sup>28</sup> While the next

<sup>18</sup> McGroarty v. Lehigh C. Co., 212 Pa. 53.

<sup>19</sup> Stevenson v. Ebervale Coal Co., 203 Pa. 316; 201 Pa. 112.

<sup>20</sup> Dexter v. Billings, 110 Pa. 135. (See P. & L. Dig., vol. 21, cols. 37609, 37463.

<sup>20a</sup> See "Costs." See also Stat. 22d and 23d, Charles II, Roberts' Dig. 138.

<sup>21</sup> \$5.33⅓ in Penna. shillings. Chapman v. Calder, 14 Pa. 357.

<sup>22</sup> Wagner v. Day, Ms. Phila., 2 T. & H. Pr., section 1589.

<sup>23</sup> Guffey v. Free, 19 Pa. 384.

<sup>24</sup> Clark v. McKisson, 6 S. & R. 87; Moyer v. Illig, 52 Pa. 444; Williams v. Glenn, 2 P. & W. 137.

<sup>25</sup> Maus v. Maus, 10 Watts, 87; Steele v. Lineberger, 72 Pa. 239.

<sup>26</sup> Williams v. Glenn, 2 P. & W. 137.

<sup>27</sup> Simunds v. Barton, 76 Pa. 436; Wadlinger on Costs, 140.

<sup>28</sup> Stroyd v. Pitts. Tr. Co., 15 Supr. C. 245.

friend may receive the money after judgment; for a minor, and satisfy it, he has no authority to compromise an infant's claim or release it.<sup>29</sup>

### 28. Practice on appeal.

Judgments in trespass are subject to the same rules as to appeals, as other forms of action. All that will be added here are a few forms illustrating the practice, in addition to those given under "Appeals," *supra*, and in Volume I, under jurisdiction of courts.

### 29. Form of exceptions to charge of court.

And now, to-wit, Feb'y 28, 1907, before verdict, counsel for both plaintiff and defendant except to the charge of the court and answers to plaintiff's and defendant's points and request that the same together with the notes of the testimony be transcribed and be filed and made part of the record.

### 30. Form of assignments of error.

*First.* The learned court below erred in its answer to the plaintiff's first point, which point and answer are as follows:

"First. That under all the evidence the verdict must be for the plaintiff.

*Per curiam.* We will refuse to instruct you that way. We will allow you to determine the question."

*Second.* The learned court below erred in that part of its general charge where it said (Appendix, page 117):

"So we will leave this question for you to determine whether this field was cultivated continuously by Bierly and his predecessors in title for twenty-one years before 1883," etc.

Form of exception to evidence.

Defendant objects because [state reasons].

Ruling. We will receive it and note the defendant an exception. Defendant excepts and bill sealed.

[Seal]

H. M. McClure, P. J.

Motion for new trial.

Rule issued.

June 22, 1907, rule discharged. *Per cur.*

H. M. McClure, P. J.

August 27, 1907.

The jury fee of \$400 having been paid judgment is hereby entered against the plaintiff and in favor of the defendant on verdict of jury.

G. M. Shindel,  
Prothonotary.

### 31. Form of notice of appeal.

Comth. of Penna. }

v. }

A. S. Bierly. }

Court of Common Pleas of Snyder County.  
No. 34. Dec. T., 1906.

Enter notice of appeal by the Commonwealth of Pennsylvania from

<sup>29</sup> O'Donnell v. Broad, No. 2, 2 D. R. 84; 1 D. R. 650.

the judgment of the Court of Common Pleas of the County of Snyder, to the Superior Court.

To George M. Shindel, Esq. Prothonotary, Middleburg, Pa., Dec. 2, 1907.	}	Frederic E. Bower, Attorneys for Appellant. Philip B. Linn,
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### 32. Form of affidavit of appellant.

State of Penna. County of Dauphin,	}	ss:
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Robert S. Conklin, Commissioner of Forestry of the Commonwealth of Pennsylvania, on behalf of the Commonwealth of Pennsylvania, being duly sworn according to law deposes and says that the above stated appeal is not taken for the purpose of delay but because the appellant believes it has suffered injustice by the judgment from which it appeals.

Robert S. Conklin,  
Commissioner of Forestry.

Sworn to and subscribed this 2nd day of December, 1907, before me.

[Seal]

\_\_\_\_\_  
Notary Public.

My commission expires Jan'y 16, 1911.  
Filed Dec. 6, 1907.

### CERTIFICATE OF JUDGE.

[Title]

I, H. M. McClure, President Judge of the Court of Common Pleas of said County of Snyder, being the judge who heard and presided at the trial of the above stated case, hereby certify that the value of the land and property really in controversy is less than fifteen hundred (\$1500) dollars.

H. M. McClure, P. J.

### 33. Certiorari from Superior Court.

On payment of the costs \$12 to the prothonotary of the Superior Court certiorari issues to the Court of Common Pleas returnable to the date fixed and a rule on the appellee to appear and plead on the return day.

### 34. Form of agreement as to supersedeas by counsel.

[Title of cause]

Now 24th March, 1902, it is hereby agreed that the appeal taken by the defendants to the Supreme Court from the judgment of the Court of Common Pleas of Luzerne County in the above entitled case shall operate as a supersedeas to an execution in the same manner as if the appellants had given bond with sufficient sureties duly approved in the manner and amount as provided for under the act

of assembly of May 19, 1897, which bond the appellee hereby waives.

A. H. McClintock,  
P. V. Weaver,  
J. B. Woodward,  
H. W. Palmer,  
S. P. Wolverton,

Counsel for appellant.

John T. Lenahan,  
John M. Garman,  
Counsel for appellee.

*Note.* This case was twice reversed in the Supreme Court on the measure of damages. (See *Stevenson v. Ebervale Coal Co.*, 201 Pa. 112, and 203 Pa. 316.)

### 35. Form of Bond for appeal.

Joseph Stevenson

v.

Ebervale Coal Co.

(And all the parties by name).

Common Pleas, Luzerne County.  
No. 657, May Term, 1896.

Know all men by these presents that ———, ———, the above named defendants and the Fidelity and Deposit Company of Maryland are held and firmly bound unto the commonwealth of Pennsylvania to the use of Joseph Stevenson of the county of Luzerne, in the sum of seventy thousand dollars, to be paid to the said use party or his certain attorney, executors, administrators or assigns; to which payment well and truly to be made and done we do bind ourselves, our successors, heirs, executors, administrators, and every of them, firmly by these presents.

Sealed with our seals and dated the 13th day of February, 1901.

Whereas the defendants above named have taken an appeal to the Supreme Court of Pennsylvania, Eastern District, from the judgment of the Court of Common Pleas of Luzerne County, in the above stated suit, the condition of this obligation is such that if the appeal be prosecuted with effect and the appellants shall pay all costs and damages awarded by the appellate court or legally chargeable against them without any fraud or further delay, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

In presence of

———,  
———

———, [Seal.]  
———, [Seal.]

#### *Approval of Bond.*

Now, 14th February, 1901, the amount of bail on appeal of above case to Supreme Court is fixed at seventy thousand dollars and the within bond and surety is approved.

Brinton Jackson,  
Prothonotary.

Filed 14th February, 1901.

#### *Agreement of Counsel on Second Trial.*

Note by stenographer:

It is agreed by both sides of this case that it be tried as though the defendants were joint tort feasons.

### 36. Certificate of stenographer.

I hereby certify that the foregoing is a true, accurate and complete

transcript of the record of trial in the case stated in the caption hereof, as taken down by me, stenographically, on February 15, 17, 18, and 19, 1902.

R. L. Cannon,  
Court Stenographer.

Wilkes-Barre, Pa., March 8, 1902.

**37. Form of remittitur from Supreme Court.**

Eastern District of Pennsylvania,  
[Seal.] To the Justices of the Common Pleas Court,  
County of Luzerne, Greeting:

Whereas by virtue of our writ of certiorari from our Supreme Court of Pennsylvania for the Eastern District, returnable in the same court on the third Monday of April, in the year of our Lord one thousand nine hundred and one, a record was brought into the same court upon appeal by Ebervale Coal Co. *et al.*, from the judgment of said court to Number 657, May Term, 1896, wherein Joseph Stevenson was plaintiff and the said appellants were defendants; and it was so proceeded in our said Supreme Court that the following judgment was made, to-wit: *Judgment reversed and a venire facias de novo awarded;*

And the record and proceedings thereupon, and all things concerning the same, were (agreeably to the act of assembly in such cases made and provided), ordered by the said Supreme Court to be remitted to the Court of Common Pleas for the county of Luzerne aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit to you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable J. Brewster McCollum, Chief Justice of our said Supreme Court at Philadelphia, the 9th day of January, 1902.

Chas. S. Greene, Prothonotary.

## CHAPTER LXII.

### TRESPASS FOR SEDUCTION.

- |   |                        |
|---|------------------------|
| 1. Character of action.                 | 4. Defenses.           |
| 2. Persons who may maintain the action. | 5. Evidence.           |
| 3. Form of statement.                   | 6. Measure of damages. |

#### 1. Character of action.

From time immemorial the parent had a right to sue for the loss of services of his minor daughter when she was seduced.

Proving loss of service, he may recover punitive damages for such injuries as a jury may think a just penalty for the double wrong. In such case the jury supplies what the law lacks, and they are not judges of the law but of what the law ought to be. Special damages need not be laid or proved.<sup>1</sup>

Seduction has been defined to be the inducing of a female who is at the time virtuous, by a man, to have unlawful carnal knowledge of her, whether with or without a promise to marry her.<sup>2</sup> It was formerly held that if the intercourse was forced it was rape and, being a felony, no action would lie;<sup>3</sup> but now it is held that since the loss to the parent is the same in any case, he may sue if the end is attained by force.<sup>4</sup> The foundation of the action is, at common law, the loss of service, the same as in case of crim. con. or alienation or enticing away a servant or an apprentice whether indentured or not.<sup>5</sup> Where the woman is above twenty-one years there must be a family relation or some kind of service shown, but if she is under the right exists from the relation.<sup>6</sup>

The action must be commenced within six years from the time of the act of intercourse and not the date of the birth of a child, that being merely a natural consequence.<sup>7</sup> This action may be commenced by *capias* and special bail required although no special damages are averred in the affidavit, Judge McClure saying:

"While the courts have clung to the fiction that the action is based upon the relation of master and servant and the loss of services, the real injury to a parent whose daughter has been seduced is the shame, mortification and disgrace brought upon him and his family. If the law presumes injury from a gross slander, how much more

<sup>1</sup> Woodward v. Walton, 2 N. R. 476; Ditcham v. Bond, 2 M. & S. 436.

<sup>2</sup> Milliken v. Long, 188 Pa. 411.

<sup>3</sup> Ream v. Rank, 3 S. & R. 215.

<sup>4</sup> Milliken v. Long, 188 Pa. 411.

<sup>5</sup> Behny v. Foundry Co., 30 Supr. C. 625.

<sup>6</sup> Logan v. Murray, 6 S. & R. 175; Hornbeth v. Barr, 8 S. & R. 36; Wilson v. Sproul, 3 P. & W. 49.

<sup>7</sup> Dunlap v. Linton, 144 Pa. 335.



violent is the presumption that a father is injured by the seduction of his daughter."<sup>8</sup>

## 2. Persons who may maintain the action.

The father has a right to maintain the action although his minor daughter is not at the time a member of his household, in the absence of proof of complete emancipation;<sup>9</sup> and this is so although she was working out for her board and schooling and during the term was seduced by the son of the man to whom she was hired.<sup>10</sup> It is provided by section 2 of the act of April 19, 1843, P. L. 348:

"That the action of seduction may be maintained and sued by any mother, where the father is deceased, of the female seduced, to recover damages for loss of service or for such aggravations as may have attended the injury."

Section 1 made it a criminal offense to have "illicit connexion, under promise of marriage."

But a married woman deserted by her husband cannot sue for seduction of her daughter who is over twenty-one years, and the act of May 4, 1855, P. L. 430, does not assist her as that relates to minor children.<sup>11</sup> The relation of master and servant, at common law, does not exist between mother and daughter,<sup>12</sup> and in order to recover in this action she would have to prove a contract of hiring, or an arrangement by which she was entitled to her daughter's services.<sup>13</sup> Where a guardian stands *in loco parentis* to his ward, he may maintain the action.<sup>14</sup>

A brother-in-law who sues must show the relation of master and servant, or he will fail.<sup>15</sup>

## 3. Form of statement.

The plaintiff James Somers claims of the defendant John Hogg the sum of five thousand dollars, which sum is justly due and payable to the plaintiff by the defendant upon the cause of action hereinafter stated, to-wit:

The said John Hogg, wickedly contriving and wrongfully and unjustly intending to injure the said plaintiff and to deprive him of the services and assistance of Florence Somers, his minor daughter and servant, she being then of the age of sixteen years, and a virtuous female, of good repute heretofore, to-wit, on the 4th day of July, A. D. 1910, and on divers other days between that day and the date of the bringing of this suit, at the county of Snyder, state of Pennsylvania, debauched and carnally knew the said Florence Somers, then and there, and from thence for a long period of time, to-wit, hitherto,

<sup>8</sup> Zimmerman v. Smith, 14 D. R. 269. For practice on *capias*, see vol. 1, "Capias."

<sup>9</sup> Hornketh v. Barr, 8 S. & R. 36.

<sup>10</sup> Mohry v. Hoffman, 86 Pa. 358.

<sup>11</sup> Matthews v. Koch, 21 C. C. 438.

<sup>12</sup> South v. Denniston, 2 Watts, 474; Fairmount, Etc., Co. v. Stutler, 54 Pa. 375; Burrell Twp. v. Guardians, 62 Pa. 472; Franz v. Riehl, 5 D. R. 565.

<sup>13</sup> Fairmount, Etc., R. Co. v. Stutler, 54 Pa. 375.

<sup>14</sup> Fernsler v. Moyer, 3 W. & S. 416.

<sup>15</sup> Wilson v. Sproul, 3 P. & W. 49.

being the daughter [or servant] of the said plaintiff, whereby she became pregnant and sick with child, and so remained for the period of nine months following, at the expiration whereof, to-wit, on the ———, at the county aforesaid, she the said Florence Somers, was delivered of the child with which she was pregnant was aforesaid. By means and in consequence of which acts, she the said Florence Somers became then and there unable to perform any services for the said plaintiff, and for a long time thereafter was unable to perform any services as aforesaid, up to the time of bringing this suit and thereby said plaintiff was deprived of her services which were of great value to him, at the county aforesaid; and he the said plaintiff was further compelled by said wrongful acts of the defendant John Hogg, to pay and necessarily did pay, lay out and expend divers sums of money for said Florence Somers [daughter or servant] on account of said illness entailed as aforesaid, for nursing, care and medical attendance amounting in the whole to the sum of ——— dollars; and altogether the said plaintiff was damaged by the said defendant to the sum of five thousand dollars; whereupon he brings suit.

—————,  
Plaintiff's attorney.

*Form of Præcipe.*

Issue summons in trespass *sur seduction* returnable next term [or return day].

—————,  
Plaintiff's attorney.

To ———, Prothy.

Or,

Issue capias in trespass for seduction, bail allowed by court at \$——, returnable, etc.

Plaintiff's attorney.

[Affidavit of cause of action attached.]

#### 4. Defenses.

It was held in an early case that where the father knew of the custom of "bundling" described by Washington Irving as of Eastern origin; that is, the habit of males and females retiring to the same bed during the period of courtship, he was estopped from suing for seduction, the consequence being permissive by him.<sup>16</sup> It is no defense, however, that the female had formerly sinned, if at the time of her seduction she was leading a chaste and virtuous life;<sup>17</sup> nor that there has been a conviction for fornication and bastardy;<sup>18</sup> nor that defendant was acquitted on the criminal charge of seduction but convicted of fornication, etc., married the girl, who sued for a divorce; in such case exemplary damages may still be given.<sup>19</sup>

#### 5. Evidence.

While an averment of chaste and virtuous character at the time of seduction is required, evidence thereof in chief is not necessary nor proper. It need only be given when attacked.<sup>20</sup> But specific acts

<sup>16</sup> Hollis v. Wells, 3 Clark, 169.

<sup>17</sup> Milliken v. Long, 188 Pa. 411.

<sup>18</sup> Wilson v. Sproul, 3 P. & W. 49.

<sup>19</sup> Eichar v. Kistler, 14 Pa. 282.

<sup>20</sup> Wilson v. Sproul, 3 P. & W. 49.

of unchastity proved by the defendant cannot be met by general proof of good conduct.<sup>21</sup> The defendant will not be permitted on cross-examination of the female seduced to ask her concerning acts of fornication with others and with a view to contradict her testimony with theirs. Her reputation must be directly proved as matter of defense. Good reputation is presumed and proof of acts is not proof of reputation.<sup>22</sup> Nor can her reputation be attacked by inuendo, on cross-examination of a witness.<sup>23</sup> Mere cumulative evidence of acts of indiscretion by the girl do not furnish ground for a new trial.<sup>24</sup> The good character of the girl when a family relation exists is material to determine the question of damages, but not so where there is merely the relation of master and servant.<sup>25</sup> It is no defense to show the good character of the defendant.<sup>26</sup> Proof of a promise to marry is admissible as an aggravation, on the question of damages.<sup>27</sup>

#### 6. Measure of damages.

Damages are not confined strictly to compensation for the loss of services; but punitive damages may be given for mental anguish, disgrace and "all that the plaintiff can feel from the nature of the injury."<sup>28</sup> All the circumstances connected with the injury may be shown, on the question of damages; and where the defendant sets up previous prostitution, it may be shown that she had reformed and was leading a virtuous life, and that defendant offered to marry her when he had her with child.<sup>29</sup> The highest authority on this is the behest: "Let him that is without sin, cast the first stone." Rayburn, J., charged the jury:

"We say to you that even if a girl had been leading a life of prostitution and she had turned aside from that and was walking in the paths of virtue and rectitude and had reformed, then that person having connection with her, seducing her, would be liable in damages to the parent for such seduction and debauchery."<sup>30</sup> Where the enforced marriage is but an aggravation so that the girl had to sue for divorce *a mensa et thoro*, exemplary damages may be awarded.<sup>31</sup> But if her previous reputation for chastity was bad the parent cannot recover punitive damages.<sup>32</sup> If her reputation is attacked and the attack fails, damages will be aggravated thereby.<sup>33</sup> Lunacy is no defense to a tort where malicious intent is not an element.<sup>34</sup>

<sup>21</sup> Zitzer v. Merkel, 24 Pa. 408.

<sup>22</sup> Hoffman v. Kemerer, 44 Pa. 452.

<sup>23</sup> Phelin v. Kenderdine, 20 Pa. 354.

<sup>24</sup> Kenderdine v. Phelin, 1 Phila. 343.

<sup>25</sup> Wilson v. Sproul, 3 P. & W. 49.

<sup>26</sup> Zitzer v. Merkel, 24 Pa. 408.

<sup>27</sup> Phelin v. Kenderdine, 20 Pa. 354; Milliken v. Long, 188 Pa. 411.

<sup>28</sup> Phelin v. Kenderdine, 20 Pa. 354; Gibble v. Bollinger, 21 Lanc. L. R. 268.

<sup>29</sup> Milliken v. Long, 188 Pa. 411.

<sup>30</sup> Milliken v. Long, *supra*.

<sup>31</sup> Eichar v. Kistler, 14 Pa. 282.

<sup>32</sup> Hoffman v. Kemerer, 44 Pa. 452.

<sup>33</sup> Phelin v. Kenderdine, 20 Pa. 354.

<sup>34</sup> Wolf's Lunacy, 195 Pa. 438.

## CHAPTER LXIII.

### COMMON LAW ACTION OF WASTE.

- |   |   |
|---|---|
| 1. What waste is.   | 9. Summons under statute of Gloucester. |
| 2. By whom committed.   | 10. Waste in lifetime of ancestor, etc. |
| 3. What is not waste, by life tenant.                         | 11. Remedy against tenant.              |
| 4. Privileges of life tenant — opened coal mines or quarries. | 12. Estrepement — ejectment — landlord. |
| 5. Oil, gas and salt.   | 13. Præcipe — form.                     |
| 6. Timber cutting.  | 14. Summons — form.                     |
| 7. Removal of buildings — measure of damages.                 | 15. Narr. — form.                       |
| 8. English statutes.  | 16. Plea and issue.                     |

#### 1. What is waste.

Waste (*vastum*) is defined by Blackstone (2 Com. 281): "A spoil or destruction in any corporeal hereditament, to the prejudice of him who has the inheritance."

Coulter, J., put it:<sup>1</sup> "Any act which does permanent injury to the freehold or inheritance is waste."

Parsons, J., said it means "spoil made by the tenant for life upon any lands or woods to the prejudice of the reversioner,"<sup>2</sup> and he held, citing many English authorities, that a tenant from year to year, might commit it by farming land in such a manner as to destroy its fertility.

#### 2. By whom committed.

The statute of 13 Edward I, ch. 14, A. D. 1285,<sup>3</sup> which provides for the action of waste, specifies guardians, tenants in dower, tenants by the curtesy, or otherwise for term of life or years, as in a position to commit waste.

By statute of Westminster 2, 3d Edward I, c. 22, the action of waste is given by one tenant in common against his co-tenant.<sup>4</sup>

#### 3. What is not waste, by life tenant.

Section 3 of the act of March 27, 1833, P. L. 99, provides "that quarrying and mining and all such other acts as will do lasting injury to the premises shall be considered as waste," to restrain which the act of April 2, 1803, 4 Sm. L. 88, provided for suing out a writ of "estressement" (estrepement).

<sup>1</sup> McCullough v. Irvine, 13 Pa. 438, an action on the case.

<sup>2</sup> Jones v. Whitehead, 4 Clark, 330.

<sup>3</sup> Roberts' Digest, 428.

<sup>4</sup> 2 Inst. 403; Coke on Litt. 200.

This act excepts mines which were opened at the time of bringing suit; and all the decisions which follow hold that mines, quarries, gravel banks, clay pits, and salt works which were opened and used when the life-tenant came into his estate, may be used by him, in a reasonable manner and he will not be guilty of waste. The reasonable usufruct of the life-tenant to such mines, etc., is for the court to pass upon.<sup>5</sup> But he may not open new mines, quarries, etc.<sup>6</sup>

#### 4. Privileges of life tenant — Opened coal mines — Quarries.

A life-tenant in Pennsylvania has greater privileges than in England, where the rights of the reversioner are more sacred, and, in general, if he use the estate as the owner used it before him, he is not guilty of waste.<sup>7</sup> It is provided in the act of April 10, 1848, P. L. 472, "that no tenant or tenants for life shall be restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession, and that the Court of Common Pleas shall have power to inquire into and determine the nature and extent of said use and enjoyment, upon any motion to dissolve said writ" of estrepement. The act of April 22, 1850, P. L. 549, has the same provision, and under these acts it was held that a life-tenant to whom lands were devised for life upon which were opened coal mines, might work them without let or hindrance, even to exhaustion.<sup>8</sup> If they are opened they become the mere annual profit of the land.<sup>9</sup> The same rule applies where the life-tenant has his estate in the reserved coal, while the right to the surface is owned by another.<sup>10</sup> It also applies to a tenant in common.<sup>11</sup> "Mine" has been construed to mean a worked vein, and the life-tenant finding it thus may follow and work it to the boundary of the estate.<sup>12</sup> The same rule applies to opened quarries of limestone and free-stone.<sup>13</sup> If the land be leased for mining the lessee may mine to exhaustion and there is no waste unless there be a forfeiture of the right under the terms of the lease.<sup>14</sup>

#### 5. Oil, gas and salt.

The principles above stated also apply to oil wells, gas and salt mines. Where there is a lease to bore for oil there can be no waste except the lease be forfeited.<sup>15</sup> But a life-tenant cannot open oil or gas wells, nor can he give any one the privilege of so doing.<sup>16</sup> The law is the same in regard to salt works as mines and quarries.<sup>17</sup>

<sup>5</sup> Woodward, J., in *Irwin v. Covode*, 24 Pa. 162.

<sup>6</sup> *Eley's Ap.*, 103 Pa. 300; *Marshall v. Mellon*, 179 Pa. 371.

<sup>7</sup> *Williard v. Williard*, 56 Pa. 119; *Ferguson v. Rafferty*, 128 Pa. 337.

<sup>8</sup> *Irwin v. Covode*, 24 Pa. 162; *Shoemaker's Ap.*, 106 Pa. 392; *Neel v. Neel*, 4 Clark, 520.

<sup>9</sup> 5 Coke 12; *Brown v. O'Brien*, 3 Clark, 93.

<sup>10</sup> *Rankin's Ap.*, 1 Mona. 308.

<sup>11</sup> *Coleman's Ap.*, 62 Pa. 252.

<sup>12</sup> *Coal Co.'s Ap.*, 85 Pa. 344; *Lynn's Ap.*, 31 Pa. 44.

<sup>13</sup> *Sayers v. Hoskinson*, 110 Pa. 473.

<sup>14</sup> *Heil v. Strong*, 44 Pa. 264; *Griffin v. Fellows*, 81 \* Pa. 114.

<sup>15</sup> *Co. v. Co.*, 57 Pa. 83.

<sup>16</sup> *Marshall v. Mellon*, 179 Pa. 371.

<sup>17</sup> *Kier v. Peterson*, 41 Pa. 356.

### 6. Timber cutting.

In early days, when timber had little value, and the chief occupation of farmers was to clear the land and make it tillable, it was considered an "improvement" to cut the timber, and when the life-tenant did so it was no waste.<sup>18</sup> It was later held that whether in cutting timber the life-tenant committed waste depended upon the custom and other circumstances,<sup>19</sup> and this rule has been followed to a recent date.<sup>20</sup> It was held, in one case that the vendee of land had the right to cut and remove the timber.<sup>21</sup> Whether the mortgagee in possession had a right to cut the timber was uncertain, depending upon whether the freehold was benefited or injured by it.<sup>22</sup> A contract to cut and remove the timber, where the original parties die is not merely personal, and the tenant in dower and legal representatives commit no waste in executing it.<sup>23</sup>

Where a tract is mainly timbered the trustee for life of a son for whose support and maintenance the land is devised, may cut the timber for the purposes of the trust and no waste is committed.<sup>24</sup> But to cut timber to sell in the market for profit is not allowed.<sup>25</sup>

### 7. Removal of buildings — Measure of damages.

Buildings which are permanent and a part of the freehold, not connected with a particular trade, cannot be removed by the life-tenant. Such removal is waste and in an action of trespass the damages will be the injury done to the inheritance by such removal.<sup>26</sup> The rule as to the measure of damages is the extent to which the inheritance was injured by the waste. An equitable tenant for life is liable to the action at the suit of the trustee-in-fee of the legal estate and the latter need not name himself as trustee.<sup>27</sup>

### 8. English laws.

The original statute of Gloucester, 6 Edward I, c. 13, which gave an equitable remedy in the nature of a writ of prohibition is the foundation of our practice in estrepement, and it is worth while to trace the course of legislation in England, so far as it is said to be in effect in Pennsylvania, as to the action of waste.

### 9. Summons.

By statute 13 Edward I, stat. 1, ch. 14, 1285, proceedings to restrain waste by writ of prohibition, which had existed since Magna Charta, were abolished and it was ordained, "That of all manner of waste done to the damage of any person there shall from henceforth be no writ of prohibition awarded, but a writ of summons, so

<sup>18</sup> *Hastings v. Crunklestone*, 3 Yeates, 261.

<sup>19</sup> *McCullough v. Irvine*, 13 Pa. 438; *Lynn's Ap.*, 31 Pa. 44.

<sup>20</sup> *Morris v. Knight*, 14 Supr. C. 324.

<sup>21</sup> *Coomalt v. Stanly*, 3 Clark, 389.

<sup>22</sup> *Givens v. McCalmont*, 4 Watts, 460; *Guthrie v. Kahle*, 46 Pa. 331.

<sup>23</sup> *Billings' Ap.*, 106 Pa. 558.

<sup>24</sup> *Beam v. Woolridge*, 3 C. C. 17.

<sup>25</sup> *Glass v. Glass*, 6 C. C. 408.

<sup>26</sup> *McCullough v. Irvine*, 13 Pa. 438.

<sup>27</sup> *Woodman v. Good*, 6 W. & S. 169.

that he of whom complaint is, shall answer for waste done at any time; and if he comes not after the summons, he shall be attached, and after the attachment he shall be distrained; and if he come not after the distress, the sheriff shall be commanded that in proper person he shall take with him twelve, etc., and shall go to the place wasted, and shall inquire of the waste done, and shall return an inquest, and after the inquest returned, they shall pass into judgment, like as it is contained in the statute of Gloucester.

#### 10. Waste in time of ancestor, etc.

By 20th Edward I, stat. 2, A. D. 1292 (Roberts' Digt., 429), it is declared "that every heir (in whose ward soever he be, and as well within age as of full age) shall have his recovery by a writ of waste in the foresaid case, and also in other when the same writ ought to hold place; and it shall hold place as well for waste and destruction made in lands and tenements of his own inheritance, and as well in the times of his ancestors, as at any other time that the fee and inheritance descended unto him and shall be answered unto therefor; and that he shall recover the tenements wasted and damages, as it is ordained in the second statute of Westminster, of damages to be recovered in a writ of waste, if the tenant be convict of waste."

(See Bacon's Abr., vol. 5, p. 468.)

#### 11. Remedy against tenant.

By 11 Henry VI, ch. 5, A. D. 1433<sup>28</sup> — where a tenant for life, or *pur autre vie* or some term of years let their estates to others and commit waste, the reversioner is provided a remedy in a writ of waste to recover the place wasted and treble damages.

#### 12. Estrepement — Ejectment — By landlord.

While the law remedy by summons is still in force, the writ of estrepement seems to have displaced it in practice in Pennsylvania. The act of April 2, 1803, 4 Sm. L. 88, provided for the issuance of a writ of "estressement" to stay waste pending an action for the recovery of the land, and it was treated as an incident of ejectment.

But the act of March 29, 1822, P. L. 86 (7 Sm. L. 520), provided that the writ of estrepement might issue on petition and affidavit of any landlord, after notice to his tenant to quit; any purchaser at sheriff's sale; any mortgagee or judgment creditor after inquisition and condemnation or judgment creditor where lands are subject to be sold on writs of *vend. ex.* or *lev. fa.* This was extended by the act of April 10, 1848, P. L. 472, so as to embrace tenants for life and requiring at least five days' notice to the tenant or tenants in possession to desist or not commit any waste. Then followed the proviso quoted, *supra*, par. 4.

<sup>28</sup> Roberts' Digest of British statutes, 428.

<sup>29</sup> Roberts' Digest, 431.

## FORMS IN THE ACTION OF WASTE.

13. *Præcipe.*

John Good, Jr.	}	In the Court of Common Pleas of Bucks County. No. —, — Term 1841.
v.		
Henry Woodman and Mary, his wife, late		
Mary Smith.		

Issue summons in trespass in waste.

John G. Michener,  
Attorney for plaintiff,  
November 29, 1841.

To John S. Bryan, Esq., Prothonotary.

14. *Summons.*

Bucks Co., ss.

Commonwealth of Pennsylvania,

[Seal of court.] To the Sheriff of said County, Greeting:

We command you that you summon Henry Woodman and Mary, his wife, late Mary Smith, so that they be and appear before our Court of Common Pleas, to be holden at Doylestown, in and for said county on the thirteenth of December next, then to answer John Good, Jr., of a plea of waste, etc.

Witness Thomas Burnside, Esq., President of our said court at Doylestown, the 29th day of November, in the year of our Lord, one thousand eight hundred and forty-one.

John S. Bryan,  
Prothonotary.

15. *Narr.*

[Title of Case.]

Bucks Co., ss. Henry Woodman and Mary, his wife, late Mary Smith, were attached to answer John Good, Jr., of a plea of trespass, etc., and whereupon the said John Good, Jr., by Henry Chapman and John G. Michener, his attorneys, complains for that whereas the said Henry Woodman and Mary, his wife, late Mary Smith, on the — day of — in the year of our Lord —, and before and from thence until and at the time of committing the grievance in this court mentioned, was and still is seised and held and enjoyed divers to-wit, — acres and perches — of land with the appurtenances situate, lying and being in the township of Buckingham, in said county of Bucks, in their demesne as of freehold in right of said Mary, the remainder thereof after the death of the said Mary, during all the time aforesaid belonging to the said John Good, Jr. Nevertheless the said defendants, the same day and year aforesaid, at the township aforesaid, in the county aforesaid, 50 white oak trees of the value of — each (describe each kind of timber trees) on the lands and premises aforesaid, then and there standing, being and growing, did waste, cut down and destroy and did carry away to the damage of the said plaintiff, three hundred dollars and therefore he brings this suit.

[Count two averred waste as to trees, the goods and chattels of the plaintiff, coming into the hands of the defendant by finding and that he wrongfully and fraudulently by craft and subtlety with-



holds the same to the damage of the plaintiff three hundred dollars.]

Signed by the attorneys.

An additional *narr.* was filed averring the provisions of the will which created the life estate and the one in remainder.

**16. Plea and issue.**

Defendant Pleads "Not guilty."

Issue joined.

Trial and verdict. Motion for a new trial overruled. Appealed to Supreme Court and judgment affirmed. Remittitur in usual form.

## APPENDIX

### *Fees of the Prothonotary in counties having a population of one million or over.*

The act of May 1, 1907, P. L. 142, which by its proviso does not apply to counties having a population of less than one million, was intended to apply to Philadelphia alone, but by the census of 1910, the county of Allegheny is shown to have a population of 1,018,462, and there being no repealing clause, it is questionable whether the act can be made to apply to said county.

"Section 1. Be it enacted, &c., That the fees to be received by the several prothonotaries of the Courts of Common Pleas of this Commonwealth shall be as follows:—

Issuing every writ of summons, *capias*, *certiorari*, or other original writ, except those which are herein specifically provided for, together with services at the first court, entering pleadings and appearance, one dollar and fifty cents.

Issuing every writ of *fiery facias*, *scire facias*, *venditioni exponas*, *levari facias*, *habere facias*, *mandamus* execution, or other writ of execution not herein specifically provided for, seventy-five cents.

Stationery, fifty cents.

Services at every subsequent court previous to trial, twenty-five cents.

All services during the trial of a cause, including swearing of jury and witnesses, one dollar.

Taking a recognizance, twenty-five cents.

Entering motion and filing reasons in arrest of judgment, for a new trial, or for judgment *non obstante veredicto*, twenty-five cents.

Entering satisfaction of judgment, or discontinuance of suit, or marking suit or judgment to use, fifty cents.

Issuing subpoena under seal, twenty-five cents.

Issuing attachment in contempt and motion therefor, each name, one dollar.

Copy of record or paper filed, for every ten words, two cents.

Certificate and seal, fifty cents.

Certified copy of rule, including seal and certificate, seventy-five cents.

Drawing special jury, striking same, and copies for parties, seventy-five cents.

Every search, where no other service is performed to which any fee is attached, fifteen cents.

Certificate and seal to search, twenty-five cents.

Locality search, including certificate and seal, forty cents.

Each lien or judgment certified, and each additional name on general or locality search, ten cents.

Entering judgment on bond and warrant of attorney, upon confession of defendant, for want of appearance, plea, or want of an

affidavit of defence, or sufficient affidavit of defence, on verdict, demurrer, including judgment index entry, and statement of plaintiff, one dollar and twenty-five cents.

Entering judgment on single bill, seventy-five cents.

Entering amicable action, filing papers, stationery, and services at first court, one dollar and twenty-five cents.

Entering transcript of judgment from justice of the peace or magistrate, including docket entry, fifty cents.

Taxing bill of costs other than prothonotary's, twenty-five cents.

Retaxing bill of costs and report thereon, fifty cents.

Taking testimony thereon, for every ten words, two cents.

Making return to writ of error, one dollar.

Entering proceedings of Supreme or Superior Court, fifty cents.

Citation and seal, and motion therefor, one dollar and fifty cents.

Suggesting death of party, or diminution of record, or substituting a party, each party, fifteen cents.

Administering oath other than on trial of cause, twenty-five cents.

Amending record on motion, twenty cents.

Entering appointment of guardian *ad litem*, twenty cents.

Subpoena or alias subpoena in divorce, one dollar.

Filing and docketing libel in divorce, one dollar.

Application for maintenance or alimony, one dollar.

Filing and docketing motions and rules and other pleadings in divorce, each, fifty cents.

Proclamation, one dollar and fifty cents.

Certificate of divorce, under seal, three dollars and fifty cents.

Order of publication, one dollar.

Entering decree in minute book docket, each, fifty cents.

Indexing in divorce index, twenty-five cents.

Docketing and filing bill to perpetuate testimony, order of court thereon, and recording same, one dollar and thirty-five cents.

Commission to take testimony, and entering return, one dollar.

Notifying each party of return or commission, when required, twenty-five cents.

Entering acknowledgment of sheriff's or treasurer's deed, including certificate of the same, one dollar.

Filing election return of general and municipal elections, to be paid by the county, one dollar.

Services at computation of returns of general or municipal election, for each election division, to be paid by the county, fifty cents.

Filing and docketing petitions for appointment of assessors, election officers, or other petitions in relation to elections, to be paid by the county, seventy-five cents.

Transmitting to Secretary of the Commonwealth copies of election returns, for each person returned, to be paid by the county, twenty-five cents.

Filing and docketing balances due from collectors, including judgment docket entry, each case, twenty-five cents.

Filing and entering county auditors' reports, each case, to be paid by the county, fifty cents.

Notifying county commissioners, auditor, or directors of the poor, of their election and time of meeting, to be paid by the county, each, fifteen cents.

Filing any paper not relating to any suit pending, and not herein provided for, including docket entry, one dollar.

Entering rule of reference, and copy under seal, sixty cents.

Appointment of arbitrators and docketing same, and proof of service of rule, fifty cents.

Each copy of rule or notice to arbitrators, thirty-five cents.

Filing and entering report of arbitrators, including judgment docket entry, fifty cents.

Receiving and entering appeal from an award of arbitrators, taking recognizance and affidavit, seventy-five cents.

Filing and docketing petition for the appointment of a commission *de lunatico*, and for inquisition *in re* habitual drunkard, for the appointment of a committee in insolvency, for the sale of unclaimed goods, or other petitions in connection with any proceedings, including order of court thereon, each, two dollars and fifty cents.

Filing any original petition not herein provided for, two dollars and fifty cents.

Issuing commission in lunacy, and entering return, one dollar.

Writ to sheriff, in lunacy, one dollar.

Entering confirmation of inquisition and appointment of committee in lunacy, one dollar.

All services on sale of lunatic's, habitual drunkard's, estate, including filing of committee's account, two dollars and fifty cents.

Filing each subsequent account, one dollar.

Filing and docketing other documents in said proceedings, each, twenty-five cents.

Writ of habeas corpus and all proceedings thereon, one dollar.

Filing and entering mechanic's lien or municipal lien, each property, seventy-five cents.

Entering ejectment suit on ejectment index, twenty-five cents.

Entering *testatum fi. fa., ca. sa., or venditioni exponas*, one dollar.

Receiving and distributing money paid into court, for each dollar under five hundred, two cents.

For each dollar exceeding five hundred, one cent.

Issuing venire, each case upon the jury trial list, seventy-five cents.

Entry of such case upon the jury trial list, twenty-five cents.

Recording any document required by law to be recorded, for every ten words, two cents.

Drawing, filing, and docketing bond, and justification thereon, including seal and oath, one dollar and seventy-five cents.

Drawing and filing justification, including seal and oath, fifty cents.

Filing and docketing account or report of assignee, auditor, trustee, committee, sequestrator, master, or examiner, two dollars and fifty cents.

Filing and docketing petition for jury to assess land damages, for *feme sole* traders (under acts of eighteen hundred and fifty-five and eighteen hundred and seventy-two), for the satisfaction of lost or ancient mortgage, for the extinguishment of ground-rent, for adoption, including order of court thereon, five dollars.

Filing corporate charter, petition for change of corporate name, or alteration or amendment of charter for merger, and all proceedings thereon, five dollars.

Filing and docketing and all proceedings in assignment for the benefit of creditors, up to and including bond and justification of assignee and surety, five dollars.

Filing and docketing appeal from the award of road jury, and railroad jury, one dollar and twenty-five cents.

Filing and docketing affidavit of ownership, in ejectment, fifty cents.

Filing and docketing affidavit of real owner, in mortgage, ground-rent, mechanic's lien, and municipal lien, fifty cents.

Issuing and docketing order of sale in partition, one dollar and fifty cents.

Filing and docketing bill in equity, and rule to appear and answer, three dollars and fifty cents.

Issuing alternative mandamus, *quo warranto*, and return thereon, including entry of appearance, pleadings, and all services at first court, three dollars and fifty cents.

Issuing and docketing injunction, and order of court thereon, two dollars and fifty cents.

Jury fee, in each case tried by jury, four dollars.

Issuing writ of *scire facias* or alias *scire facias* on lien, claim, judgment, to revive judgment *sur* bail in error, *sur* recognizance, *sur* certificate of the Orphans' Court to executors and administrators of deceased party, to garnishee in foreign attachment, or on bill of discovery, seventy-five cents.

Issuing attachment *sur* judgment, *sur* libel, domestic attachment, foreign attachment, and under the act of one thousand eight hundred and sixty-nine, one dollar and twenty-five cents.

Entering certiorari to Supreme Court or Superior Court, and bond thereon, with justification, three dollars.

Filing exemplification of judgment from another county, one dollar and twenty-five cents.

Bail piece, one dollar and fifty cents.

Indexing suit against a decedent's estate, twenty-five cents.

Indexing judgment, assignment of judgment, or *lis pendens* in judgment index, twenty-five cents.

Filing and indexing sheriff's certificate of attachment upon real estate, one dollar.

Entering satisfaction upon judgment and locality indexes, each entry, twenty-five cents.

Entry restriction of lien of judgment, each property, fifty cents.

Certified copy, under seal, of registration of physician, student-at-law, veterinarian, or dentist, one dollar.

Entry of motion and order of court for admission of attorney-at-law, and certificate thereof, two dollars.

Certificate of official capacity, under seal, one dollar.

Certificate to exemplification of record, under act of Congress, one dollar.

Entering revival of judgment by agreement, one dollar and twenty-five cents.

Entering transcript from the Orphans' Court of amount due by executor, administrator, or guardian, each entry, fifty cents.

Entry of precept from Orphans' Court, two dollars and fifty cents.

Each entry upon locality index, twenty-five cents.

Every suit ended before issue joined, or before jury trial, two dollars.

The fee for services not herein specially provided for shall be the same as for similar services: *Provided*, however, that the provisions of this act shall not apply to counties having a population of less than "one million."



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